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Michigan Circuit Court Benchbook: Criminal Proceedings—Revised Edition

Updates: January 2012–May 1, 2012

Updates have been issued for the Michigan Circuit Court Benchbook: Criminal Proceedings. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 1: General Rules Governing Court Proceedings

1.1(A) Access to Court Proceedings and Records

- Effective May 1, 2012, ADM 2010-26 amended MCR 7.210(B)(2) and MCR 7.212(A)(1)(a) to provide a method by which an appellant may develop a certified settled statement of facts when a transcript of the proceedings in the trial court or tribunal is unavailable; a settled statement of facts made and certified as prescribed by MCR 7.210(B)(2) controls the timing of the appellant's brief in the same manner as would a transcript. MCR 7.212(A).

1.1(H) Access to Court Proceedings and Records

- The trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning the jury's request did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, and the petitioner did not argue that he suffered actual harm. *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012).

1.6(A) Personal Protection Orders (PPOs)

- In *Lamkin v Engram*, ___ Mich App ___, ___ (2012), the trial court committed reversible error when the petitioner did not request an ex parte PPO and the court dismissed the petition before interviewing the petitioner or conducting an evidentiary hearing.

1.6(B) Personal Protection Orders (PPOs)

- In determining whether a PPO has been violated, the court must look only to the behavior of the individual against whom the PPO is held, not that of the person who holds the PPO. *In re Kabanuk*, 295 Mich App 252, 256-258 (2012).

- The court may not consider behavior of which it has judicial notice, such as an individual's loud and disruptive conduct at other hearings, to find that the individual acted in conformity with that behavior. *Kabanuk*, 295 Mich App at 259-261 (trial court violated MRE 404(b)(1) to the extent that it relied on the disruptive behavior of the respondent's husband at prior hearings in making its determination that the respondent and her husband violated PPOs on the date in question).

Chapter 2: Preliminary Proceedings

2.4(A)(1) Right to Counsel

- "[N]ot all communications between a judge and jury are critical stages[,]" and the trial court's ex parte denial of the jury's request to review trial testimony did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings. *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012).

Chapter 3: Pretrial Motions & Proceedings

3.1(E) Discovery

- The petitioner established a *Brady*[1] violation where a police investigator's undisclosed notes contained statements directly contradicting an eyewitness's trial testimony; because the eyewitness's testimony constituted the sole evidence linking the petitioner to the crime, the evidence was "material" within the meaning of *Brady v Maryland*, 373 US 83, 87 (1963). *Smith v Cain*, 565 US ___, ___ (2012).

[1] *Brady v Maryland*, 373 US 83 (1963).

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3.14(D) Motion to Suppress Defendant's Statement

- "[I]mprisonment alone is not enough to create a custodial situation within the meaning of *Miranda* [*v Arizona*, 384 US 436 (1966)][]"; rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Howes v Fields*, 565 US ___, ___ (2012).

- "The legal analysis [applicable to determining whether a confession was voluntary] is essentially the same with respect to examining the 'voluntary' prong of a *Miranda*[2] waiver." *People v Ryan (Sean)*, 295 Mich App 388, 397 (2012). For a confession to be voluntary, it "'must have been the product of a free and deliberate choice rather than intimidation, coercion or deception[.]'" *Ryan (Sean)*, *supra* at 397, quoting *People v Daoud*, 462 Mich 621, 635 (2000).

3.14(E)(5) Motion to Suppress Defendant's Statement

- There is no "categorical rule . . . that the questioning of a prisoner is always custodial [within the meaning of *Miranda v Arizona*, 384 US 436 (1966),] when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." *Howes v Fields*, 565 US ___, ___ (2012) (reversing *Fields v Howes*, 617 F3d 813 [CA 6, 2010], and holding that "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted[]").

- The questioning of a jailed defendant by a parole officer, four days after the defendant's arrest for allegedly violating his parole by committing an armed robbery, constituted a custodial interrogation for purposes of *Miranda*, 384 US 436. *People v Elliott (Samuel)*, ___ Mich App ___, ___, ___ n 3 (2012) ("[t]he 'inherently compelling pressures' that were lacking in *Fields*[, 565 US at ___,] were present" where, "[i]n contrast [to *Fields*], the authorities did not question [the] defendant . . . while he was serving a prison sentence[, but] rather[] . . . questioned [him] shortly after he was arrested, and the questioning focused on the reason for his arrest[]").

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[2] *Miranda v Arizona*, 384 US 436 (1966).

- "[A] parole officer is a 'law enforcement officer' for purposes of *Miranda*[, 384 US 436, and] . . . [s]tatements made by a parolee to a parole officer during a custodial interrogation are [therefore] inadmissible in a subsequent trial where, before questioning, the parolee invoked his [or her] right to counsel." *Elliott (Samuel)*, ___ Mich App at ___ (parole officer improperly questioned the defendant "in an attempt to obtain [his] 'statement'" about a robbery where the defendant, who was in jail following his arrest for allegedly violating his parole by committing the robbery, had previously invoked his right to counsel).

3.14(G) Motion to Suppress Defendant's Statement

- "Statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial where, before questioning, the parolee invoked his [or her] right to counsel." *People v Elliott (Samuel)*, ___ Mich App ___, ___ (2012) (parole officer improperly questioned the defendant "in an attempt to obtain [his] 'statement'" about a robbery where the defendant, who was in jail following his arrest for allegedly violating his parole by committing the robbery, had previously invoked his right to counsel).

3.15(B) Motion to Suppress Identification of Defendant

- "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v New Hampshire*, 565 US ___, ___ (2012) (where an eyewitness, in response to a police officer's request for a more specific description of the perpetrator of a theft, pointed out her window at the petitioner, who was standing near another officer, the trial court did not err in denying the petitioner's motion to suppress the identification without first conducting a preliminary assessment of its reliability; no such inquiry was required because "law enforcement officials did not arrange the suggestive circumstances surrounding [the] identification[]").

3.18 Search and Seizure Issues—Was There a Search or Seizure?

- The concept of "reasonable expectation of privacy" as discussed in *Katz v United States*, 389 US 347, 360-361 (1967) (Harlan, J., concurring), and its progeny "did not narrow the Fourth

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Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy. *United States v Jones (Antoine)*, 565 US ___, ___ (2012) (attaching a Global-Positioning-System [GPS] tracking device to the defendant's vehicle, and using that device to monitor the vehicle's travel on public streets, constituted a search for Fourth Amendment purposes).

3.19 Search and Seizure Issues—Does the Defendant Have Standing?

- The concept of "reasonable expectation of privacy" as discussed in *Katz v United States*, 389 US 347, 360-361 (1967) (Harlan, J., concurring), and its progeny "did not narrow the Fourth Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy. *United States v Jones (Antoine)*, 565 US ___, ___ (2012).

3.20(B)(1) Search and Seizure Issues—Where Did the Search Take Place?

- "[A] vehicle is an 'effect' as that term is used in the [Fourth] Amendment." *United States v Jones (Antoine)*, 565 US ___, ___ (2012) (holding that "the Government's installation of a [Global-Positioning-System (GPS)] device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search[]'").

3.20(B)(5) Search and Seizure Issues—Where Did the Search Take Place?

- Where an officer received information that the defendant was driving erratically, was confused, and was taking oxycontin for pain following surgery, there was "reason[] to believe [the defendant's] vehicle might contain evidence of . . . 'the offense of arrest[]'" within the meaning of *Arizona v Gant*, 556 US 332, 351 (2009), and the officer therefore lawfully searched the defendant's vehicle for evidence of narcotics or other drugs after arresting him for drunk driving and placing him in a police car. *People v Tavernier*, ___ Mich App ___, ___ (2012).

- The exclusionary rule did not apply to evidence discovered in the defendant's car during a search conducted after a passenger was lawfully arrested and after the passenger and the defendant were secured in police vehicles. *People v Mungo (On Second Remand)*, ___ Mich App ___, ___ (2012). Although the search was rendered impermissible under the United States Supreme Court's subsequent decision in *Gant*, 556 US at 351, the good-faith exception to the exclusionary rule applied because the officer who conducted the search "had a good-faith basis to rely on [*New York v Belton*, 453 US 454, 460 (1981),] . . . [which] authorized a search incident to an arrest of [any] recent occupant of a vehicle." *Mungo (On Second Remand)*, *supra* at ___.

3.20(H) Search and Seizure Issues—Where Did the Search Take Place?

- The Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

3.21(B)(2) Search and Seizure Issues—Was a Warrant Required?

- The Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

3.23(C) Search and Seizure Issues—Is Exclusion the Remedy if a Violation Is Found?

- Under *Davis v United States*, 564 US ___, ___ (2011), where police acted in good-faith reliance on then-current United States Supreme Court precedent in conducting a search of the defendant's car incident to a passenger's arrest, the exclusionary rule did not apply to evidence discovered in that search, even though the search was rendered unconstitutional under a subsequently-issued United States Supreme Court decision. *People v Mungo (On Second Remand)*, ___ Mich App ___, ___ (2012).

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3.25(B) Double Jeopardy Issues

- "[W]hen 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." *People v Evans (Evans II)*, 491 Mich 1, 3-4, 22, 25 (2012) (Double Jeopardy Clauses of state and federal constitutions did not bar retrial where the trial court erroneously added an extraneous element to the charged offense and granted a directed verdict of acquittal on the ground that the prosecution had failed to present proof of the additional element).

Chapter 4: Pleas

4.4(C) Withdrawal of a Guilty Plea

- "[T]he new rule of criminal procedure announced in *Padilla* [*v Kentucky*, 559 US ___, ___ (2010), requiring "criminal defense counsel [to] advise a defendant when a guilty plea will render the defendant subject to automatic deportation[,]"] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

4.4(D) Withdrawal of a Guilty Plea

- "[T]he new rule of criminal procedure announced in *Padilla* [*v Kentucky*, 559 US ___, ___ (2010), requiring "criminal defense counsel [to] advise a defendant that a guilty plea will render the defendant subject to automatic deportation[,]"] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

Footnote 8, page 4-14

Footnote 10, page 4-16

- "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v Frye*, 566 US ___, ___ (2012).

4.5(C) Sentence Bargaining

- "[T]he new rule of criminal procedure announced in *Padilla* [*v Kentucky*, 559 US ___, ___ (2010), requiring "criminal defense counsel [to] advise a defendant that a guilty plea will render the defendant subject to automatic deportation[,]"] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

- "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v Frye*, 566 US ___, ___ (2012).

4.5(C)(1) Sentence Bargaining

- "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v Washington*, 466 US 668, 687 (1984)]." *Missouri v Frye*, 566 US ___, ___ (2012). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, *supra* at ___.

- "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel[;] . . . a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] . . . [and] a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 US at ___ (where defense counsel failed to inform the respondent of a favorable plea offer and the respondent pleaded guilty to the original charge on more severe terms, the case was remanded to the state appeals court to consider whether the "plea offer, if accepted by [the respondent], would have been adhered to by the prosecution and accepted by the trial court[]").

- Where defense counsel's ineffective assistance results in a defendant's rejection of a favorable plea offer, followed by his or

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her conviction at an ensuing trial and the imposition of a sentence harsher than that offered, "[the] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v Cooper*, 566 US ___, ___ (2012).

- The defendant "established that counsel's failure to inform him of the actual consequences of accepting or rejecting [a] plea offer prejudiced him[]" where defense counsel's erroneous advice and failure to inform him of the 25–year mandatory minimum sentence for a conviction of the charged offense resulted in his rejection of a favorable plea offer, a jury conviction of the charged offense, and the imposition of the mandatory sentence. *People v Douglas (Jeffery)*, ___ Mich App ___, ___ (2012).

4.5(C)(2) Sentence Bargaining

- When "a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence," the remedy, like other Sixth Amendment remedies, "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Lafler v Cooper*, 566 US ___, ___ (2012) (citation omitted). Depending on "[t]he specific injury" suffered by the defendant, resentencing may be an appropriate remedy in one case, while in another case it may be appropriate to require the prosecution to reoffer the plea proposal. *Lafler*, *supra* at ___.

- Where defense counsel's erroneous advice resulted in the defendant's rejection of a favorable plea offer, a jury conviction of the charged offense, and the imposition of a mandatory sentence, and where counsel additionally rendered ineffective assistance at trial, the appropriate remedy was to "vacate [the] defendant's convictions and sentences and remand to the trial court for the prosecution to reinstate its plea offer" and, if the defendant rejected the offer, for a new trial. *People v Douglas (Jeffery)*, ___ Mich App ___, ___ (2012).

Chapter 5: Trial & Posttrial Proceedings

5.12(C) Directed Verdict

- "[W]hen 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." *People v Evans (Evans II)*, 491 Mich 1, 3-4, 22, 25 (2012) (Double Jeopardy Clauses of state and federal constitutions did not bar retrial where the trial court erroneously added an extraneous element to the charged offense and granted a directed verdict of acquittal on the ground that the prosecution had failed to present proof of the additional element).

5.13(E) Jury Instructions

- "The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, ___ Mich App ___, ___ (2012), citing *People v Wade (Michael)*, 283 Mich App 462, 464-468 (2009). Accordingly, where the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, the error's prejudicial effect was mitigated by the presence of the missing element on the verdict form; thus, no reversible error occurred. *Eisen*, *supra* at ___.

5.13(I) Jury Instructions

- "The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, ___ Mich App ___, ___ (2012) (holding that, although the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, no reversible error occurred because the verdict form reflected the missing element).

5.14(B)(2) Jury Matters During Deliberations

- The trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable." *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012).

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5.14(D) Jury Matters During Deliberations

- The trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable." *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012).

5.18(A)(1) Ineffective Assistance of Counsel

- Where the Michigan Court of Appeals "fail[ed] to apply *Strickland* [*v Washington*, 466 US 668 (1984),] to assess [an] ineffective-assistance-of-counsel claim . . . , the [Court's] adjudication was contrary to clearly established federal law[,]" and the respondent was entitled to pursue habeas corpus review. *Lafler v Cooper*, 566 US ___, ___ (2012), citing *Panetti v Quarterman*, 551 US 930, 948 (2007).

5.18(D) Ineffective Assistance of Counsel

- "[T]he new rule of criminal procedure announced in *Padilla* [*v Kentucky*, 559 US ___, ___ (2010), requiring "criminal defense counsel [to] advise a defendant that a guilty plea will render the defendant subject to automatic deportation[,]"] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

- "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v Frye*, 566 US ___, ___ (2012). "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v Washington*, 466 US 668, 687 (1984)]." *Frye*, 566 US at ___.

- "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or

her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___.

Chapter 6: Sentencing & Post-Sentencing

6.1(A) Felony Sentencing

- Effective February 23, 2012, 2012 PA 27, as part of a package of public acts designed to assist prisoners in obtaining operator's licenses and state personal identification cards upon release, amended MCL 771.14 by adding MCL 771.14(2)(h), which requires that a PSIR include "[a] statement as to whether the person has provided [to the Department of Corrections] the identification documents referenced in [MCL 771.14(9)(b)]."

6.1(C)(1) Felony Sentencing

- The Michigan Supreme Court vacated *People v Brooks (Anthony)*, 293 Mich App 525 (2011), to the extent that it "addressed the trial court's decision to upwardly depart from the sentencing guidelines." *People v Brooks (Anthony)*, 490 Mich 993 (2012) (because the Court of Appeals granted the defendant a new trial, his challenge to his sentence was moot; additionally, "[t]he Court of Appeals' discussion of this issue . . . wrongly left the impression that a departure sentence of life may only be imposed on a habitual offender when the sentencing offense is murder or a Class A felony[; s]ee MCL 769.12[1][]").

6.1(E)(3) Felony Sentencing

- The Michigan Supreme Court vacated *People v Brooks (Anthony)*, 293 Mich App 525 (2011), to the extent that it "addressed the trial court's decision to upwardly depart from the sentencing guidelines." *People v Brooks (Anthony)*, 490 Mich 993 (2012) (because the Court of Appeals granted the defendant a new trial, his challenge to his sentence was moot; additionally, "[t]he Court of Appeals' discussion of this issue . . . wrongly left the impression that a departure sentence of life may only be imposed on a habitual offender when the sentencing offense is murder or a Class A felony[; s]ee MCL 769.12[1][]").

6.1(E)(7) Felony Sentencing

- Effective April 1, 2012, 2011 PA 293 amended MCL 769.1j(1) and MCL 769.1j(7) to eliminate the distinction between "serious"

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and "specified" misdemeanors, and to provide for a minimum assessment of $50.00 against a defendant who commits *any* misdemeanor or ordinance violation.

- Minimum state costs are to be assessed on each qualifying conviction, so long as "any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.)." SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).

- Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim assessment of $75.00 in cases involving a conviction of *any* misdemeanor or ordinance violation.

- The crime victim assessment is to be "[b]ased upon the [m]ost [s]erious [o]ffense [c]onvicted" in a case. SCAO Crime Victim Assessment and Minimum State Cost Charts, p 1.

6.1(E)(8) Felony Sentencing

- "Because [MCL 780.766(2)] plainly requires the trial court to order 'full' restitution, . . . a trial court abuses its discretion when it orders restitution other than full restitution." *People v Allen (Regina)*, ___ Mich App ___, ___ n 1 (2012).

- The trial court did not clearly err in determining that an insurance company "suffered a direct financial loss as a result of [the defendant's] course of criminal conduct[]" in attempting to purchase a controlled substance from a pharmacy using an insurance contract number that she extracted from a subscriber database during her employment with the company's vendor. *Allen (Regina)*, ___ Mich App at ___ (affirming the trial court's order requiring the defendant to pay restitution to the company in an amount determined by "assigning a value to the hours [the company's employee] spent on the [fraud] investigation[]").

- "Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and [the Court of Appeals] reviews de novo the proper interpretation of statutes. . . . However, [the] Court reviews the findings underlying a trial court's restitution order for clear error. . . . A finding is clearly erroneous if [the] Court is left with the definite and firm conviction that a mistake has been made." *Allen (Regina)*, ___ Mich App at ___ (citations omitted).

6.3(B)(2) Delayed/Deferred/Diversionary Sentences

- The trial court must "take into account the nature and severity of the crimes and the importance of public safety[]" when deciding whether to grant a defendant youthful trainee status. *People v Khanani*, ___ Mich App ___, ___ (2012) ("[g]iven the trial court's description of [the] defendant as 'frighten[ing]' and its apparent agreement with the prosecutor's description of [the] defendant as a serious predator," the trial court abused its discretion in nevertheless granting the defendant youthful trainee status for first-degree home invasion and several additional offenses).

6.3(B)(2)(a) Delayed/Deferred/Diversionary Sentences

- "[T]he sentencing guidelines have not been held to apply to the decision whether to grant youthful trainee status." *People v Khanani*, ___ Mich App ___, ___ (2012).

6.3(B)(2)(i) Delayed/Deferred/Diversionary Sentences

- A trial court's decision concerning a defendant's assignment under the HYTA is reviewed for an abuse of discretion. *People v Khanani*, ___ Mich App ___, ___ (2012), citing *People v Giovannini*, 271 Mich App 409, 411 (2006). In *Khanani*, *supra* at ___, the trial court abused its discretion in granting youthful trainee status to the defendant, who pleaded guilty in three separate cases to six offenses, including first-degree home invasion; the trial court's decision fell outside the range of reasoned and principled outcomes in light of the defendant's age and the seriousness and timing of the home invasion offense, which was committed shortly after he turned 19 while he was on bond awaiting sentencing for the other offenses.

Chapter 7: Appeals & Opinions

7.1 Appeals from District Court to Circuit Court

- **This section has been substantially rewritten.** Effective May 1, 2012, ADM 2010-19 replaced subchapter 7.100 of the Michigan Court Rules to provide detailed rules regarding appeals to the circuit court and to renumber existing rules. The new subchapter substantially rewrites in detail procedures for appeals from district and municipal courts.

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7.2 Appeals From Parole Board Decisions

- **This section has been substantially rewritten.** Effective May 1, 2012, ADM 2010-19 replaced subchapter 7.100 of the Michigan Court Rules to provide detailed rules regarding appeals to the circuit court and to renumber existing rules. The new subchapter substantially rewrites in detail procedures for appeals from district and municipal courts. The rules providing procedures for appealing from decisions of the Michigan Parole Board, formerly set out in MCR 7.104(D), are now found in MCR 7.118.

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MICHIGAN CIRCUIT COURT BENCHBOOK: CRIMINAL PROCEEDINGS—REVISED EDITION

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Michigan Supreme Court

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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. The text has been revised, reordered, and updated through May 1, 2012.

Acknowledgments

The revised edition of this benchbook has been broken into three volumes:

- *Circuit Court Benchbook: Civil Proceedings—Revised Edition*
- *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*
- *Evidence Benchbook*

Work on the 2009 edition of the civil and criminal portions of the benchbook was overseen by an Editorial Advisory Committee facilitated by MJI Research Attorney Sarah Roth and MJI Publications Manager Lisa Schmitz, both of whom skillfully revised the Civil and Criminal volumes, respectively, of this edition of the benchbook. MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

- The Honorable William J. Caprathe
- The Honorable J. Richardson Johnson
- The Honorable Richard M. Pajtas
- The Honorable James R. Redford
- The Honorable Donald E. Shelton

Using This Benchbook

This benchbook is intended for Michigan Circuit Court Judges who handle criminal cases. The purpose of this benchbook is to provide a single source to address issues that may arise while the judge is on the bench. The benchbook is designed to be a ready reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision-making and the process as a whole.
- The text covers the routine issues that a circuit judge may face and non-routine issues that require particular care when they arise.
- The text is designed to encourage best practices rather than minimal compliance.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.
- The text identifies whether the court's decision is discretionary (note the standard of review language provided for most sections).

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Court Rules and the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.

- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).
- The discussion of each topic is designed to move from the general to the specific without undue elaboration.
- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.
- Most sections conclude with the standard of review applied by the appellate courts, which can be used to quickly determine whether the decision is discretionary.
- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.
- Every effort has been made to cite the source for each statement (if no authority is cited for a proposition, then the statement is the author's opinion).
- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.
- If a model or standard jury instruction addresses an issue, it is referenced in the text.

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Table of Contents

Chapter 1: General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records 1-1

A. Record of Proceedings 1-1
B. Open or Closed Trial 1-3
C. Limits on Access to Court Proceedings 1-5
D. Media Access to Court Proceedings 1-5
E. "Gag Orders" 1-6
F. Access to Court Files and Records 1-6
G. Limits on Access to Court Records 1-8
H. Access to Judge—Ex Parte Communications 1-9
I. Standard of Review 1-10

1.2 Court-Appointed Counsel and Waiver of Fees 1-11

A. Generally 1-11
B. Reimbursement/Reinstatement of Fees 1-12
C. Standard of Review 1-13

1.3 Disqualification of Judge 1-13

A. Grounds for Disqualification 1-13
B. Motion to Disqualify 1-17
C. Burden of Proof 1-18
D. Remittal of Disqualification 1-18
E. State Bar Ethics Committee 1-18
F. Standard of Review 1-19

1.4 Attorneys 1-19

A. Attorney's Duty to the Court 1-19
B. Attorney's Duty to the Client 1-20
C. Motion to Disqualify Attorney 1-20
D. Standard of Review 1-21

1.5 Contempt of Court 1-21

A. Introduction 1-21
B. Direct Contempt—In the Presence of the Court 1-22
C. Indirect Contempt—Outside the Presence of the Court 1-22
D. Civil or Criminal Contempt 1-23

E. Right to Counsel 1-24
F. Punishment 1-25
G. Sanctions Other Than Contempt 1-26
H. Standard of Review 1-27

1.6 Personal Protection Orders (PPOs) 1-27

A. Obtaining or Terminating a PPO 1-27
B. Hearing 1-28
C. Sentencing 1-29
D. Multiple Punishments 1-29

1.7 Discretion 1-29

Chapter 2: Preliminary Proceedings

2.1 Complaints and Warrants 2-1

2.2 Arrest 2-3

A. Probable Cause 2-3
B. Delay Between Crime and Arrest 2-4
C. Delay Between Warrantless Arrest and Arraignment 2-5
D. Arrest Outside Jurisdiction 2-6
E. Standard of Review 2-6

2.3 Pretrial Release 2-6

A. Generally 2-6
B. Personal Recognizance 2-8
C. Conditional Release 2-8
D. Money Bail 2-9
E. Denial of Pretrial Release 2-11
F. Rationale for Decision 2-12
G. Custody Hearing 2-13
H. Modification of Release Decision 2-14
I. Bond Forfeiture 2-14
J. Setting Aside Bond Forfeiture 2-17
K. Termination of Release Order 2-19
L. Revocation of Release on Conviction 2-20
M. Release Pending Appeal 2-20
N. Standard of Review 2-21

2.4 Right to Counsel 2-22

A. Generally 2-22
B. Multiple Representation of Defendants 2-25
C. Indigence—Waiver of Fees and Court-Appointed Counsel 2-26
D. Substitution or Withdrawal of Counsel 2-27
E. Removal of Counsel 2-29
F. Withdrawal of Assigned Appellate Counsel 2-29

2.5 Waiver of Counsel 2-29

A. Right of Self-Representation 2-29

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B. Waiver of Right to Counsel 2-33
C. Advice at Subsequent Proceedings 2-34
D. Standby Counsel 2-35
E. Standard of Review 2-35

2.6 Grand Jury 2-36

A. One Person Grand Jury 2-36
B. Citizen Grand Jury 2-36
C. Multicounty Grand Jury 2-37
D. Oath for the Grand Jury 2-38
E. Right to Counsel 2-38
F. Rules of Evidence 2-38
G. Discovery 2-39
H. Investigative Subpoenas 2-39

2.7 Preliminary Examination 2-41

A. Initial Bind Over by District Court 2-41
B. Review of District Court's Bindover 2-46
C. Discharge of Defendant 2-46
D. Motion to Remand for Preliminary Examination 2-47
E. Standard of Review 2-47

2.8 Information or Indictment 2-47

A. Content 2-47
B. Amendments 2-48
C. Joinder of Counts 2-49
D. Standard of Review 2-51

2.9 Arraignment on Information or Indictment 2-51

Chapter 3: Pretrial Motions & Proceedings

3.1 Discovery 3-2

A. Generally 3-2
B. Mandatory Disclosure 3-2
C. Discretionary Disclosure 3-4
D. Prohibited Disclosure/Privilege 3-4
E. Discovery Violation 3-6
F. Bill of Particulars 3-7
G. Standard of Review 3-8

3.2 Witnesses—Disclosure, Production, and Appointment 3-8

A. Witness Disclosure 3-8
B. Witness Location and Production 3-9

3.3 Special Notice Requirement—Rape Shield Law 3-11

A. Generally 3-11
B. Evidence of Victim's Past Sexual Conduct 3-13

3.4 Alibi Defense 3-15

A. Notice and Timing 3-15
B. Failure to Provide Notice 3-16
C. Impeachment with Alibi Notice 3-17
D. Cross-Examination of Alibi Witness 3-17
E. Jury Instruction 3-18
F. Standard of Review 3-18

3.5 Defenses Involving a Defendant's Mental Status 3-18

A. Competency Determination 3-18
B. Diminished Capacity 3-26
C. Not Guilty By Reason of Insanity 3-26
D. Guilty but Mentally Ill 3-29
E. Acquittal by Reason of Insanity 3-30

3.6 Entrapment 3-31

A. Generally 3-31
B. Not an Issue of Guilt or Innocence 3-31
C. Hearing 3-32
D. Test for Entrapment 3-32
E. Entrapment by Estoppel 3-34
F. Standard of Review 3-35

3.7 Pretrial Motions—Generally 3-35

A. Form 3-35
B. Timing 3-35
C. Pretrial Conference/Scheduling 3-36
D. Evidentiary Hearing 3-37
E. Disposition 3-38
F. When Findings of Fact and Conclusions of Law Are Required 3-39
G. Standard of Review 3-40

3.8 Motion to Dismiss 3-40

3.9 Change of Venue 3-40

A. Generally 3-40
B. Timing 3-42
C. Standard of Review 3-42

3.10 Separate or Joint Trial 3-43

A. One Defendant—Multiple Charges 3-43
B. Multiple Defendants 3-44
C. Standard of Review 3-46

3.11 Speedy Trial 3-46

A. Right to a Speedy Trial 3-46
B. Length of the Delay 3-47
C. Reasons for the Delay 3-47
D. Assertion of the Right 3-48
E. Resulting Prejudice 3-48
F. Recognizance Release 3-48

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G. Untried Charges Against State Prisoners—180-Day Rule 3-50
H. Detainers 3-53
I. Standard of Review 3-55

3.12 Adjournment or Continuance 3-56

A. Generally 3-56
B. Factors 3-56
C. Standard of Review 3-57

3.13 Motion to Suppress Evidence 3-58

A. Burden 3-58
B. Timing 3-58
C. Evidentiary Hearing 3-59
D. Disposition 3-60
E. Interlocutory Appeal 3-60
F. Standard of Review 3-61

3.14 Motion to Suppress Defendant's Statement 3-61

A. Admissibility 3-61
B. Corpus Delicti Rule 3-62
C. Evidentiary ("Walker") Hearing 3-63
D. Voluntary, Knowing, and Intelligent Confession 3-64
E. Inadmissible Confessions 3-69
F. Use of Improper Confession 3-78
G. Assertion of Miranda Rights 3-79
H. Waiver of Miranda Rights 3-80
I. Standard of Review 3-83

3.15 Motion to Suppress Identification of Defendant 3-83

A. Generally 3-83
B. Evaluating the Lineup's Suggestiveness 3-85
C. Right to Counsel 3-86
D. Photo Lineup 3-87
E. Defendant's Request for a Lineup 3-88
F. Identification of Defendant's Voice 3-88
G. In-Court Identification 3-89
H. Standard of Review 3-91

3.16 Motions for Rehearing or Reconsideration 3-91

3.17 Search and Seizure Issues—Generally 3-92

3.18 Search and Seizure Issues—Was There a Search or Seizure? 3-93

3.19 Search and Seizure Issues—Does the Defendant Have Standing?.. 3-96

3.20 Search and Seizure Issues—Where Did the Search Take Place?..... 3-98

A. Dwelling Searches 3-98
B. Automobile Searches 3-104
C. Search or Seizure of Containers or Personal Effects 3-112
D. Searches That Take Place in a School 3-113
E. Searches That Take Place in an Airport 3-113

F. Searches That Take Place at Border Crossings 3-113
G. Searches of Parolees or Probationers 3-114
H. Searches That Take Place in Prison or Jail 3-115
I. The Use of Roadblocks/Checkpoints 3-115

3.21 Search and Seizure Issues—Was a Warrant Required? 3-115

A. Search Warrants 3-115
B. Exceptions to the Warrant Requirement 3-125

3.22 Search and Seizure Issues—Was There Probable Cause? 3-149

3.23 Search and Seizure Issues—Is Exclusion the Remedy if a Violation Is Found? 3-149

A. Inevitable Discovery Doctrine 3-149
B. Independent Source Doctrine 3-151
C. Good Faith Doctrine 3-151
D. Attenuation Doctrine 3-154
E. Statutory Violations 3-155

3.24 Search and Seizure Issues—Standard of Review 3-156

3.25 Double Jeopardy Issues 3-157

A. Generally 3-157
B. Multiple Prosecutions for the Same Offense 3-158
C. Multiple Punishments for the Same Offense 3-160
D. Standard of Review 3-164

Chapter 4: Pleas

4.1 Plea of Guilty or Nolo Contendere 4-1

A. Generally 4-1
B. Requirements for Guilty or Nolo Contendere Pleas 4-1
C. Nolo Contendere Plea Details 4-3
D. Use of Felony Pleas 4-4
E. Remedy for a Defective Plea 4-5
F. Standard of Review 4-6

4.2 Plea of Guilty but Mentally Ill 4-7

4.3 Plea of Not Guilty by Reason of Insanity 4-8

4.4 Withdrawal of a Guilty Plea 4-9

A. Withdrawal of Plea Before Acceptance 4-9
B. Withdrawal of Plea Before Sentencing 4-9
C. Withdrawal of Plea After Sentencing 4-13
D. Motion to Withdraw Based on Ineffective Assistance of Counsel. 4-14
E. Effect of Withdrawal or Vacation of Plea 4-17
F. Inadmissibility of Withdrawn Plea 4-17
G. Appealing a Guilty Plea 4-17
H. Standard of Review 4-19

4.5 Sentence Bargaining 4-19

A. Sentence Agreements and Recommendations 4-19
B. Violations of a Sentence Agreement or Recommendation 4-21
C. Ineffective Assistance of Counsel Causing Lapse or Rejection of Plea Offer 4-24

4.6 Plea—Collateral Attack of Earlier Plea or Conviction Used for Purposes of Sentence Enhancement 4-28

Chapter 5: Trial & Posttrial Proceedings

5.1 Trial or Jury Waiver 5-1

A. Right to a Jury Trial 5-1
B. Waiver of a Jury Trial 5-2
C. Standard of Review 5-4

5.2 Bench Trial 5-5

A. Is Disqualification An Issue? 5-5
B. Pretrial Motions in a Bench Trial 5-6
C. Evidentiary Issues in a Bench Trial 5-6
D. Motion for Acquittal 5-6
E. Decision 5-7
F. Standard of Review 5-8

5.3 Jury Selection 5-8

A. Number of Jurors 5-9
B. Identity of Jurors 5-10

5.4 Voir Dire 5-10

A. Challenges for Cause 5-12
B. Peremptory Challenges 5-14
C. Discrimination During Voir Dire 5-15
D. Alternate Jurors and Removal or Substitution of a Juror at Trial .. 5-19
E. Substitution of Judges 5-20
F. Sequestration of Jury 5-21
G. Anonymous Jury 5-21
H. Standard of Review 5-22

5.5 Oaths or Affirmations 5-23

A. Juror Oath Before Voir Dire 5-23
B. Juror Oath Following Selection 5-24
C. Oath for Bailiff Before Deliberation 5-25
D. Oath for Witness 5-25
E. Oath for Interpreter 5-26
F. Child Witness 5-26
G. Suggested Caution to Witness 5-26

5.6 Subpoenas 5-27

A. In General 5-27
B. Subpoena Duces Tecum (Subpoena for Production of Evidence) . 5-27
C. Motion to Quash Subpoena 5-28

5.7 Conducting the Trial 5-28

A. Stipulations 5-28
B. Opening Statement 5-29
C. Interim Commentary 5-30
D. Witness Examination 5-30
E. Closing Argument 5-32
F. Summation of Evidence by Court 5-36
G. Standard of Review 5-37

5.8 Questions or Comments by Judge 5-38

5.9 Issues Affecting the Jury During Trial 5-38

A. Reference Document 5-38
B. Jury Note Taking 5-39
C. Jury Questions 5-39
D. Jury View 5-40
E. Prohibited Jury Actions 5-41

5.10 Defendant's Conduct and Appearance at Trial 5-42

A. Presumption of Innocence 5-42
B. Right to Be Present 5-46
C. Testimony 5-48
D. Self-Incrimination—Requiring Defendant to Display Body or Perform Act 5-48

5.11 Confrontation 5-50

A. Defendant's Right of Confrontation 5-50
B. Special Arrangements to Accommodate Compelling Interests 5-66
C. Standard of Review 5-68

5.12 Directed Verdict 5-69

A. Rule 5-69
B. Test Applied by the Court 5-69
C. Double Jeopardy Implications 5-70
D. Standard of Review 5-72

5.13 Jury Instructions 5-72

A. Generally 5-72
B. Preliminary Instructions 5-73
C. Interim Instructions 5-73
D. Final Instructions 5-73
E. Content of Instructions 5-74
F. Instructions on Lesser Included Offenses 5-75
G. Questions About Instructions 5-80
H. Objections to the Instructions 5-81
I. Standard of Review 5-81

5.14 Jury Matters During Deliberations 5-83

A. Separation of the Jury 5-83
B. Communication with the Jury 5-84

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C. Materials in Jury Room 5-86
D. Requests to Review Testimony or Evidence 5-88
E. Requests to Clarify Instructions 5-89
F. Hung Jury 5-89
G. Multiple Charges—Verdict on One or More Counts But Not All 5-94
H. Standard of Review 5-94

5.15 Verdict 5-94

A. Unanimity Requirement 5-94
B. Inconsistent Verdicts 5-96
C. Several Counts 5-96
D. Use of Special Verdicts 5-96
E. Polling 5-97
F. Reconvening Jury 5-98
G. Meeting With Jury After Verdict 5-98

5.16 Mistrial 5-99

A. Determination 5-99
B. Attachment of Jeopardy 5-99
C. Permissible Retrials 5-99
D. Example—Polygraph Test Results 5-100
E. Juror Conduct 5-102
F. Standard of Review 5-103

5.17 New Trial 5-103

A. Generally 5-103
B. Grounds for a New Trial 5-105
C. Standard of Review 5-111

5.18 Ineffective Assistance of Counsel 5-112

A. General Standard 5-112
B. Evidentiary (Ginther) Hearing 5-118
C. Waiver of Attorney-Client Privilege 5-119
D. Pleas 5-119
E. Appellate Standard 5-120
F. Standard of Review 5-121

Chapter 6: Sentencing & Post-Sentencing

6.1 Felony Sentencing 6-1

A. Presentence Investigation Report 6-1
B. Sentencing Guidelines 6-6
C. Scoring Offense Variables (OVs) and Prior Record Variables (PRVs) 6-6
D. Allocution 6-16
E. Imposition of Sentence 6-17
F. Judgment/Reissuance of Judgment 6-41
G. Correction and Appeal of Sentence 6-42
H. Standard of Review 6-44

6.2 Habitual Offender Sentencing 6-45

A. Notice Required 6-45
B. Proof of Prior Convictions 6-46
C. Calculating a Habitual Offender's Sentence 6-48
D. Standard of Review 6-49

6.3 Delayed/Deferred/Diversionary Sentences 6-49

A. Delayed Sentence 6-50
B. Deferred Adjudication of Guilt 6-52
C. Conditional Sentences 6-58
D. Suspended Sentences 6-58
E. Mandatory Sentences 6-58
F. Standard of Review 6-59

6.4 Juvenile Sentencing 6-59

A. Automatic Waiver Cases 6-60
B. Sentencing Hearing 6-61
C. Postjudgment Procedure 6-63
D. Retention of Jurisdiction 6-65
E. Commitment Review Hearing 6-66
F. Probation Revocation 6-67
G. Final Review Hearings 6-69
H. Standard of Review 6-70

6.5 Sentencing a Sexually Delinquent Person 6-70

A. Definition 6-70
B. Procedure 6-71

6.6 Jail Credit 6-73

A. Generally 6-73
B. Alternative Programs 6-73
C. Arrested Parolees 6-74
D. Void Sentences 6-76
E. Consecutive Sentences 6-76
F. Sheriff's Disciplinary Credit 6-76
G. No Credit for Sentence Reduction Due to Jail Overcrowding 6-77
H. Credit for Time Served Before Sentence Only If Denied or Unable to Furnish Bond 6-78
I. Credit for Time Erroneously Spent at Liberty 6-78
J. Standard of Review 6-79

6.7 Probation Revocation 6-79

A. Issuance of Summons or Warrant 6-79
B. Arraignment 6-80
C. Hearing 6-80
D. Plea 6-82
E. Sentencing 6-83
F. Appeal Rights 6-85

6.8 Postappeal Relief 6-85

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A. Generally 6-85
B. Motion for Relief From Judgment—Preliminary Matters 6-86
C. Right to Counsel 6-89
D. Motion for Relief From Judgment—Decision 6-90
E. Standard of Review 6-91

6.9 Setting Aside a Conviction 6-91

A. Convictions That May Not Be Set Aside 6-92
B. Procedure for Application 6-93
C. Submission of Application to State Police 6-93
D. Submission of Application to the Attorney General and Prosecuting Attorney 6-94
E. Court Action on the Application 6-95
F. Effect of Order 6-95
G. Access to Records of Convictions That Have Been Set Aside 6-96
H. Standard of Review 6-97

Chapter 7: Appeals & Opinions

7.1 Appeals from District Court to Circuit Court 7-1

A. Jurisdiction 7-2
B. Venue 7-2
C. Stay of Proceedings and Bond 7-3
D. Appeal of Right 7-4
E. Appeal By Leave 7-6
F. Cross Appeal 7-9
G. Late Appeals 7-9
H. Record on Appeal 7-10
I. Motions 7-11
J. Briefs 7-11
K. Dismissal 7-12
L. Decision and Judgment 7-13
M. Miscellaneous Relief 7-13
N. Assessment of Costs 7-14

7.2 Appeals from Parole Board Decisions 7-14

A. Grounds for Grant of Parole 7-14
B. Procedure for Appeal from Grant of Parole 7-15
C. Appeal From Parole Revocation 7-18

7.3 Standard of Review 7-19

A. Generally 7-19
B. De Novo 7-19
C. Clear Error 7-19
D. Abuse of Discretion 7-20
E. What Standard of Review Should Be Employed? 7-20
F. Right Result—Wrong Reason 7-21

7.4 Basis for Parties' Positions 7-21

A. Party Must State Basis For Claim 7-21
B. Party Must Provide Record Supporting Claim 7-22

7.5 Precedent 7-22

A. Michigan Supreme Court 7-22
B. Michigan Court of Appeals 7-22
C. Circuit Court 7-23
D. United States Supreme Court 7-23
E. Sixth Circuit Court of Appeals 7-23
F. Attorney General 7-23
G. Dicta 7-23
H. Retroactivity of Judicial Decisions 7-23

7.6 Doctrines of Collateral Estoppel, Res Judicata, and Law of the Case 7-24

A. Collateral Estoppel 7-24
B. Res Judicata 7-25
C. Law of the Case 7-25

7.7 Statutory Construction and Interpretation 7-26

A. Generally 7-26
B. Statutory Challenges 7-27
C. Retroactivity of Statutes 7-29
D. Standard of Review 7-29

7.8 Remand 7-29

A. Authority to Remand 7-29
B. Process Upon Remand 7-30

7.9 Establishing a Record for Review 7-30

A. Bench Trial 7-30
B. Required Findings of Fact/Conclusions of Law 7-31
C. On Remand 7-33

7.10 Oral Opinions 7-33

7.11 Written Opinions 7-34

A. Generally 7-34
B. Specifically 7-34

Appendix: Checklists and Scripts

Felony Arraignment Script Appx-3
Attorney Waiver Script Appx-5
Waiver of Right to Attorney Appx-7
Felony Plea Script / Checklist Appx-9
Jury Waiver in Criminal Case Appx-13
Bench Trial Decision Checklist Appx-15
Trial Outline—Criminal Case Appx-17

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Voir Dire Questions for the Court in Criminal Case Appx-20
Final Instructions Checklist—Criminal Appx-21
Verdict Checklist Appx-23
Felony Sentencing Script / Checklist Appx-25
Felony Probation Violation—Arraignment Checklist Appx-29
Felony Probation Violation—Plea Checklist Appx-31
Felony Probation Violation—Contested Hearing Checklist Appx-33
Felony Probation Violation—Sentencing Checklist Appx-35

Tables of Authority

Cases
Michigan Statutes
Michigan Court Rules
Michigan Rules of Evidence
Michigan Rules of Professional Conduct
Michigan Criminal Jury Instructions
United States Code
Constitutional Authority

Chapter 1: General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records 1-1
1.2 Court-Appointed Counsel and Waiver of Fees 1-11
1.3 Disqualification of Judge 1-13
1.4 Attorneys 1-19
1.5 Contempt of Court 1-21
1.6 Personal Protection Orders (PPOs) 1-27
1.7 Discretion 1-29

1.1 Access to Court Proceedings and Records

A. Record of Proceedings

MCR 6.006(A) allows circuit courts to use two-way interactive video technology to conduct certain proceedings between a courtroom and a prison, jail, or other location, including pretrial conferences, pleas, show cause hearings, waivers and adjournments of extradition, and referrals for forensic determination of competency.

MCR 6.006(C)(1) states that, on a showing of good cause, as long as the defendant is either present in the courtroom or has waived the right to be present, circuit courts may use two-way interactive video technology in certain proceedings to take testimony from a person at another location, including 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.

MCR 6.006(C)(2) states that, on a showing of good cause, as long as the defendant is either present in the courtroom or has waived the right to be present, circuit courts may, with the consent of the

parties, use two-way interactive video technology during a trial to take testimony from a person at another location. 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. *Id*.

"[A party's] silence or failure to specifically object to the taking of testimony by two-way interactive video technology is [not] the equivalent of consent." *People v Buie (Buie I)*, 285 Mich App 401, 417 (2009) (the defendant did not consent by failing to specifically object to the procedure; in fact, the defendant's desire to "question the veracity of the[] proceedings" indicated that he objected to the video-conferencing procedure). "Additionally . . . MCR 6.006(C) does not permit defense counsel to consent to the use of two-way, interactive video technology where a defendant objects to the procedure." *People v Buie (Buie II) (After Remand)*, 291 Mich App 259, 272-273, 274 (2011), lv gtd 489 Mich 938 (2011) ("because [the] defendant expressly objected to the use of the technology, defense counsel's agreement with its use d[id] not qualify . . . as consent under MCR 6.006(C)(2)").

MCR 8.108(B)(1) states that a "court reporter or recorder shall attend the court sessions under the direction of the court and take a verbatim record of the following:

> "(a) the voir dire of prospective jurors;
>
> "(b) the testimony;
>
> "(c) the charge to the jury;
>
> "(d) in a jury trial, the opening statements and final arguments;
>
> "(e) the reasons given by the court for granting or refusing any motion made by a party during the course of a trial; and
>
> "(f) opinions and orders dictated by the court and other matters as may be prescribed by the court."

MCR 8.108(E) states in part that "[t]he court reporter or recorder shall furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof) to any party on request."

MCR 8.109(A) indicates that a trial court may use audio or video recording devices for making the record of court proceedings.

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Occasionally, proceedings occur without a court reporter present, or with a recording system that was not turned on or did not function correctly. MCR 7.210(B)(2) provides specific steps for an appellant to follow "[w]hen a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder. . . to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript." If a settled statement of facts is made and certified as prescribed by MCR 7.210(B)(2), it controls the timing of the appellant's brief in the same manner as would a transcript. MCR 7.212(A)(1).~~Upon discovery that a record of the proceedings cannot be created, the trial court should explain what has occurred and determine whether the parties can agree on a summary, or settled record, of what occurred during the time the proceedings were not being recorded. Alternatively, the trial court can summarize what occurred and inquire whether there are any additions or corrections that the parties wish to make. See MCR 7.210(B)(2) ("[w]hen a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript").~~

B. Open or Closed Trial[1]

A criminal defendant is entitled to a public trial. US Const, Am VI; Const 1963, art 1, § 20. A criminal trial must be open to the public, unless the court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580-581 (1980).

The requirements for total closure are: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (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) it must make findings adequate to support the closure. *People v Kline*, 197 Mich App 165, 170 (1992).

Because the effect of a partial closure does not rise to the level of a total closure, only a substantial (rather than a compelling) reason for the closure is necessary. *Kline*, 197 Mich App at 170. A partial closure occurs where the public is only partially excluded, such as when family members or members of the press are allowed to remain, or when the closure order is narrowly tailored to specific needs. *Kline*, *supra* at 170 n 2.

[1] See the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for a discussion of motions to exclude the public and press.

A court has statutory authority to exclude certain persons from the courtroom or to limit the disclosure of information in the courtroom. See, e.g., MCL 600.1420 (court may exclude minors who are not parties or witnesses in cases of scandal or immorality), and MCL 750.520k (in a criminal sexual conduct case, a court may suppress the victim's and actor's names and details of the alleged offense until the defendant is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever is first).

"The parties may not, by their mere agreement, empower a judge to exclude the public and press." *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

The right to a public trial extends to pretrial hearings, *Waller v Georgia*, 467 US 39, 43-47 (1984), and the jury selection process, *Presley v Georgia*, 558 US ___, ___ (2010).

"[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." *Waller*, 467 US at 48. See *Presley*, 558 US at ___ ("[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course"). "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]" e.g., "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Presley, supra* at ___ (trial court improperly excluded public from courtroom during jury selection process without considering alternatives to closure).

The right to a public trial "is not self-executing: the defendant must timely assert the right." *People v Vaughn (Joseph)*, 291 Mich App 183, 196 (2010), lv gtd 490 Mich 887 (2011). "[T]he failure to timely assert the right to a public trial forecloses the later grant of relief." *Vaughn (Joseph), supra* at 196-197 (defense counsel's failure to object to the trial court's decision to close the courtroom to the public during voir dire precluded appellate relief); see also *People v Orlewicz*, 293 Mich App 96, 112-114 (2011) (the defendant's request to allow his family to remain in the courtroom, which the trial court had cleared for voir dire due to the large number of potential jurors, did not

constitute a legal objection to the closure of the courtroom; therefore, the defendant waived his right to a public trial).

C. Limits on Access to Court Proceedings

Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless

> "(a) a party has filed a written motion that identifies the specific interest to be protected, or the court sua sponte has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
>
> "(b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> "(c) the court states on the record the specific reasons for the decision to limit access to the proceeding." MCR 8.116(D)(1).

Any person may file a motion to set aside an order entered under MCR 8.116(D)(1) or object to its entry. MCR 2.119[2] governs the proceedings for motions or objections under MCR 8.116(D)(1). MCR 8.116(D)(2).

The court must forward a copy of the order to the State Court Administrative Office. MCR 8.116(D)(3).

D. Media Access to Court Proceedings

The press has no greater right of access to court proceedings than does the public. *In re Midland Publishing Co, Inc*, 420 Mich 148, 162 (1984).

See Administrative Order No. 1989-1,[3] 432 Mich cxii (1989), setting out guidelines applicable to film or electronic media coverage of court proceedings.

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[2] See the Michigan Judicial Institute's *Michigan Circuit Court Benchbook: Civil Proceedings*, Chapter 3, for a discussion of MCR 2.119.

[3] Available at http://coa.courts.mi.gov/rules/documents/3AdministrativeOrders.pdf, pp 55-57.

E. "Gag Orders"

The term "gag order" refers to a court order directed to attorneys, witnesses, and parties prohibiting them from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. A court order prohibiting reporters from publishing information related to a case is unconstitutional. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556 (1976) ("The [United States Supreme] Court has interpreted [First Amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary").

MCR 8.116(D)(1) should be followed in assessing whether to grant a gag order prohibiting discussion of the case with reporters. A gag order that is reasonable and serves a legitimate purpose that overrides any limited incidental affects on First Amendment rights is permissible. *In re Detroit Free Press*, 463 Mich 936 (2000).

F. Access to Court Files and Records

Unless a file, document, or information in a file or document, is made confidential pursuant to statute, court rule, or court order under MCR 8.119(F), any person may inspect a file or document. MCR 8.119(E)(1). If a case is nonpublic pursuant to statute or court rule, all material related to the case should also be treated as nonpublic, including notes, recordings, and transcripts. See, e.g., MCR 8.119(F)(4) ("[f]or purposes of this rule, 'court records' includes all documents and records of any nature that are filed with the clerk in connection with the action"; "[m]aterials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion"). Supreme Court Administrative Order No. 2006-2[4] addresses the confidentiality of social security numbers and management of non-public information contained within public documents.

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(F)(5)]." *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(F)(5)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(F)(1)] allows when a motion involves other court records." *Jenson*, *supra* at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(F)(5)).

[4] Available at http://coa.courts.mi.gov/rules/documents/3AdministrativeOrders.pdf, pp 139-140.

Access to court records can be restricted by the Legislature. *In re Midland Publishing Co, Inc*, 420 Mich at 159. For example, MCL 750.520k allows a court, in a criminal sexual conduct case, to order the suppression of the victim's and actor's names and details of the alleged offense until after the preliminary examination. For a partial listing of statutes, court rules, and cases that restrict public access to court records, see the State Court Administrative Office's Case File Management Standards.[5]

To determine whether a right of access exists regarding a document, a court should ask whether the document has historically been open to the public and press, and whether access "'plays a significant positive role in the function of the particular process in question.'" *In re People v Atkins*, 444 Mich 737, 740 (1994), quoting *Press-Enterprise Co v Superior Ct of California*, 478 US 1, 8 (1986) (after the defendant was found competent to stand trial, the court provided newspapers with an edited (as opposed to full text) version of the psychiatrist's written report; because competency reports that have not been admitted into evidence have traditionally been viewed as confidential, and public access would not play a significant positive role in the functioning of the particular process in question, the court's denial of full access to the report was affirmed).

"[T]he press has a qualified right of postverdict access to jurors' names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court's order." *In re Disclosure of Juror Names (People v Mitchell)*, 233 Mich App 604, 630-631 (1999). If a court determines that jurors' safety concerns are "legitimate and reasonable," the court may deny media access to jurors' names and addresses. *In re Disclosure of Juror Names*, *supra* at 630. Jurors' privacy concerns alone are insufficient to deny access to jurors' names. *Id*.

Committee Tips:

- *Reports and records may be privileged or confidential and their treatment should be scrutinized in each case. Examples are substance abuse evaluations and treatment records, medical records and reports, and psychological/ psychiatric records and reports.*
- *Consider whether the document can be removed from the file pursuant to the court's*

[5] Available at http://courts.michigan.gov/scao/resources/standards/cf_stds.pdf.

authority to strike pleadings or parts of pleadings under MCR 2.115(B).

Consider whether a filed document can be removed from the file by court order. See MCR 8.119(E) and MCR 2.107(G).

For other information parties wish to keep confidential, consider having the document marked as an exhibit, reviewed by the court on the record, and then returned to the parties at the conclusion of the proceeding.

G. Limits on Access to Court Records

MCR 8.119(F)(1)–MCR 8.119(F)(3) states as follows:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > "(a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > "(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > "(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> "(2) In determining whether good cause has been shown, the court must consider,
>
> > "(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
> >
> > "(b) the interest of the public.
>
> "(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records."

MCR 8.119(F) is not intended to limit a court's authority to issue protective orders under MCR 2.302(C) for trade secrets, etc. MCR 8.119(F)(4).

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"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(F)(5).]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(F)(5)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(F)(1)] allows when a motion involves other court records." *Jenson*, *supra* at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119[F][5]).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119[6] governs the proceedings on such a motion or objection." MCR 8.119(F)(6).

If a court grants a motion to seal a court record, the court must send a copy of the order to the Clerk of the Michigan Supreme Court and to the State Court Administrative Office. MCR 8.119(F)(7).

When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed file will be referred to the trial court. *Id*. MCR 8.119(F) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c). "Materials that are subject to a motion to seal a Court of Appeals file in whole or in part shall be held under seal pending the court's disposition of the motion." MCR 7.211(C)(9)(c).

H. Access to Judge—Ex Parte Communications

"A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . ." except for the limited exceptions set out in the Michigan Code of Judicial Conduct 3.A(4). The exceptions include communications for scheduling, consulting with court personnel, and, with the consent of the parties, conferring separately with the parties and their attorneys in an effort to reach resolution. Michigan Code of Judicial Conduct 3.A(4)(a), (c), and (d). The prohibition on ex parte communications may also apply to nonparties such as probation agents. See *People v Black*, 103 Mich App 109, 115 (1981) ("[w]here the trial court has communicated with the probation officer ex parte, [the reviewing court] must presume that th[e] right [to the effective assistance of counsel] has been denied")~~. See also~~; *People v Crawford (Alvin)*, 115 Mich App 516,

[6] See the Michigan Judicial Institute's *Michigan Circuit Court Benchbook: Civil Proceedings*, Chapter 3, for a discussion of MCR 2.119.

520 (1982) ("when a trial court holds an ex parte conversation with a presentence investigator, there is a rebuttable presumption of prejudice to the defendant that, if not rebutted, requires reversal").

However, "not all communications between a judge and *jury* are critical stages—meaning a stage at which there is a 'reasonable probability that [a defendant's] case could suffer significant consequences from his [or her] total denial of counsel.'" *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012) (emphasis supplied; citation omitted) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, and the petitioner did not contend that he suffered actual harm as a result of the ex parte communication).

Committee Tip:

The prohibition on ex parte communications precludes a judge from obtaining or seeking substantive information without both parties having the opportunity to participate. It is recommended that court staff be carefully trained to intercept prohibited ex parte communications. These communications can include efforts by the parties or other persons interested in the case to contact the judge, contacts with or from police or other agencies, and communications with jurors. The judge also should not view the scene without notifying the parties, who should have the opportunity to be present.

I. Standard of Review

A trial court's decision to permit public access to court proceedings and documents is reviewed for an abuse of discretion, in light of the facts and circumstances of the particular case. *Int'l Union, United Auto, Aerospace and Agricultural Implement Workers of America v Dorsey*, 268 Mich App 313, 329 (2005), rev'd in part on other grounds 474 Mich 1097 (2006), citing *Nixon v Warner Communications, Inc*, 435 US 589, 599 (1978).

1.2 Court-Appointed Counsel and Waiver of Fees

A. Generally

"An indigent defendant has a right to an appointed attorney whenever the offense charged requires on conviction a minimum term in jail or the court determines it might sentence to a term of incarceration, even if suspended. If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence." MCR 6.610(D)(2).

> "If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:
>
> > "(1) present employment, earning capacity and living expenses;
> >
> > "(2) outstanding debts and liabilities, secured and unsecured;
> >
> > "(3) whether the defendant has qualified for and is receiving any form of public assistance;
> >
> > "(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
> >
> > "(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

"The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer." MCR 6.005(B).

Indigence must be determined on a case-by-case basis by considering the defendant's financial ability, not that of his or her friends or relatives. *People v Arquette*, 202 Mich App 227, 230 (1993).

"If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C). See SCAO form MC 222, *Petition and Order for Court Appointed Attorney*[7]

[7] Available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc222.pdf.

("I understand that I may be ordered to repay the court for all or part of my attorney and defense costs").

"If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment." MCR 6.005(D).

MCR 6.001(D) states that the rules of civil procedure generally apply to criminal cases. MCR 2.002 authorizes a trial court to relieve an indigent person of his or her obligation to pay filing fees and assures that a complainant will not be denied access to the courts on the basis of indigence. *Lewis (Man) v Dep't of Corrections*, 232 Mich App 575, 579 (1998). MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of filing fees.

Fee waiver issues frequently arise in the context of litigation initiated by prisoners. MCL 600.2963 addresses claims of indigency in connection with the civil actions of prisoners. MCL 600.2963(1) requires a prisoner to include a certified copy of his or her institutional account showing the current balance and a 12-month history of deposits and withdrawals. See also MCL 791.268, requiring withdrawal from prisoner accounts if installment payments are ordered under MCL 600.2963. MCL 600.2963(8) states that "[a] prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid."

B. Reimbursement/Reinstatement of Fees

A trial court is not required to analyze a defendant's ability to pay a fee for a court-appointed attorney before imposing the fee; it is only required to do so if the fee is actually enforced. *People v Jackson (Harvey)*, 483 Mich 271, 275 (2009), overruling in part *People v Dunbar*, 264 Mich App 240 (2004). However, "[o]nce an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *Jackson (Harvey)*, *supra* at 275. In any event, "remittance orders of prisoner funds, under MCL 769.1*l*, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment . . . ." *Id*.

MCR 6.001(D) states that the rules of civil procedure generally apply to criminal cases. MCR 2.002(G) states that the court may reinstate the fees and costs previously waived if, at the conclusion of the litigation, the reason for the waiver or suspension no longer exists.

If fees and costs were previously waived due to the litigant's indigency, the trial court, before reinstating the fees and costs, must determine whether the litigant is presently indigent. *Kenneth Martin v Dep't of Corrections (On Remand)*, 201 Mich App 331, 335 (1993). However, a litigant's indigency is not required to be established in any particular manner. *Man Lewis*, 232 Mich App at 582.

Where fees were suspended due to the court process, and there was no determination that the petitioner would be unable to pay the fees indefinitely, the trial court did not abuse its discretion in reinstating the fees. *Koss v Dep't of Corrections*, 184 Mich App 614, 617 (1990).

When the trial court noted that it suspended filing fees to ensure timely review of the prisoner petitioner's complaint, the trial court did not abuse its discretion in reinstating the petitioner's obligations to pay the fees following review of the petitioner's complaint, because the reason for suspension no longer existed. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992).

C. Standard of Review

A trial court's determination of a defendant's indigence is reviewed for an abuse of discretion. *People v Gillespie*, 42 Mich App 679, 681-682 (1972).

A trial court's decision to grant a defendant's motion for production of transcripts at public expense is reviewed for an abuse of discretion. *People v Cross (Everett)*, 30 Mich App 326, 336 (1971).

A trial court's decision to reinstate previously waived fees and costs is reviewed for an abuse of discretion. See *Man Lewis*, 232 Mich App at 580, and *Koss*, 184 Mich App at 617.

1.3 Disqualification of Judge

A. Grounds for Disqualification

Due process requires an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996).

MCR 2.003(C)[8] sets out the grounds for disqualification of a judge:

> "(C) Grounds.

[8] MCR 2.003 was amended effective November 25, 2009. ADM File No. 2009-04.

"(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

> "(a) The judge is biased or prejudiced for or against a party or attorney.
>
> "(b) The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*AT*] *Massey* [*Coal Co*], 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

"(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

"(d) The judge has been consulted or employed as an attorney in the matter in controversy.

"(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

"(f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimus economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

"(g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

> "(*i*) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> "(*ii*) is acting as a lawyer in the proceeding;
>
> "(*iii*) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> "(*iv*) is to the judge's knowledge likely to be a material witness in the proceeding.

> "(2) Disqualification not warranted.
>
> > "(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.
> >
> > "(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action."

"A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." Michigan Code of Judicial Conduct, Canon 3(C). However, the Supreme Court has cautioned that an objective standard applies and that, under the court rule, recusal is not required based on an "appearance of impropriety." *Adair v State of Michigan*, 474 Mich 1027, 1038-1041 (2006). The Court also discussed with approval the federal "duty to sit" doctrine—an obligation to remain on a case absent good grounds for recusal. *Adair*, *supra* at 1040-1041.

Generally, "a showing of actual, personal prejudice is required to disqualify a judge under MCR 2.003." *People v Wade (Michael)*, 283 Mich App 462, 470 (2009). However, there are certain situations in which the appearance of impropriety on the part of the judge is so strong as to constitute a due process violation, such as "when the judge (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker." *Wade (Michael)*, *supra* at 470. In those instances, a showing of actual bias is unnecessary. *Id*.

"[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *Wade (Michael)*, 283 Mich App at 470. In *Wade (Michael)*, *supra* at 470-471, the Court of Appeals held that the trial judge did not err in failing to disqualify herself, where her extrajudicial comment was directed at security guards in general, and not specifically at the defendant (who was a security guard); she explicitly stated that she was not personally biased against the defendant and that she could be fair and impartial; and the alleged bias did not manifest itself at trial.

Claims that due process requires judicial disqualification should be examined on a case-by-case basis. *Cain*, 451 Mich at 514. "Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases." *VanBuren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 599 (2003). The situation should be reviewed in light of the totality of the circumstances. *VanBuren Charter Twp*, *supra* at 601. Disqualification should only occur in situations "where 'experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.'" *Crampton v Dep't of State*, 395 Mich 347, 351 (1975), quoting *Withrow v Larkin*, 421 US 35, 47 (1975).

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 868, 882-890 (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 884. "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*. In *Caperton*, *supra* at 872-874, 884, 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. 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 873-874. 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 872-876, 884-890.

"Letters, or even complaints, to the Judicial Tenure Commission alone do not require disqualification of a trial judge." *Ireland v Smith*, 214 Mich App 235, 249 (1995). Disqualification is not required when the moving party has filed a complaint with the Judicial Tenure Commission until the judge has been privately censured or a complaint has been filed by the Judicial Tenure Commission itself.

People v Bero, 168 Mich App 545, 552 (1988); *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 126-127 (1988).

A judge may not "perpetually recuse" himself or herself "from cases of a particular advocate or particular party because of derogatory comments made against the judge by the advocate or the party in a particular case, or because of the judge's personal dislike of a particular advocate." Michigan Ethics Opinion JI-44 (November 1, 1991).[9]

B. Motion to Disqualify

If a motion to disqualify is filed, it must be filed within 14 days after the moving party discovers the ground for disqualification or, if discovery of the ground for disqualification occurs within 14 days of the trial date, "the motion must be made forthwith." MCR 2.003(C)(1). "If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted." *Id.* A party who fails to move for disqualification within 14 days of discovering the alleged grounds for disqualification may not raise the issue for the first time on appeal. MCR 2.003(C)(1); *Fischhaber v Gen Motors Corp*, 174 Mich App 450, 455-456 (1988). See also *People v Mixon*, 170 Mich App 508, 514 (1988), rev'd in part on other grounds 433 Mich 852 (1989) ("because [the defendant] failed to move for disqualification of the trial judge pursuant to MCR 2.003(C)(1), the issue is not preserved for appellate consideration").

A motion must be supported by an affidavit setting out all grounds for disqualification known at the time the motion is filed. MCR 2.003(C)(2). The affidavit must be made on personal knowledge, be factually specific, and demonstrate that the affiant is competent to testify to the facts stated in the affidavit. MCR 2.119(B)(1)(a)–MCR 2.119(B)(1)(c). The challenged judge decides the motion. MCR 2.003(C)(3).

If the challenged judge denies the motion, and if requested by a party, the motion shall be referred to the chief judge who shall decide it de novo. MCR 2.003(C)(3)(a). If the challenged judge is the sole judge or chief judge of the court, and if requested by a party, the motion must be referred to the State Court Administrative Office, which must assign it to another judge who must decide the motion de novo. MCR 2.003(C)(3)(b). "[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial

[9] http://www.michbar.org/opinions/ethics/numbered_opinions/ji-044.htm?CFID=17995692&CFTOKEN=10413048.

court after the trial court judge's denial of the party's motion." *Welch v Dist Court*, 215 Mich App 253, 258 (1996), citing *Law Offices of Lawrence J Stockler PC v Rose*, 174 Mich App 14, 23 (1989), and MCR 2.003(C)(3)(a).

If the motion is granted, "the action shall be assigned to another judge of the same court, or, if one is not available, the State Court Administrator shall assign another judge." MCR 2.003(C)(4).

C. Burden of Proof

"The party moving for the disqualification [of the judge] bears the burden of proving actual bias or prejudice." *People v Houston (Yolanda)*, 179 Mich App 753, 756 (1989). A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Cain*, 451 Mich at 497-499. Bias or prejudice *in fact* must be shown, which generally cannot be predicated solely on the judge's prior rulings. *People v Minier*, 100 Mich App 114, 121 (1980).

D. Remittal of Disqualification

MCR 2.003(E) states that "[p]arties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge[,]" and that "[s]uch waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate." Moreover, unless the attorneys jointly propose the remittal, the judge should be careful not to solicit, seek, or hear comment regarding the waiver to avoid any appearance that the waiver was coerced. "Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record." *Id*. See SCAO form MC 272, *Remittal of Disqualification*,[10] which may be used for the waiver process.

E. State Bar Ethics Committee

On a pending case, the court may request an ethics opinion from the State Bar Ethics Committee. However, the court is not obligated to follow the opinion. Informal contacts can be made with both the State Court Administrative Office and the State Bar, both of which are willing to provide guidance. Although the Judicial Tenure Commission no longer provides opinions, there are a number of earlier rulings and opinions that may be helpful.

[10] Available at http://courts.michigan.gov/scao/courtforms/general/mc272.pdf.

F. Standard of Review

On appeal, a trial court's findings of fact on a motion to disqualify a judge are reviewed for an abuse of discretion, and the judge's application of the law to the facts is reviewed de novo. *Cain*, 451 Mich at 503 n 38. A chief judge's review of the trial judge's decision on the motion for disqualification is de novo. MCR 2.003(C)(3)(a); *Cain*, *supra* at 503 n 38. The reviewing court must be provided with transcripts of the hearings and affidavits. *Czuprynski*, 166 Mich App at 124; *MacDonald v Ford Motor Co*, 117 Mich App 538, 542 (1982).

1.4 Attorneys

A. Attorney's Duty to the Court

An attorney is responsible for aiding the administration of justice. An attorney has a duty to uphold the legal process and act in conformity with standards imposed on members of the bar. These standards include the rules of professional responsibility and judicial conduct adopted by the Michigan Supreme Court. MCR 9.103(A). Grounds for discipline include conduct that is prejudicial to the proper administration of justice or that violates the Michigan Rules of Professional Conduct (MRPC). See MCR 9.104(1) ("conduct prejudicial to the proper administration of justice"), and MCR 9.104(4) ("conduct that violates the standards or rules of professional conduct adopted by the Supreme Court").

The authority to supervise and discipline Michigan attorneys derives from the state constitution and rests with the Michigan Supreme Court. *Schlossberg v State Bar Grievance Bd*, 388 Mich 389, 394 (1972). This constitutional responsibility is discharged, in turn, by the Attorney Grievance Commission (acting as the Supreme Court's prosecution arm) and the Attorney Discipline Board (acting as the Supreme Court's adjudicative arm). MCR 9.100 *et seq*.

"Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194 (2002). All Michigan judges have an independent responsibility to supervise the ethical conduct of attorneys who appear in their courtrooms. *Attorney Gen v Michigan Pub Svc Comm*, 243 Mich App 487, 491-492 (2000). This tradition is reflected in the Michigan Code of Judicial Conduct. Canon 3(B)(3) provides that "[a] judge should take or institute appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Judges, as well as lawyers, are obliged by the Michigan Rules of Professional Conduct to report

attorney misconduct. *Grievance Administrator v Fieger*, 476 Mich 241 (2006); MRPC 8.3.

B. Attorney's Duty to the Client

An attorney must represent and advocate on behalf of his or her client. In doing so, the attorney must not make inflammatory remarks with the intent to prejudice the jury. Each party is entitled to a fair trial uninfluenced by appeals to passion. *Wayne Co Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 131 (1975). For instance, it is improper and prejudicial for a prosecutor to appeal to the civic duty of the jury. *People v Weatherspoon*, 171 Mich App 549, 558 (1988).

The severity and repetitiveness of prejudicial remarks are considered when determining if a new trial is warranted. *Wayne County Road Comm'rs*, 394 Mich at 131. Whereas one remark may not prejudice the jury, repetitive remarks may be so damaging that a new trial is required. The harmful effects of prejudicial remarks can often be corrected through the court's instruction to the jury. The judge may prevent a miscarriage of justice by explaining to jurors that attorneys' comments are not evidence. *People v Johnson (Roger)*, 382 Mich 632, 649 (1969).

C. Motion to Disqualify Attorney

Although not specifically addressed by court rule, case law suggests that the court has the authority to consider a motion to disqualify counsel. *Rymal v Baergen*, 262 Mich App 274, 316-322 (2004); *Evans & Luptak*, 251 Mich App at 193-203. Typically, a motion to disqualify is based on an alleged conflict of interest. See MRPC 1.7 (General Rule), MRPC 1.8 (Prohibited Transactions), and MRPC 1.9 (Former Client). Another potential ground for disqualification may arise if the lawyer is a potential witness. MRPC 3.7. A conflict of interest exists where "the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused." *People v Mayhew*, 236 Mich App 112, 126-127 (1999). A conflict of interest also exists where the prosecutor was privy to confidential information while in an attorney-client relationship. *People v Herrick*, 216 Mich App 594, 599 (1996).

See *People v Tesen*, 276 Mich App 134, 141 (2007), where an individual prosecutor was properly disqualified because he took the lead role in interviewing the child victim and was likely to be called to testify at trial.[11] Although other people witnessed the prosecutor interview the child and could have testified about what they

[11] See MRPC 3.7 (Lawyer as Witness).

observed, none of the witnesses could testify to the prosecutor's qualifications, training, and experience in the use of forensic interview protocol when questioning child victims. *Tesen*, *supra* at 144-145. Questions related to a person's qualifications, experience, and training "would clearly be of some value to a [fact-finder] trying to determine the weight and credibility of the victim's account of the charged offenses." *Id*. at 144.

D. Standard of Review

Whether a conflict of interest exists is a question of fact that is reviewed for clear error. *Avink v SMG*, 282 Mich App 110, 116 (2008). The application of "ethical norms" to a decision whether to disqualify counsel is reviewed de novo. *Avink*, *supra* at 116.

1.5 Contempt of Court

A. Introduction

"Michigan courts have, as an inherent power, the power at common law to punish all contempts of court." *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14 (1987). "This contempt power inheres in the judicial power vested in th[e Michigan Supreme Court], the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, § 1." *Dougherty*, *supra* at 91 n 14. MCL 600.1701 defines a court's power to punish contempt by fine or imprisonment or both.[12] Contempt may be either civil or criminal and either direct or indirect. Direct contempt occurs in the immediate view and presence of the court; indirect contempt is outside of the immediate view and presence of the court. The purpose of criminal contempt is to punish for past conduct. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968).

"A court that is adjudicating contempt proceedings without a jury must make findings of fact." *DeGeorge v Warheit*, 276 Mich App 587, 596 (2007). For a finding of criminal contempt, the contempt must be proven beyond a reasonable doubt. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714 (2000).

Courts have the authority to use their contempt powers to encourage payment of court-ordered payments. MCL 600.1701(e).

An excellent summary of the law and procedure governing contempt is found in *In re Contempt of Dudzinski*, 257 Mich App 96 (2003).

[12] For a more detailed discussion, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

A juvenile can be held in contempt. MCR 3.928; See SCAO form JC 40, *Order for Contempt of Court*.[13] **Note:** a juvenile contempt sentence may not exceed 30 days. MCR 3.928(C).

B. Direct Contempt—In the Presence of the Court[14]

MCL 600.1711(1) provides the court with authority to summarily punish, by fine or imprisonment, or both, contempt that occurs in its immediate view and presence.

If contempt occurs in the immediate view and presence of the court and the judge defers consideration of a contempt citation until after the conclusion of the trial, the charges must be considered and heard before a different judge. *In re Contempt of Scharg*, 207 Mich App 438, 439-440 (1994).

C. Indirect Contempt—Outside the Presence of the Court[15]

If the contempt is committed outside the immediate view and presence of the court, it is not subject to summary punishment, and the appropriate process is a show cause hearing. *In re Contempt of McRipley*, 204 Mich App 298, 301 (1994).

The court may punish contempt committed outside its presence "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." MCL 600.1711(2).

Contempt proceedings for indirect contempt typically involve alleged violations of a court order or failure to appear for a scheduled court proceeding.

The standard of proof for civil contempt "is more stringent than in other civil actions: proof of contempt must be clear and unequivocal." *In re Contempt of Calcutt*, 184 Mich App 749, 757 (1990).

The circuit court may "punish by fine or imprisonment, or both," "parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court." MCL 600.1701(g). MCR 3.606 sets out contempt procedures for alleged contempt committed outside the presence of the court. An ex parte motion, supported by an affidavit of facts, requesting an order to

[13] Available at http://courts.michigan.gov/scao/courtforms/juvenile/jc40.pdf.

[14] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 2.

[15] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 2.

show cause is required to bring the matter before the court. MCR 3.606(A)(1). The order to show cause must be personally served, unless the court orders otherwise. MCR 2.107(B)(1)(b). In addition, the court can issue a bench warrant. MCR 3.606(A)(2).

Statutes and court rules cover specialized contempt proceedings such as: failure to pay child support, MCL 600.1701, MCR 3.928; violation of parenting time orders, MCL 552.641; and violation of a personal protection order, MCL 600.2950, MCL 600.2950a, MCR 3.708.

When a defendant is arrested on a bench warrant, the sheriff "shall keep such person in his [or her] actual custody, and shall bring him [or her] personally before the court issuing the warrant, and shall keep and detain him [or her] in his [or her] custody, until such court orders otherwise, or until the defendant is entitled to be discharged on bond." MCL 600.1735.

D. Civil or Criminal Contempt[16]

The first step in any contempt proceeding is to determine whether the alleged conduct is subject to criminal or civil contempt sanctions, because due process requires that the person charged be advised, at the outset, whether the proceedings involve civil or criminal contempt. *In re Contempt of Rochlin*, 186 Mich App 639, 648-649 (1990). Distinguishing between civil and criminal contempt can be difficult, because both types may result in the contemnor's imprisonment for willfully failing to comply with a court order. *Porter v Porter*, 285 Mich App 450, 456 (2009). All contempt proceedings are considered "quasi-criminal" or "criminal in nature." *Porter*, *supra* at 456 (quotations and citations omitted).

Civil contempt. Civil contempt is coercive and intended to compel the offending person to take some action of which he or she is capable to purge the contempt. It is prospective. Willful disobedience is not necessary for civil contempt. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499-501 (2000). Proof of contempt must be clear and unequivocal. *People v Matish*, 384 Mich 568, 572 (1971). "[I]n a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Porter*, 285 Mich App at 456-457. Because civil contempt actions are tried by the court without a jury, the court must make findings of fact, state

[16] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 2.

its conclusions of law, and direct entry of the appropriate judgment. *In re Contempt of Calcutt*, 184 Mich App at 758.

"[T]here 'are two types of civil contempt sanctions, coercive and compensatory.'" *Porter*, 285 Mich App at 455-456, quoting *In re Contempt of Dougherty*, 429 Mich at 97. However, "civil sanctions primarily intended to compel the contemnor to comply with the court's order may also have a punitive effect." *Porter*, *supra* at 456. The process is civil if the contempt consists of a party's refusal to do something that he or she is ordered to do for the opposite party's benefit or advantage. *Id*. In that instance, the order is coercive (as opposed to punitive), and is intended to compel the party to follow the court's order. *Id*.

Criminal contempt. Criminal contempt sanctions past conduct and is punitive. With criminal contempt, the accused has the due process rights that apply to a criminal defendant, except there is no right to a jury trial. In a criminal proceeding, the standard of proof is beyond a reasonable doubt. *In re Contempt of Rapanos*, 143 Mich App 483, 488-489 (1985). A party charged with criminal contempt has a presumption of innocence and the right against self-incrimination. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 713. The willful disregard or disobedience of a court order must be clearly and unequivocally shown. *Matish*, 384 Mich at 572, and must be proven beyond a reasonable doubt. *In re Contempt of Auto Club Ass'n*, *supra* at 714. The accused is entitled to time to prepare his or her defense, secure the assistance of counsel, and produce witnesses. *In re Collins*, 329 Mich 192, 196 (1950).

The rules of evidence (other than those with respect to privileges) do not apply when contempt is summarily punished. MRE 1101(b)(4). The rules of evidence apply to proceedings involving indirect contempt. MRE 1101(a).

E. Right to Counsel

When summary proceedings are used for contempt that occurs in the presence of the court, there apparently is no right to counsel. However, if the hearing is delayed (i.e., the contempt did not occur in the court's presence), there is a right to counsel if the defendant faces the possibility of jail. See *Argersinger v Hamlin*, 407 US 25, 37-38 (1972). The Michigan Supreme Court has held "that conviction for criminal contempt can be sustained only upon a record which shows compliance with the procedural safeguards established for the prosecution of any other crime of equal gravity." *People v Johns*, 384 Mich 325, 333 (1971). For civil contempt (which by definition is not a criminal proceeding), there typically is no right to counsel. See *Sword v Sword*, 399 Mich 367, 373, 380-381 (1976). However, "the Due

Process Clause of the Fourteenth Amendment of the United States Constitution precludes incarceration of an indigent defendant if he has been denied counsel in a contempt proceeding for failure to pay child support." *Mead v Batchlor*, 435 Mich 480, 483 (1990). "[T]he due process right to appointed counsel is triggered by an indigent's fundamental interest in physical liberty, and not by the civil or criminal nature of the proceeding." *Mead, supra* at 498. But see *Turner v Rogers*, 564 US ___, ___ (2011),[17] where the United States Supreme Court concluded that in cases involving child support enforcement, "where . . . the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support) [even if that person may be subject to incarceration for up to one year]." However, to meet due process requirements, "the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Turner, supra* at ___. Alternative procedures include sufficient notice regarding the importance of the ability to pay, a fair opportunity to present and dispute relevant financial information, and court findings on the noncustodial parent's ability to pay. *Id.* at ___.

F. Punishment

Three kinds of sanctions are available to redress a contemnor's behavior: (1) civil coercion to force compliance with an order; (2) criminal punishment to vindicate the court's authority; and (3) civil compensatory relief for the complainant. *In re Contempt of Dougherty*, 429 Mich at 98; *In re Contempt of United Stationers Supply Co*, 239 Mich App at 499. When the contempt is civil and consists of the failure to do what is still in the power of the contemnor to do, imprisonment may be imposed until the contemnor performs, or no longer has the power to perform, the act or duty, and pays any fine and costs. MCL 600.1715(2); *In re Contempt of Dougherty, supra* at 96; *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 711-712.

Except in cases involving the omission of an act still in the contemnor's power to perform, contempt may be punished by a fine of not more than $7,500, or imprisonment for not more than 93 days, or both. MCL 600.1715(1). An individual convicted of criminal contempt may be sentenced to probation according to the provisions of MCL 771.1 to MCL 771.14a. MCL 600.1715(1).

[17] The Court specifically stated that this holding does not address cases where the past due child support is owed to the state or unusually complex cases where the noncustodial parent "'can fairly be represented only by a trained advocate.'" *Turner*, 564 US at ___, quoting *Gagnon v Scarpelli*, 411 US 778, 788 (1973).

MCL 600.1715(2) addresses contempt in cases involving the omission of an act still in the contemnor's power to perform: "the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment."

There are Michigan statutes that provide more specific penalties for particular types of contempt. See, e.g., the personal protection order statutes, MCL 600.2950 and MCL 600.2950a, and the statutes covering violation of a visitation order, MCL 552.641 *et seq*.

A court may also punish contempt by denying court processes to one who is in contempt of a court order. *Homestead Dev Co v Holly Twp*, 178 Mich App 239, 247 (1989) (court found the defendant in default when it failed to pay court-ordered sanctions by the date listed on the order).

A court may also order compensation for loss or injury resulting from the violation of a court order. *In re Contempt of Dougherty*, 429 Mich at 98.

G. Sanctions Other Than Contempt

A court has the authority "to sanction litigant misconduct, even when there is no statute or court rule addressing the particular form of misconduct, based on [its] fundamental interest in protecting its integrity and that of the judicial system." *Brenner v Kolk*, 226 Mich App 149, 160 (1997). The Michigan Supreme Court has affirmed "the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." *Maldonado v Ford Motor Co*, 476 Mich 372, 375 (2006). "[T]rial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action." *Maldonado*, *supra* at 376 (court dismissed the case against the plaintiff with prejudice because she and her attorneys "repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny [the] defendants a fair trial, and frustrate the due administration of justice").

H. Standard of Review

The issuance of an order of contempt is in the sound discretion of the trial court and will be reviewed for an abuse of discretion. *In re Contempt of United Stationers Supply Co*, 239 Mich App at 499. See also *In re Contempt of Dudzinski*, 257 Mich App at 99; *Deal v Deal*, 197 Mich App 739, 743 (1993). A trial court's findings in a contempt

proceeding must be affirmed on appeal if there is competent evidence to support them under the respective burdens of proof required by civil and criminal contempts. *Brandt v Brandt*, 250 Mich App 68, 73 (2002).

The exercise of a trial court's inherent power to sanction litigants and their counsel is reviewed for an abuse of discretion. *Maldonado*, 476 Mich at 388.

1.6 Personal Protection Orders (PPOs)

A. Obtaining or Terminating a PPO[18]

A domestic relationship PPO restrains a person with a relationship to the petitioner, as specified in MCL 600.2950, from acts listed in that statute. A non-domestic relationship PPO under MCL 600.2950a must be based on alleged conduct that constitutes stalking, aggravated stalking, or cyberstalking regardless of the relationship between the parties, and may restrain any individual from such conduct. *Poburskyv Gee*, 249 Mich App 44, 47 (2001). MCL 600.2950a(2)(a)–600.2950a(2)(b) protect victims of sexual assault, victims who have received obscene material, or petitioners who have been placed in reasonable apprehension of sexual assault by the respondent. See MCL 600.2950a(3) for activities a court could restrain or enjoin an individual from doing for PPO petitions under MCL 600.2950a(2).

A personal protection order can limit custody and parenting time. *Brandt v Brandt*, 250 Mich App 68, 70-71 (2002).

A petitioner bears the burden of proof when seeking to obtain an ex parte PPO. *Kampf v Kampf*, 237 Mich 377, 386 (1999). Under MCR 3.310(B)(5), the burden of justifying continuation of a PPO granted ex parte is on the applicant for the restraining order. Accordingly, the petitioner will have the burden of persuasion in a hearing held on a motion to terminate or modify an ex parte PPO. *Pickering v Pickering*, 253 Mich App 694, 699 (2002).[19]

Where a petitioner does not request an ex parte PPO, MCR 3.705(B)(1) requires the court to interview the petitioner or hold an

[18] For a more detailed discussion, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapters 6-8.

[19] Under MCR 3.707(A)(1)(b), "the respondent may file a motion to modify or terminate an ex parte [PPO] or an ex parte order extending a [PPO] and request a hearing within 14 days after being served with, or receiving actual notice of, the order. Any motion otherwise to modify or terminate a [PPO] by the respondent requires a showing of good cause." See the Michigan Judicial Institute's *Domestic Violence Benchbook* for more information on modifying, terminating, or extending a PPO.

evidentiary hearing before it can grant or deny the PPO. *Lamkin v Engram*, ___ Mich App ___, ___ (2012) (the trial court committed reversible error when the petitioner did not request an ex parte PPO and the court dismissed the petition before interviewing the petitioner or conducting an evidentiary hearing).

B. Hearing

Contempt proceedings for violations of a PPO are governed by MCR 3.708. MCR 3.708(H)(1) specifically states that a respondent is not entitled to a jury trial.

MCL 764.15b(2)(a) and MCR 3.708(F)(1)(a) state that if a respondent is held in custody, a hearing for violating a PPO must be held within 72 hours of arraignment, unless either the prosecution or the defense requests an extension. However, MCL 764.15b(8) states that failure to have a hearing within 72 hours does not rescind a PPO, and a court may not dismiss the proceedings or impose any other sanction.

The burden of proof is beyond a reasonable doubt for criminal contempt and clear and convincing evidence for civil contempt. MCR 3.708(H)(3).

In a contempt proceeding under MCL 600.2950a(23) for violation of a PPO, the court must look only to the behavior of the individual against whom the PPO is held, not that of the person who holds the PPO. *In re Kabanuk*, 295 Mich App 252, 256-258 (2012).

The rules of evidence apply to PPO violation hearings. MCR 3.708(H)(3). The court may not consider behavior of which it has judicial notice, such as an individual's loud and disruptive conduct at other hearings, to find that the individual acted in conformity with that behavior. *Kabanuk*, 295 Mich App at 259-261 (trial court violated MRE 404(b)(1) to the extent that it relied on the disruptive behavior of the respondent's husband at prior hearings in making its determination that the respondent and her husband violated PPOs on the date in question).

The hearing can be delayed when there is a pending criminal charge. MCR 3.708(F)(1)(c).

Judicial findings at the conclusion of a hearing are required. MCR 3.708(H)(4).

C. Sentencing

Because PPO violation proceedings are contempt proceedings and not criminal proceedings, a respondent has no right to allocution. *Brandt*, 250 Mich App at 76; MCR 3.708(H)(5).

MCR 3.708(H)(5) states:

"(a) If the respondent pleads or is found guilty of criminal contempt, the court shall impose a sentence of incarceration for no more than 93 days and may impose a fine of not more than $500.00.

"(b) If the respondent pleads or is found guilty of civil contempt, the court shall impose a fine or imprisonment as specified in MCL 600.1715 (fine of not more than $7,500 and/or imprisonment not to exceed 93 days [except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform]) and 600.1721 (sum sufficient to indemnify person who has suffered actual loss or injury due to the alleged misconduct) . . . ."

D. Multiple Punishments

In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to other criminal penalties imposed for a separate criminal offense. MCL 600.2950(23) and MCL 600.2950a(20); *People v Coones*, 216 Mich App 721, 727-728 (1996).

1.7 Discretion

Many decisions of a judge are discretionary, and are reviewed for an abuse of that discretion. It is prudent for the judge to recognize his or her discretion when making those types of decisions. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Babcock, supra* at 269. "An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id*.

Chapter 2: Preliminary Proceedings

2.1 Complaints and Warrants 2-1
2.2 Arrest 2-3
2.3 Pretrial Release 2-6
2.4 Right to Counsel 2-22
2.5 Waiver of Counsel 2-29
2.6 Grand Jury 2-36
2.7 Preliminary Examination 2-41
2.8 Information or Indictment 2-47
2.9 Arraignment on Information or Indictment 2-51

2.1 Complaints and Warrants

A defendant has a constitutional right to be informed of the nature of the charges pending against him or her. Const 1963, art 1, § 20; *People v Higuera*, 244 Mich App 429, 442-443 (2001). A criminal complaint must be sufficiently specific to apprise the accused of the nature of the charges. *People v Quider*, 172 Mich 280, 285-286 (1912). "A complaint is a written accusation that a named or described person has committed a specified criminal offense," and it "must include the substance of the accusation against the accused and the name and statutory citation of the offense." MCR 6.101(A). A criminal complaint must also "adequately inform of the substance of the accusations," and its factual allegations must "provide the basis from which commission of the legal elements of the charge can be inferred." *Higuera*, *supra* at 447. However, "'[t]he primary function of a complaint is to move the magistrate to determine whether a warrant shall issue.'" *Id*. at 443, quoting *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162 (1982).

"Criminal prosecutions may be initiated in the court having jurisdiction over the charge upon the filing of an information." *People v Glass (Willie)*, 464 Mich 266, 277 (2001); MCL 767.1 *et seq*. The basis of an information is a signed warrant and complaint. *Glass (Willie)*, *supra* at 277. The

complaint must state the substance of the alleged crime and reasonable cause to believe that the person named in the complaint is the person who committed the crime. *Id*., citing MCL 764.1d.

The complaint must be signed and sworn to before a judicial officer or court clerk. MCR 6.101(B). "A complaint may not be filed without a prosecutor's written approval . . . or unless security for costs is filed with the court." MCR 6.101(C).

"A court must issue an arrest warrant, or a summons . . . if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense." MCR 6.102(A). The probable cause determination "may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources." MCR 6.102(B). The court rule also governs the contents of the warrant, interim bail, execution and return of the warrant, and release on interim bail. MCR .6.102(C)–MCR 6.102(F).

The court may issue a summons instead of an arrest warrant if requested by the prosecutor. MCR 6.103(A). The court rule provides for the form of the summons, as well as its service and return. MCR 6.103(B)–MCR 6.103(C).

The procedures for arraignment on the warrant or complaint are governed by MCR 6.104. A person in custody "must be taken without unnecessary delay before a court." MCR 6.104(A). At a defendant's arraignment, the court must address issues of pretrial release, possible appointment of counsel, and scheduling the defendant's preliminary examination. Because the arraignment on a felony occurs in district court, the process is beyond the scope of this benchbook.[1] However, a felony arraignment script is provided in the Appendix.

Before an information is filed, the person accused has a right to a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the person accused committed it. MCL 767.42; *Glass*, 464 Mich at 277-278.

If the case is bound over to circuit court after arraignment in district court, an information must be filed on or before the date set for arraignment in circuit court. See MCL 767.1 and MCL 767.40. See also MCR 6.112(B) and MCR 6.112(C).

[1] See the *Michigan Judicial Institute's Criminal Procedure Monograph 4: Felony Arraignments in District Court*.

"Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense." MCR 6.112(G). MCR 6.112(G) places the burden on the defendant to demonstrate prejudice and establish that the error was not harmless. *People v Waclawski*, 286 Mich App 634, 707 (2009). In *Waclawski*, *supra* at 705, an original felony information was not filed by the prosecutor. However, the defendant was unable to establish prejudice where the record revealed that the defendant was aware of the charges against him and participated in his own defense. *Id*. at 707.

2.2 Arrest

A. Probable Cause

"'A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that individual committed a felony.'" *People v Tierney*, 266 Mich App 687, 705 (2005), quoting *People v Kelly (Albert)*, 231 Mich App 627, 631 (1998). In reviewing a challenge to probable cause, the court "must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Kelly (Albert)*, *supra* at 631. "'The prosecution has the burden of establishing that an arrest without a warrant is supported by probable cause.'" *Tierney*, *supra* at 705, quoting *People v Davenport*, 99 Mich App 687, 691 (1980).

"An 'officer must consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he [or she] has probable cause to make an arrest. . . . [A] suspect's satisfactory explanation of suspicious behavior is certainly a factor' in determining whether probable cause exists.'" *Miller (Alan) v Sanilac Co*, 606 F3d 240, 249 (CA 6, 2010), quoting *Gardenhire v Schubert*, 205 F3d 303, 318 (CA 6, 2000). In *Miller (Alan)*, *supra* at 249, summary judgment was improper where a genuine issue of material fact existed regarding whether the police officer had probable cause to arrest the defendant for reckless driving where the defendant acknowledged driving 30 miles per hour past a stop sign, but explained that the road was icy and that he was unable to brake at the intersection.

"Because distinctly different probable-cause standards distinguish . . . arrest and bind-over decisions," a district court's conclusion that it lacked probable cause to bind a defendant over for trial on the

charge for which he was arrested does not necessarily render the arrest itself invalid. *People v Cohen (Clarence)*, 294 Mich App 70, 72, 76-77 (2011) (circuit court erroneously concluded that in the absence of probable cause to bind the defendant over for trial on charge of possession of cocaine, police lacked probable cause to arrest for that offense, and that evidence of additional crime obtained following arrest therefore must be suppressed; police had probable cause to arrest based on the defendant's joint constructive possession of cocaine paraphernalia, which was observed in plain view and within the defendant's reach in car occupied by only driver and the defendant, and evidence discovered after the constitutionally valid arrest was admissible in prosecution for additional offense).

B. Delay Between Crime and Arrest

The Speedy Trial Clause of the Sixth Amendment does not protect the defendant against lengthy prearrest delay, only from pretrial delay following an arrest. *United States v Lovasco*, 431 US 783, 788 (1977). Generally, a defendant is protected against unreasonable prearrest delay by the applicable statute of limitations. *People v Bisard*, 114 Mich App 784, 788-789 (1982). A delay between an offense and the arrest of the defendant may violate the defendant's federal and state due process rights. *People v Cain*, 238 Mich App 95, 109 (1999). The due process inquiry must consider the reasons for the delay as well as the prejudice to the defendant. *Lovasco*, *supra* at 790. A delay in bringing charges against a defendant may deny the due process right to a fair trial if the prosecutor delays to gain a tactical advantage or to deprive the defendant of an opportunity to defend against the charges. *Id*. at 797 n 19.

An "oppressive" delay between the alleged crime and the defendant's arrest may implicate a defendant's due process rights and lead to a motion to dismiss. *People v Tanner (Hattie Mae)*, 255 Mich App 369, 414 (2003), rev'd on other grounds 469 Mich 437 (2003). In deciding the motion, the court must balance the actual prejudice to the defendant with the prosecutor's reasons for the delay. *Cain*, 238 Mich App at 108-109; *Bisard*, 114 Mich App at 790-791.

The defendant must produce evidence that he or she sustained "actual and substantial" prejudice because of the delay. *Cain*, 238 Mich App at 108; *Bisard*, 114 Mich App at 791. "Actual and substantial" prejudice means that the defendant's ability to defend against the charges was "meaningfully impaired" by the delay. *Cain*, *supra* at 110; *Bisard*, *supra* at 788. "Proof of 'actual and substantial' prejudice requires more than just generalized allegations." *People v Crear*, 242 Mich App 158, 166 (2000). "Alleged imperfections of a witness'[s] memory are generally insufficient to establish actual and

substantial prejudice." *Crear*, *supra* at 166. Additionally, the death of a witness, by itself, is insufficient to establish actual prejudice, as is the loss of physical evidence. *People v Adams (Stephan)*, 232 Mich App 128, 136-138 (1998). "When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more—that the prejudice resulting from the delay outweighs any reason provided by the state." *Bisard*, *supra* at 790.

Once the defendant has made a showing of prejudice, the prosecution has the burden of persuading the court that the reasons for the delay justified any prejudice that resulted. *Cain*, 238 Mich App at 109; *Bisard*, 114 Mich App at 791. In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *Bisard*, *supra* at 786-787, 791. See also *Adams (Stephan)*, 232 Mich App at 132-139 (12-year delay did not violate the defendants' due process rights where physical evidence was lost, but its potentially exculpatory value was unsubstantiated), and *Cain*, *supra* at 107-111 (defendant unable to establish unfair prejudice during 16-month delay where witnesses had slight memory failure and evidence that was unrelated to the case was thrown away). And see *People v Patton*, 285 Mich App 229, 236-237 (2009) (the defendant was unable to establish actual and substantial prejudice because he did not identify any specific prejudice; rather, he made general allegations that the prearrest delay prevented him from contacting witnesses but gave no details on the substance of a defense to the charge, or details regarding how the witnesses would have supported a defense).

C. Delay Between Warrantless Arrest and Arraignment

Persons arrested without a warrant must be promptly brought before a neutral magistrate for a probable cause determination. *People v Cipriano*, 431 Mich 315, 319 (1988); MCL 764.13; MCL 764.26; MCR 6.104(A).

"[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of [a warrantless] arrest will, as a general matter, [be found to] comply with the promptness requirement" of the federal constitution's Fourth Amendment. *Riverside v McLaughlin*, 500 US 44, 56 (1991). However, a probable cause determination is not automatically proper simply because it is made within 48 hours. *Riverside*, *supra* at 56. A delay of less than 48 hours may still be unconstitutional if it is an unreasonable delay. *Id*.

Police authorities may only hold an arrestee for more than 48 hours before arraignment if they can "'demonstrate the existence of a bona fide emergency or other extraordinary circumstance'" that would justify the delay. *People v Whitehead*, 238 Mich App 1, 2 (1999), quoting *Riverside*, 500 US at 57.

D. Arrest Outside Jurisdiction

An arrest by an officer outside the officer's jurisdiction does not require dismissal of the charge or exclusion of the evidence obtained as a result of the arrest. *People v Hamilton*, 465 Mich 526, 527 (2002). "The Fourth Amendment exclusionary rule only applies to constitutionally invalid arrests, not merely statutorily illegal arrests." *Hamilton*, *supra* at 532-533. Probable cause that a crime has been committed is all that is required for a constitutional arrest; the crime committed may be a felony or a misdemeanor. *Id*. at 533. Where probable cause to arrest exists, the arrest is constitutional and the exclusionary rule does not apply. *Id*.

E. Standard of Review

A trial court's decision on a motion to dismiss on the basis of prearrest delay is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389 (2001). To the extent that a claim of prearrest delay implicates constitutional due process rights, it is reviewed de novo. *Cain*, 238 Mich App at 108. The trial court's related factual findings are reviewed for clear error. *Tanner (Hattie Mae)*, 255 Mich App at 412.

2.3 Pretrial Release

A. Generally

Every person charged with a noncapital offense has the right to bail. *Stack v Boyle*, 342 US 1, 4 (1951). "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v Salerno*, 481 US 739, 755 (1987). "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack*, *supra* at 4. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Id*. at 5.

Everyone is entitled to bail, except in the following instances:

(1) if the defendant is charged with murder or treason;

> (2) if the defendant is charged with first-degree criminal sexual conduct, armed robbery, or kidnapping with the intent to extort money or something valuable;
>
> (3) if the defendant is charged with committing a violent felony[2] *and* at the time the violent felony was committed, he or she was on probation, parole, or released pending trial for another violent felony; or
>
> (4) if the defendant is charged with committing a violent felony *and* during the 15 years preceding the commission of the violent felony, the defendant was convicted of two or more violent felonies. [MCR 6.106(B); Const 1963, art 1, § 15.]

Before denying bail, the court must also find evident proof that the defendant committed the crime or the presumption of guilt is great. MCR 6.106(B); Const 1963, art 1, § 15.

In general, at a defendant's first appearance in court, the court must order that, pending trial, the defendant: (1) be held in custody; (2) be released on personal recognizance or an unsecured appearance bond; or (3) be released conditionally, with or without money bail (ten percent, cash or surety). MCR 6.106(A).

Bail and bond reasonably ensure the appearance of the defendant as required. MCR 6.106(D). The court considers two factors when deciding whether to grant pretrial release: (1) whether the defendant will appear as required, and (2) public safety. *Id*.

If the court determines that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense. MCR 6.106(B)(3). Within those 90 days, the trial must begin or the court must immediately schedule a hearing and set the amount of bail. *Id*.

"The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled 'Custody Order.'" MCR 6.106(B)(4). See SCAO form MC 240, *Order for Pretrial Release/Custody/Amended*.[3] The completed form must be placed in the court file. MCR 6.106(B)(4).

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[2] A violent felony is defined in MCR 6.106(B)(2) as "a felony, an element of which involves a violent act or threat of a violent act against any other person."

[3] Available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc240.pdf.

B. Personal Recognizance

"If the defendant is not ordered held in custody pursuant to MCR 6.106(B), the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond . . . ." MCR 6.106(C). Bond is subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released. *Id*. However, if the court determines that such release will not reasonably ensure the appearance of the defendant, or that such release will present a danger to the public, the court may deny the defendant a personal recognizance bond. *Id*.

C. Conditional Release

The court may order the pretrial release of the defendant subject to any condition (in addition to the conditions attending a personal recognizance bond) the court determines is reasonably necessary to ensure the appearance of the defendant, and to ensure public safety. MCR 6.106(D)(1)–MCR 6.106(D)(2).

The court may require the defendant to do any of the following, as set out in MCR 6.106(D)(2):

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> "(b) not use alcohol or illicitly use any controlled substance;
>
> "(c) participate in a substance abuse testing or monitoring program;
>
> "(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> "(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> "(f) surrender driver's license or passport;
>
> "(g) comply with a specified curfew;
>
> "(h) continue to seek employment;
>
> "(i) continue or begin an educational program;
>
> "(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant

> and report any violation of any release condition to the court;
>
> "(k) not possess a firearm or other dangerous weapon;
>
> "(l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> "(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order,[4] the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved.
>
> "(n) satisfy any injunctive order made a condition of release; or,
>
> "(o) comply with any other condition, including the requirement of money bail as described in [MCR 6.106](E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

The court may order certain defendants charged with crimes involving domestic violence[5] to wear or carry a global positioning system (GPS) device as a condition of pretrial release. MCL 765.6b(6). If the court orders a defendant to be monitored by a GPS device as a condition of release pursuant to MCL 765.6b(6), the court must require as a condition of release that the defendant not purchase or possess a firearm. MCL 765.6b(3).

D. Money Bail

"If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot be otherwise assured, money bail, with or without conditions described in [MCR 6.106(D)], may be required." MCR 6.106(E).

MCR 6.106(E)(1)(a) provides that the court may require the defendant to post, at the defendant's option[6]:

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[4] Examples include Personal Protection Orders (PPOs), MCR 3.706(A)(1) ("An order granting a personal protection order must include . . . [a] statement that the [PPO] has been entered, listing the type or types of conduct enjoined"), and protective orders against domestic violence as provided in MCR 3.700 *et seq*. MCR 3.207(A).

[5] As defined in MCL 400.1501(d)(*i*)–MCL 400.1501(d)(*iv*). MCL 765.6b(6)(a).

> "(*i*) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or
>
> "(*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
>
> > "[A] a cash deposit, or its equivalent, for the full bail amount, or
> >
> > "[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,
> >
> > "[C] designated real property[.]"

MCR 6.106(E)(1)(b) provides that the court may require the defendant to post, at the defendant's option[7]:

> "(*i*) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or
>
> "(*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
>
> > "[A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,
> >
> > "[B] designated real property."

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[6] However, in certain instances, a defendant may not exercise the options set out in MCR 6.106(E)(1)(a). For example, a person arrested pursuant to a bench warrant issued under MCL 552.631 for failure to pay child support, or pursuant to a felony warrant for failure to pay spousal or child support under MCL 750.165, must deposit a cash performance bond in an amount not less than $500.00 or 25 percent of the arrearage, whichever is greater; in its discretion, the trial court may set the cash bond in an amount up to 100 percent of the arrearage, plus costs. MCL 552.631(2); MCL 750.165(3); see also MCL 552.632. Additionally, MCL 765.6a requires the posting of "a cash bond or a surety other than the [bail] applicant if the applicant (1) [i]s charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) [h]as been twice convicted of a felony within the preceding [five] years."

[7] However, in certain instances, a defendant may not exercise the options set out in MCR 6.106(E)(1)(a). For example, a person arrested pursuant to a bench warrant issued under MCL 552.631 for failure to pay child support, or pursuant to a felony warrant for failure to pay spousal or child support under MCL 750.165, must deposit a cash performance bond in an amount not less than $500.00 or 25 percent of the arrearage, whichever is greater; in its discretion, the trial court may set the cash bond in an amount up to 100 percent of the arrearage, plus costs. MCL 552.631(2); MCL 750.165(3); see also MCL 552.632. Additionally, MCL 765.6a requires the posting of "a cash bond or a surety other than the [bail] applicant if the applicant (1) [i]s charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) [h]as been twice convicted of a felony within the preceding [five] years."

When setting money bond, the court should recognize the constitutional mandate that "excessive bail shall not be required . . . ." Const 1963, art 1, § 16.

"Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the defendant will appear when his [or her] presence is required." *People v Edmond*, 81 Mich App 743, 747-748 (1978).

MCL 765.6(1) provides:

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> > "(a) The seriousness of the offense charged.
> >
> > "(b) The protection of the public.
> >
> > "(c) The previous criminal record and the dangerousness of the person accused.
> >
> > "(d) The probability or improbability of the person accused appearing at the trial of the cause."

MCL 765.6(2) provides:

> "If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court."

For example, "if the full bail amount were set at $10,000 with a 10% deposit or a $2,500 surety bond, a defendant could post bail either by paying $1,000 to the court . . . or by paying only $250 to a bond provider, who then would post a $2,500 bond with the court." SB 151 (S-1) Bill Analysis, 5/21/04.

E. Denial of Pretrial Release

Bail may be denied to a defendant charged with murder or treason when the proof of the defendant's guilt is evident or the presumption of guilt is great. Const 1963, art 1, § 15; MCL 765.5; MCR 6.106(B)(1)(a)(*i*); *People v Milosavleski*, 450 Mich 954 (1996). The court may also deny pretrial release to a defendant charged with

committing a violent felony when one of the following circumstances applies:

> (1) at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony. MCR 6.106(B)(1)(a)(*ii*)(A).
>
> (2) during the 15 years preceding the commission of the violent felony, the defendant had been convicted of two or more violent felonies under the laws of Michigan or substantially similar laws of the United States or another state arising out of separate incidents. MCR 6.106(B)(1)(a)(*ii*)(B).

MCR 6.106(B)(2) defines a "violent felony" as "a felony, an element of which involves a violent act or threat of a violent act against any other person."

The court may also deny pretrial release to a defendant charged with first-degree criminal sexual conduct, armed robbery, or kidnapping with the intent to extort money or other valuable item, if it finds that proof of the defendant's guilt is evident or the presumption of guilt is great. MCR 6.106(B)(1)(b). The court still may grant pretrial release to the defendant if it finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person. *Id*.

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

F. Rationale for Decision

In deciding which release to use and what terms and conditions to impose, the court, according to MCR 6.106(F)(1), should consider the following information:

> "(a) defendant's prior criminal record, including juvenile offenses;
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;

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> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence; and,
>
> "(i) any other facts bearing on the risk of nonappearance or danger to the public."

"If the court orders the defendant held in custody pursuant to [MCR 6.106(B)] or released on conditions in [MCR 6.106(D)] that include money bail, the court must state the reasons for its decision on the record. The court need not make a finding on each of the enumerated factors." MCR 6.106(F)(2).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

G. Custody Hearing

If a defendant has been denied pretrial release pursuant to MCR 6.106(B), the defendant may be held in custody for 90 days, excluding delays attributable to the defense. MCR 6.106(B)(3). After 90 days, the defendant's trial must begin or the court must immediately schedule a hearing and set bail for the defendant. *Id*. The court may conduct a custody hearing if the defendant is being held in custody pursuant to MCR 6.106(B) and either the defendant or the prosecutor requests a custody hearing. MCR 6.106(G)(1). The party seeking modification of a release decision has the burden of going forward. MCR 6.106(H)(2)(c). The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision under MCR 6.106(B). MCR 6.106(G)(1). The rules of evidence, except those pertaining to privilege, are not applicable to the custody hearing. MCR 6.106(G)(2)(b).

H. Modification of Release Decision

The court, on its own or on the request of either party, may modify a prior release decision after "finding that there is a substantial reason for doing so[.]" MCR 6.106(H)(2). "The party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c). The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

MCR 6.106(H)(2) provides, in part:

> "(a) Prior to Arraignment on the Information. Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may, on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing.
>
> "(b) Arraignment on Information and Afterwards. At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing."

I. Bond Forfeiture

1. Default, Arrest of Accused, and Release of Surety

Upon a finding that a defendant has failed to comply with conditions of release, the court may issue a warrant. See SCAO form MC 229, *Petition and Bench Warrant*.[8] See also State Court Administrative Memorandum, 2007-05, Amendment to Surety Bond Process, August 9, 2007.[9] "Upon issuing the bench warrant, the court should set a show cause date, prepare SCAO form MC-218, *Order Revoking Release and Forfeiting Bond, Notice of Intent to Enter Judgment*,[10] and sign and mail the form to the defendant, the surety agent, anyone who posted bond, and the prosecutor." State Court Administrative Memorandum, 2007-05(C)(1)(b).

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[8] Available at http://courts.michigan.gov/scao/courtforms/general/mc229.pdf.

[9] Available at http://courts.michigan.gov/scao/resources/other/scaoadm/2007/2007-05.pdf.

[10] Available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc218.pdf.

MCR 6.106(I)(2)(a)-(b) provide:

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> > "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.
> >
> > "(b) If the defendant does not appear and surrender to the court within 28 days after the revocation date, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, and costs of the court proceedings, or if a surety bond was posted, an amount not to exceed the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. If the defendant does not within that period satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the court proceedings."

MCL 765.26 provides:

> "(1) In all criminal cases where a person has entered into any recognizance for the personal appearance of another and such bail and surety afterwards desires to be relieved from responsibility, he or she may, with or without

> assistance, arrest or detain the accused and deliver him or her to any jail or to the sheriff of any county. In making the arrest or detainment, he or she is entitled to the assistance of any peace officer.
>
> "(2) The sheriff or keeper of any jail is authorized to receive the principal and detain him or her in jail until he or she is discharged. Upon delivery of his or her principal at the jail by the surety or his or her agent or any officer, the surety shall be released from the conditions of his or her recognizance.
>
> "(3) Whenever the prosecuting attorney of a county is satisfied that a person who has been recognized to appear for trial has absconded, or is about to abscond, and that his or her sureties or either of them have become worthless, or are about to dispose or have disposed of their property for the purpose of evading the payment or the obligation of such bond or recognizance or with intent to defraud their creditors, and that prosecuting attorney makes a satisfactory showing to this effect to the court having jurisdiction of that person, the court or judge shall promptly grant a mittimus to the sheriff or any peace officer of that county, commanding him or her forthwith to arrest the person so recognized and bring him or her before the officer issuing the mittimus and on the return of that mittimus may, after a hearing on the merits, order him or her to be recommitted to the county jail until such time as he or she gives additional and satisfactory sureties, or is otherwise discharged."

"A surety is generally discharged from responsibility on the bond when the principal has been returned to custody or delivered to the proper authorities . . . or when the principal's case is finally determined[.]" *In re Forfeiture of Bail Bond (On Remand)*, 276 Mich App 482, 489 (2007), citing MCL 765.26(1). "MCL 765.26 . . . intend[s] to reward a surety who, through its own diligence, apprehends and surrenders the principal to the appropriate authorities." *In re Forfeiture of Surety Bond*, 208 Mich App 369, 372-373 (1995) (surety "was not released from liability inasmuch as it failed to pursue its statutory remedies despite the fact that it was plainly aware of [the] defendant's whereabouts during the period between his default and subsequent arrest[]").

Additionally, MCL 765.28(1) provides:

> "(1) If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution shall be awarded and executed upon the judgment in the manner provided for in personal actions."

Under MCL 765.28(1), "once a default occurs, the surety must be given an opportunity to appear before the court and show cause why judgment should not be entered against it[,] . . . [and a] trial court may not order judgment on a forfeited bond without first conducting a show-cause hearing." *In re Forfeiture of Bail Bond (On Remand)*, 276 Mich App at 492 n 5, citing *In re Forfeiture of Surety Bond*, 208 Mich App at 374.

J. Setting Aside Bond Forfeiture

The trial court must consider a motion to set aside a bond forfeiture judgment under the standards set out in MCL 765.28(2) and MCL 600.4835. *People v Bray*, 481 Mich 888, 889 (2008).

MCL 765.28(2)-(3) provide:

> "(2) Except as provided in [MCL 765.28](3), the court shall set aside the forfeiture and discharge the bail or surety bond within 1 year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person. If the bond or bail is discharged, the court shall enter an

> order to that effect with a statement of the amount to be returned to the surety.
>
> "(3) [MCL 765.28](2) does not apply if the defendant was apprehended more than 56 days after the bail or bond was ordered forfeited and judgment entered and the surety did not fully pay the forfeiture judgment within that 56-day period."

Similarly, MCL 765.15(1) provides, in relevant part:

> ". . . The court shall set aside the forfeiture and discharge the bail or bond, within 1 year from the time of the forfeiture judgment, in accordance with [MCL 765.15](2) if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person."

"[A] person is 'apprehended' within the meaning of [MCL 765.15(1)][11] when that person is held in custody in another state." *In re Forfeiture of Bail Bond*, 209 Mich App 540, 543 (1995) (trial court erred in denying a bond depositor's motion to set aside a forfeiture on the ground that the defendant, who had been taken into custody in New Jersey on unrelated charges seven months after the forfeiture was entered and remained in custody there at the time of the depositor's motion, "had not been returned to the county where the bond was posted[]" and had therefore not been "apprehended" within the meaning of former MCL 765.15[a]); see also *In re Forfeiture of Bail Bond*, 229 Mich App 724, 728 (1998) ("the first criterion [of former MCL 765.15(a) (that the defendant be 'apprehended')] was met by [the] defendant's apprehension in New Jersey within one year of the forfeiture judgment[]").

"[T]he following considerations are among those relevant to determining whether 'the ends of justice have not been thwarted': (1) the depositor's role, if any, in hiding the defendant, failing to assist in the apprehension of the defendant, or affirmatively assisting in the apprehension of the defendant; (2) the length of time elapsing between the defendant's failure to appear and his ultimate apprehension; (3) the extent to which evidence has been lost (e.g., death or unavailability of witnesses, fading of witnesses' memories) or whether the prosecution's case has otherwise been affected by the delay; (4) the extent to which the defendant has committed additional crimes before apprehension, and the seriousness of such crimes; (5) the extent to which there has been a psychological or

[11] Effective May 1, 1994, 1993 PA 343 amended MCL 765.15 and redesignated former MCL 765.15(a) as MCL 765.15(1). The amendment did not substantively change this provision.

emotional effect upon the initial victim as a result of the defendant being at large; (6) the extent to which the defendant's apprehension was involuntary; and (7) the extent to which extradition or other legal procedures have been required, thereby causing additional delays in carrying out justice." *In re Forfeiture of Bail Bond*, 229 Mich App at 729-731 (noting that "[w]hile a depositor obviously risks losing the funds deposited if the defendant fails to appear, a depositor does not, by virtue alone of providing funds for a bond, undertake an affirmative duty to produce the defendant[; r]ather, . . . the depositor's involvement, if any, in either hiding or apprehending the defendant is simply a relevant consideration in determining whether 'the ends of justice have not been thwarted[]'").

"[T]he costs of 'apprehending the person' under [MCL 765.15(1)] include a jurisdiction's costs in locating the defendant, as well as any extradition costs." *In re Forfeiture of Bail Bond*, 229 Mich App at 731-732 (noting that "[t]he county's costs to locate the defendant (e.g., man-hours of investigative time, professional and support personnel costs, telephone calls) are all part of the costs of apprehension[]").

K. Termination of Release Order

MCR 6.106(I) provides, in part:

> "(I) Termination of Release Order.
>
> > "(1) If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge anyone who has posted bail or bond, and return the cash (or its equivalent) posted in the full amount of the bail, or, if there has been a deposit of 10 percent of the full bail amount, return 90 percent of the deposited money and retain 10 percent.
> >
> > * * *
> >
> > (3) If money was deposited on a bail or bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to [MCR 6.106](I)(1).

"If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety." MCL 765.28(2).

See also MCL 765.15(2)-(3), which provide:

> "(2) If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under [MCL 765.1 *et seq*.], and the cash bond or bail used for that purpose shall be allocated as provided in [MCL 775.22]. Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check, or security shall pay or deliver it as provided in the order to the person named in the order or to that person's order.
>
> "(3) If the cash, check, or security is in the hands of the sheriff or any officer other than the treasurer or clerk, the officer holding it shall dispose of the cash, check, or security as the court orders upon presentation of a certified copy of the court's order."

L. Revocation of Release on Conviction

MCL 770.9a(1) requires that a defendant convicted of an assaultive crim[12]e and awaiting sentence be detained and not be admitted to bail unless the court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons.

MCL 770.9b requires that a defendant awaiting sentence who was convicted of sexually assaulting a minor be detained and not be admitted to bail.

M. Release Pending Appeal

"During the time between the trial court judgment and the decision of the court to which an appeal is taken, the trial judge may admit the defendant to bail, if the offense charged is bailable[13] and if the

[12] MCL 770.9a(3) defines "assaultive crime" as an offense against a person described in MCL 750.81c(3), 750.82, 750.83, 750.84, 750.86, 750.87, 750.88, 750.89, 750.90a, 750.90b(a), 750.90b(b), 750.91, 750.200 to 750.212a, 750.316, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.411h(2)(b), 750.411h(3), 750.411i, 750.520b, 750.520c, 750.520d, 750.520e, 750.520g, 750.529, 750.529a, 750.530, and 750.543a to 750.543z.

[13] See MCR 6.106(B)(1)–MCR 6.106(B)(4) and Const 1963, art 1, § 15, for offenses for which a defendant is not entitled to bail.

offense is not an assaultive crime as defined in [MCL 770.]9a . . . ." MCL 770.8.

"During the pendency of an appeal or application for leave to appeal, a justice or judge of the court in which the appeal or application is filed may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in [MCL 770.]9a . . . or sexual assault of a minor as described in [MCL 770.]9b. . . ." MCL 770.9.

The right of a defendant to bail upon appeal by the prosecutor is governed by MCL 770.9a and MCL 765.7. MCL 770.12(3). MCL 765.7 provides that "[i]f an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required."

N. Standard of Review

A district court magistrate's decision is reviewed de novo as an appeal of right in district court. *People v Wershe*, 166 Mich App 602, 607 (1988); MCL 600.8515. A bail decision by a district court judge at the close of a preliminary examination does not constitute a review of the initial bail decision made by a magistrate at the arraignment; the bail decision following preliminary examination is a new bail decision and, once entered, it is the decision subject to review and deference as set out in the court rules. *Wershe*, *supra* at 606.

A trial court's decision regarding forfeiture of a bail bond is reviewed for an abuse of discretion. *In re Forfeiture of Bail Bond (On Remand)*, 276 Mich App at 488.

If a party files a motion seeking review of a release decision, the lower court's order may not be stayed, vacated, modified, or reversed unless the reviewing court finds an abuse of discretion. MCR 6.106(H)(1). The circuit court must have a transcript of the district court proceedings concerning the release decision; without a transcript, the issue cannot be reviewed. *People v Szymanski*, 406 Mich 944 (1979). If the reviewing court finds an abuse of discretion, it may only modify the release decision after considering the factors set out in MCR 6.106(F)(1)(a)–MCR 6.106(F)(1)(i).[14] *People v Weatherford*, 132 Mich App 165, 170 (1984) (trial court should not have increased the amount of the defendant's bail because there was

[14] See Section 2.3(H).

no finding of an abuse of discretion, and because the trial court did not consider any of the court rule factors in raising the amount of bail).

Decisions on a motion to set aside a bond forfeiture are reviewed for an abuse of discretion. *In re Forfeiture of Bail Bond*, 229 Mich App at 727.

2.4 Right to Counsel

A. Generally

1. Constitutional Rights to Counsel

A criminal defendant has a constitutional right to counsel. *Coleman v Alabama*, 399 US 1, 7 (1970). In Michigan, a criminal defendant's right to counsel has two sources: (1) the Sixth Amendment of the United States Constitution, US Const, Am VI, applicable to the states through the Fourteenth Amendment, US Const, Am XIV, and its Michigan corollary in Const 1963, art 1, § 20, and (2) a prophylactic right found in the Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self-incrimination and to due process, US Const, Am V, and its Michigan corollary in Const 1963, art 1, § 17. *People v Williams (Kevin)*, 244 Mich App 533, 538 (2001). "The Fifth Amendment right to counsel is distinct and not necessarily coextensive with the right to counsel afforded criminal defendants under the Sixth Amendment," because "the Fifth Amendment right to counsel during a custodial interrogation serves an entirely different purpose than the Sixth Amendment right to counsel at trial." *Williams (Kevin)*, *supra* at 538-539.

"The right to counsel found in the Fifth Amendment is designed to counteract the inherently compelling pressures of custodial interrogation, and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse with the police only through counsel." *Williams (Kevin)*, 244 Mich App at 539 (internal quotations and citations omitted). "The procedural safeguards for this right to counsel adopted in *Miranda* [*v Arizona*, 384 US 436 (1966)] require that the police discontinue the questioning of a suspect when a request for counsel is made." *Williams (Kevin)*, *supra* at 539. However, those safeguards only apply when a suspect is in custody and is being interrogated. *Id*. "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," *People v Smielewski (Timothy)*, 214 Mich App 55, 60 (1995), 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, Texas*, 554 US 191, 198 (2008). See also *Montejo v Louisiana*, 556 US 778, 797 (2009) (critical stage includes interrogation after a defendant has asserted his or her right to counsel at an arraignment or similar proceeding), and *Duncan (Christopher) v State of Michigan*, 284 Mich App 246, 264 (2009) (critical stages include preliminary examination, pretrial lineup, entry of plea); see also *Bourne v Curtin*, 666 F 3d 411, 412-414 (CA 6, 2012) ("not all communications between a judge and jury are critical stages[,]" and the trial court's ex parte denial of the jury's request to review trial testimony did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings). 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 194-195.

2. Actual Imprisonment

No person may receive an actual or suspended sentence for any offense—petty, misdemeanor, or felony—unless he or she was represented by counsel at trial or knowingly and intelligently waived representation. *Alabama v Shelton*, 535 US 654, 657-659, 662 (2002) (an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment). An indigent defendant's right to counsel applies to the states through the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 340, 344-345 (1963).

No real distinction exists between "actual imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel). *Shelton*, 535 US at 659.

3. Counsel of Choice

A criminal defendant has a constitutional right to retain an attorney of his or her choice. *People v Arquette*, 202 Mich App 227, 231 (1993). However, the constitutional right to counsel of choice is not absolute; it only applies to criminal defendants who retain counsel, not to indigent defendants for whom

counsel is appointed. *United States v Gonzalez-Lopez*, 548 US 140, 144, 151 (2006).

Where a defendant is wrongly denied his or her Sixth Amendment right to counsel of choice, the constitutional violation is complete and the defendant's conviction must be reversed; the defendant need not show that he or she was denied a fair trial or that his or her actual counsel was ineffective. *Gonzalez-Lopez*, 548 US at 148; *People v Aceval*, 282 Mich App 379, 386 (2009). "However, this right to choice of counsel is limited and may not extend to a defendant under certain circumstances." *Aceval*, *supra* at 386, citing *Gonzalez-Lopez*, *supra* at 151; *Wheat v United States*, 486 US 153, 164 (1988). For example, a defendant may not insist on retaining counsel who is not a member of the bar, or counsel for whom representation of the defendant would constitute a conflict of interest. *Gonzalez-Lopez*, *supra* at 152. Nor may a defendant insist on retaining a specific attorney as a tactic to delay or postpone trial. *People v Akins*, 259 Mich App 545, 557-558 (2003). "'[A] balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated.'" *Aceval*, *supra* at 387, quoting *People v Krysztopaniec*, 170 Mich App 588, 598 (1988).

4. Standard of Review

Violation of a defendant's Sixth Amendment right to counsel of choice is a structural error and is not subject to harmless error analysis. *Gonzalez-Lopez*, 548 US at 150.

Whether to permit the substitution of appointed counsel with retained counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556; *Arquette*, 202 Mich App at 231. "[A] defendant must be afforded a reasonable time to select his [or her] own retained counsel." *Arquette*, *supra* at 231.

B. Multiple Representation of Defendants

MCR 6.005(F) distinguishes between appointed and retained counsel. Joint representation is allowed when counsel is retained, after inquiry by the court. Joint representation is not allowed when counsel is appointed.

"[T]he court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint

representation unless: (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests; (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding." MCR 6.005(F). The distinction between court-appointed counsel and retained counsel in MCR 6.005(F) was upheld in *People v Portillo*, 241 Mich App 540, 542-543 (2000).

Michigan Rule of Professional Conduct (MRPC) 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

MCR 6.005(G) requires the attorney to inform the court if an unanticipated conflict of interest arises.

To show a violation of the Sixth Amendment right to the effective assistance of counsel based on joint representation, a defendant who did not preserve the issue by objection at trial "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan*, 446 US 335, 350 (1980). The mere possibility of a conflict of interest does not constitute ineffective assistance of counsel. *Cuyler*, *supra* at 350.

C. Indigence—Waiver of Fees and Court-Appointed Counsel

1. Generally

MCR 2.002 authorizes a trial court to waive or relieve an indigent person of his or her obligation to pay fees and costs and assures that a complainant will not be denied access to the courts on the basis of indigence. *Lewis (Man) v Dep't of Corrections*, 232 Mich App 575, 579 (1998). For example, "it is . . . axiomatic that an indigent defendant is entitled to a transcript at public expense." *Arquette*, 202 Mich App at 230.

Indigence must be determined on a case-by-case basis by considering the defendant's financial ability, not that of his or her friends or relatives. *Arquette*, 202 Mich App at 230.

MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of fees and costs.

2. Reinstatement of Fees

At the end of litigation, the court may order a person to pay the costs and fees that were waived when the reason for the waiver or suspension no longer exists. MCR 2.002(G).

When the trial court noted that it suspended filing fees to ensure timely review of the prisoner petitioner's complaint, the trial court did not abuse its discretion in reinstating the petitioner's obligations to pay the fees following review of the petitioner's complaint because the reason for suspension no longer existed. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992).

3. Appointment of Counsel

If a defendant requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent. MCR 6.005(B). The factors used to guide the court in this determination include:

> "(1) [the defendant's] present employment, earning capacity and living expenses;
>
> "(2) [the defendant's] outstanding debts and liabilities, secured and unsecured;
>
> "(3) whether the defendant has qualified for and is receiving any form of public assistance;
>
> "(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
>
> "(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel." MCR 6.005(B)(1)–MCR 6.005(B)(5).

A defendant's ability to post bond and gain pretrial release does not make the defendant ineligible for a court-appointed lawyer. MCR 6.005(B).

"If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a

lawyer and may establish a plan for collecting the contribution." MCR 6.005(C).

4. Standard of Review

A trial court's determination of a defendant's indigence is reviewed for an abuse of discretion. *People v Gillespie*, 42 Mich App 679, 681-682 (1972).

D. Substitution or Withdrawal of Counsel

While an indigent defendant is entitled to have counsel appointed at public expense, he or she is not entitled to choose the lawyer. *People v Ginther*, 390 Mich 436, 441 (1973). An indigent defendant may be entitled to have his or her assigned lawyer replaced on a showing of adequate cause. *Ginther*, *supra* at 441. An indigent defendant who seeks substitution of assigned counsel must show good cause for substitution. *Id*.

A defendant is not entitled to replace his or her assigned counsel whenever he or she is dissatisfied with the attorney for some reason. *People v Bradley*, 54 Mich App 89, 95 (1974). If there is good cause to discharge a defendant's first appointed attorney and to do so would not disrupt the judicial process, substitution of counsel may be proper. *Bradley*, *supra* at 95. A defendant has no right to continuously threaten and then replace a court-appointed attorney. *People v Harlan*, 129 Mich App 769, 778 (1983).

A defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial. *People v Davis (Keith)*, 277 Mich App 676, 679-680 (2008), vacated in part on other grounds, lv den in part 482 Mich 978 (2008).

A defendant's Sixth Amendment right to counsel was not violated when a trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed out-of-state to assist the defendant's local attorney at trial. *People v Fett*, 469 Mich 913 (2003).

1. Good Cause

What constitutes good cause for substitution of counsel depends on the facts and circumstances of each case. *People v Hernandez (Louis)*, 84 Mich App 1, 7 (1978). Lack of preparation and failure to call or investigate witnesses do not generally constitute good cause without a showing of prejudice. *Hernandez (Louis)*, *supra* at 7-8 n 1. A valid and reasonable disagreement between counsel and the defendant regarding a fundamental trial tactic (such as whether to call alibi witnesses)

satisfies the good cause requirement. *People v Jones (Edward)*, 168 Mich App 191, 194 (1988), citing *People v Williams (Charles)*, 386 Mich 565, 578 (1972). The fact that a defendant filed a grievance against his or her counsel or expressed a lack of confidence in his or her counsel does not establish the good cause necessary to warrant substitution of counsel. *People v Strickland*, 293 Mich App 393, 397-399 (2011); *People v Traylor*, 245 Mich App 460, 463 (2001).

2. Procedure

A trial court is obligated to take testimony and make findings of fact when a factual dispute exists with regard to a defendant's assertion that his or her assigned attorney "is not adequate or diligent or . . . is disinterested[.]" *Ginther*, 390 Mich at 441-442. A full adversarial proceeding is not required, and in some circumstances, questioning the attorney alone may be sufficient. *People v Ceteways*, 156 Mich App 108, 119 (1986). In fact, "*Ginther*[, supra at 442,] explicitly says that failure to explore defendant's claim does not always require that the conviction be set aside." *Ceteways*, *supra* at 119.

3. Standard of Review

The trial court's decision on a request for substitution of counsel is reviewed for an abuse of discretion. *Traylor*, 245 Mich App at 462.

The trial court's decision on a motion for a continuance to retain new counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556.

E. Removal of Counsel

"A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct." *People v Durfee*, 215 Mich App 677, 681 (1996) (court had no authority to remove the defendant's court-appointed counsel for "conduct allegedly committed in other cases or outside the courtroom").

F. Withdrawal of Assigned Appellate Counsel

"A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw [in the Court of Appeals] if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous." MCR 7.211(C)(5); *Anders v California*, 386 US 738, 744-745 (1967). **Note:**

MCR 7.211(C)(5) and *Anders* are only applicable to appeals as of right, not to appeals by leave. *In re Withdrawal of Attorney*, 231 Mich App 504, 505 (1998). "Where counsel has been appointed to assist a defendant [in an appeal by leave, such as where he or she is] convicted by a plea of guilty or nolo contendere, a motion to withdraw is properly addressed to the appointing authority, the trial court." *In re Withdrawal of Attorney, supra* at 507.

2.5 Waiver of Counsel

A. Right of Self-Representation

A defendant has a constitutional right of self-representation. US Const, Am VI; *Faretta v California*, 422 US 806, 807 (1975). The defendant's right to self-representation is explicitly guaranteed by the Michigan Constitution and by statutory law. Const 1963, art 1, § 13; MCL 763.1. However, the right to proceed to trial without counsel is not absolute. *People v Dennany*, 445 Mich 412, 427 (1994). If a defendant wishes to proceed to trial without the assistance of an attorney, the court is required to safeguard the defendant's waiver by communicating some specific information to the defendant.

> "First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.[15]
>
> "Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.[16]
>
> "Third, even though a defendant has waived the assistance of a lawyer, the waiver must be reaffirmed at each subsequent proceeding.
>
> "In addition, pursuant to [*People v*] *Anderson* [*(Donny)*, [398 Mich 361 (1976),] the court must, upon a defendant's initial request to proceed pro se, determine three things: (1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant

[15] See MCR 6.005(D)(2).

[16] See MCR 6.005(D)(1).

> of the disadvantages of self-representation; and (3) that self-representation will not disrupt, unduly inconvenience, or burden the court." *Dennany*, 445 Mich at 438-439.

A defendant's refusal to cooperate with his or her appointed counsel and his or her unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in *propria persona* (in pro per or pro se) where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell (Lord)*, 471 Mich 182, 184 (2004).

In *Russell (Lord)*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. *Russell (Lord)*, 471 Mich at 184. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. *Russell (Lord)*, *supra* at 184. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. *Id*. at 184-185. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "need[ed]" to be provided with "competent counsel." *Id*. at 185-186.

The *Russell* (*Lord)* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set out in *Faretta*, 422 US 806, and first adopted by the Michigan Supreme Court in *Anderson (Donny)*, 398 Mich 361. *Russell (Lord)*, 471 Mich at 190. Applying those requirements to the facts in *Russell (Lord)*, the Court concluded:

> "In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.

> "While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel. Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.
>
> "We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with [*People v*] *Adkins* [*(Kenneth Ray)*, 452 Mich 702 (1996),] and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel." *Russell (Lord)*, 471 Mich at 192-193.

A criminal defendant may be found competent to stand trial but not competent to act as his or her own counsel at trial. *Indiana v Edwards*, 554 US 164, 174 (2008). According to the United States Supreme Court, when a trial judge, after finding a defendant competent to stand trial, concludes that the defendant "still suffer[s] from severe mental illness to the point where [he or she is] not competent to conduct trial proceedings by [him- or herself]," the trial judge may limit the defendant's Sixth Amendment right to self-representation by appointing counsel to represent the defendant at trial. *Edwards*, *supra* at 178.

Even where the defendant "appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses," the defendant "subsequently made an intelligent, knowing, and voluntary waiver of this right to counsel after the trial court rejected [the] defendant's request to recall and cross-examine the witnesses." *People v Williams (Rodney)*, 470 Mich 634, 647 (2004).

During the trial in *Williams (Rodney)*, *supra* at 637, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-

representation. *Id*. at 637-638. The defendant then asserted that the witnesses' testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination testimony read at trial. *Id*. at 638. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. *Id*. at 638-639. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Id*. at 639. According to the Court, the "[d]efendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Id*. at 644.

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, 267 Mich App 208, 220-229 (2005).

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because pro se representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones (Emmett) v Jamrog*, 414 F3d 585, 589, 592-594 (CA 6, 2005).

Even where the defendant "went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial . . . then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do,'" *People v Chaaban*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2005 (Docket No. 253513) at slip op p 3, the Michigan Supreme Court found that the defendant unequivocally requested to represent himself at trial, and that the trial court erroneously refused to permit the defendant to do so. *People v Chaaban*, 474 Mich 917 (2005) (case remanded for a new trial).

There is no *federal* constitutional right to self-representation on direct appeal from a criminal conviction. *Martinez v California*, 528 US 152, 163 (2000). The United States Supreme Court clearly stated, however, that nothing in its *Martinez* holding prevented any state

from recognizing a right to self-representation in appellate proceedings under the state's constitution. *Martinez*, *supra* at 163.

B. Waiver of Right to Counsel

A defendant who wishes to waive his or her right to counsel must do so knowingly, intelligently, and voluntarily. See *People v Brooks (Anthony)*, 293 Mich App 525, 537 (2011), vacated in part on other grounds 490 Mich 993 (2012).

Before a trial court may grant a defendant's request to proceed pro se, it must determine whether:

> (1) the defendant's request for self-representation was unequivocal;
>
> (2) the defendant's request was made knowingly, intelligently, and voluntarily; and
>
> (3) the court would be unduly burdened, inconvenienced, or disrupted if the defendant's request was granted. [*Anderson (Donny)*, 398 Mich at 367-368.]

The United States Supreme Court has held that there is no specific list of questions that must be used; rather, the inquiry should be tailored to the particular case and stage of the proceedings. *Iowa v Tovar*, 541 US 77, 88-92 (2004).

A defendant is not required to personally assert his or her constitutional right to self-representation for the request to be valid; the request may be made through counsel. *People v Hill (Thomas)*, 485 Mich 912 (2009).

A valid waiver of counsel requires substantial compliance with MCR 6.005(D).[17] *Adkins (Kenneth Ray)*, 452 Mich at 721, overruled in part on other grounds *Williams (Rodney)*, 470 Mich at 641 n 7. To ensure that the defendant's choice is made knowingly and intelligently, the trial court must advise the defendant of the dangers and disadvantages of self-representation. MCR 6.005(D). MCR 6.005(D) requires the trial court to advise the defendant of the charges, the maximum penalty upon conviction, and the risks associated with self-representation. MCR 6.005(D)(1). The court rule also requires the trial court to provide the defendant with an opportunity to consult with counsel—appointed counsel, if the defendant is indigent. MCR 6.005(D)(2); *People v Hicks (Rodney)*, 259 Mich App 518, 523 (2003).

[17] A form and script for a defendant's waiver of counsel is located in the Appendix.

"Compliance with MCR 6.005(D) and [MCR 6.005](E) goes *part of the way* toward establishing that a defendant has knowingly and voluntarily waived counsel." *Brooks (Anthony)*, 293 Mich App at 538 (emphasis added). In addition to substantially complying with the court rules, a court must also find that "(1) the defendant's waiver of counsel is unequivocal . . . ; (2) the defendant actually does understand the significance and consequences of self-representation . . . ; and (3) self-representation will not 'disrupt, unduly inconvenience, and burden the court and the administration of the court's business.'" *Brooks*, *supra* at 538.

A juvenile defendant may waive the assistance of counsel according to the requirements of MCR 6.905(C). These requirements mandate that the court appoint standby counsel to assist the juvenile at trial and sentencing. MCR 6.905(C)(5).

C. Advice at Subsequent Proceedings

Once a defendant has waived the assistance of a lawyer, a record must be made at each subsequent proceeding to show that the court advised the defendant of the continuing right to a lawyer (at public expense if the defendant is indigent) and that the defendant has waived the right. MCR 6.005(E). At the beginning of any proceeding following the defendant's initial waiver of counsel, the record should reflect the defendant's continued waiver of counsel or the defendant's request for the assistance of counsel. *Id*. If the defendant requests an attorney and can afford to retain one, arrangements must be made to permit the defendant to do so. MCR 6.005(E)(3). If the defendant requests an attorney and is indigent, the court must appoint an attorney to represent the defendant. MCR 6.005(E)(2). If the prosecution would be significantly prejudiced by an adjournment and a defendant has not been reasonably diligent in seeking counsel, the court may refuse to grant an adjournment to appoint counsel or to permit the defendant to retain counsel. MCR 6.005(E).

D. Standby Counsel

A plurality[18] of the Michigan Supreme Court has held that "a request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights." *Dennany*, 445 Mich at 446.

[18] "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of stare decisis." *Negri v Slotkin*, 397 Mich 105, 109 (1976).

In contrast, the Court of Appeals has held that a defendant's request for standby counsel does not make that same defendant's request for self-representation invalid as a matter of law, and that a defendant's request for self-representation can be accompanied by a request for standby counsel without affecting the unequivocal nature of the defendant's request to proceed in *propria persona*. *Hicks (Rodney)*, 259 Mich App at 526-528. According to the *Hicks (Rodney)* Court, the trial court should evaluate the defendant's credibility to determine the vacillation or unequivocal nature of a defendant's request. *Hicks (Rodney)*, *supra* at 528-529.

The presence of standby counsel alone does not legitimize a waiver of counsel inquiry when the inquiry does not satisfy legal requirements. *Dennany,* 445 Mich at 448 n 26.

E. Standard of Review

A trial court's factual determination whether a waiver was knowing and intelligent is reviewed for clear error, while the meaning of "knowing and intelligent" is a question of law reviewed de novo on appeal. *Williams (Rodney)*, 470 Mich at 640.

2.6 Grand Jury

Criminal prosecutions may be initiated when the prosecuting attorney files a complaint and an information, or by grand jury indictment. MCL 767.1 *et seq.*; *People v Glass (Willie)*, 464 Mich 266, 276 (2001). There is no state constitutional right to indictment by a grand jury. *Glass (Willie)*, *supra* at 278. An information shall not be filed until the defendant has had or has waived a preliminary examination. MCL 767.42(1). However, indictees do not have the right to a preliminary examination. *Glass (Willie)*, *supra* at 283, overruling *People v Duncan (Pat)*, 388 Mich 489 (1972) (which had granted indictees the right to a preliminary examination). The grand jury indictment is a procedural alternative to the preliminary examination. *Glass*, *supra* at 278. See also *People v Baugh*, 249 Mich App 125, 129-130 (2002) (where the defendant was indicted by grand jury, the information issued after the defendant's preliminary examination was null and void following the Court's decision in *Glass*).

Grand juries are creatures of statute. Generally, the statutes provide for a one person grand jury, MCL 767.3 and MCL 767.4, a citizen grand jury comprised of 13 to 17 grand jurors, MCL 767.11, and a multi-county grand jury, MCL 767.7c, MCL 767.7d, MCL 767.7e, MCL 767.7f, and MCL 767.7g.

A. One Person Grand Jury

"A 'one person' grand jury may be convened to investigate whether probable cause exists to suspect a crime has been committed." *People v Farquharson*, 274 Mich App 268, 274 (2007). "The 'one person' grand jury is a creation of statute and draws its extraordinary powers from [MCL 767.3 and MCL 767.4]." *Farquharson*, *supra* at 268. The one person grand jury statute does not violate a defendant's right to due process. *In re Colacasides*, 379 Mich 69, 75 (1967). Whether the judge orders an inquiry "into the matters relating to [the alleged crime]" is discretionary. MCL 767.3.

B. Citizen Grand Jury

Citizen grand juries are drawn and summoned as directed by the court. MCL 767.7. A grand juror's term of service is six months. MCL 767.7a. Not more than 17 persons and not less than 13 shall be sworn on any grand jury. MCL 767.11. A foreperson is appointed by the court. MCL 767.11; MCL 767.12. Witnesses appearing before the grand jury have the right to counsel. MCL 767.19e and MCR 6.005(I). An indictment requires the concurrence of at least nine of the grand jurors. MCL 767.23. The foreperson shall present the indictment to the court in the presence of the grand jury. MCL 767.25(1). The judge presiding over the grand jury proceedings shall then return the indictment to the court having jurisdiction. MCL 767.25(3). An arrest warrant may be issued by the court. MCL 767.30. The statute contemplates that a defendant will be arraigned in the court having jurisdiction over the matter because the statute indicates that the court may properly receive the indictee's plea of guilty if offered. MCL 767.37.

A grand jury is not required to "reflect the precise racial composition of a community." *Glass*, 464 Mich at 284. The *Glass* Court indicated that the three-step analysis set out in *Castaneda v Partida*, 430 US 482, 494 (1977), should be used to resolve a defendant's claim of racial discrimination in the selection of a grand jury. *Glass*, *supra* at 284. "[I]n addition to showing discriminatory purpose, [the] defendant must show that the grand jury selection procedure resulted in a 'substantial underrepresentation of his [or her] race.'" *Id*. at 285, quoting *Castaneda*, *supra* at 494. In *Glass*, *supra* at 285, the Court applied the three steps set out in *Castaneda*, *supra* at 494:

> (1) The defendant must show that he or she belongs to a recognizable and distinct class singled out for different treatment by the law as written or as applied.

(2) The defendant must show that significant underrepresentation of that distinct class existed over a significant period of time.

(3) The defendant must show that the selection procedure was susceptible to abuse or was not racially neutral.

C. Multicounty Grand Jury

The Court of Appeals may convene a multicounty grand jury if the petition establishes: (1) probable cause to believe that a crime, or a portion of a crime, has been committed in two or more of the counties named in the petition, and (2) reason to believe that a grand jury with jurisdiction over two or more of the counties named in the petition could more effectively address the criminal activity referenced in the petition than could a grand jury with jurisdiction over one of those counties. MCL 767.7d. The term of a multicounty grand jury must not exceed six months. MCL 767.7f.

Committee Tip:

In considering a challenge to the creation or scope of a multicounty grand jury, consider reviewing a copy of the petition, order of the Court of Appeals, presiding judge's order, and any order continuing the term of the grand jury. In addition, seek information regarding the number and source of the grand jurors along with the number concurring in any indictment being challenged.

D. Oath for the Grand Jury

The following oath should be used when a grand jury is sworn:

"You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge,

> according to the best of your understanding; so help you God." MCL 767.9.

E. Right to Counsel

"A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness." MCR 6.005(I)(1); MCL 767.19e. If the witness is financially unable to retain a lawyer, upon request, one will be appointed for the witness at public expense. MCR 6.005(I)(2).

F. Rules of Evidence

With the exception of those rules regarding privilege, the rules of evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

Testimony given before the grand jury may be admissible at trial, subject to the rules of evidence. *People v Chavies*, 234 Mich App 274, 281-284 (1999), overruled on other grounds *People v Williams (Cleveland)*, 475 Mich 245, 254 (2006).

G. Discovery

A defendant is entitled to a transcript of his or her grand jury testimony and other parts of the grand jury record—including other witnesses' testimony—that touch on the issue of the defendant's guilt or innocence. *People v Bellanca*, 386 Mich 708, 715 (1972). This entitlement applies whether the defendant is charged by information or indictment. *People v Fagan (On Remand)*, 213 Mich App 67, 68-70 (1995) (definition of indictment includes information, see, e.g., MCL 750.10, MCL 761.1(d); MCL 767.2.

H. Investigative Subpoenas

In general, MCL 767A.2 permits a prosecuting attorney to petition the court to issue one or more investigative subpoenas to investigate the commission of a felony. MCL 767A.3 authorizes the judge to issue the investigative subpoena.

> "A court may 'authorize the prosecutor to issue an investigative subpoena if the judge determines that there is reasonable cause to believe a felony has been committed and that there is reasonable cause to believe

that the person who is the subject of the investigative subpoena may have knowledge concerning the commission of a felony or the items sought are relevant to investigate the commission of a felony.'" *Farquharson*, 274 Mich App at 273, quoting *In re Subpoenas to News Media Petitioners*, 240 Mich App 369, 375 (2000), citing MCL 767A.3(1).

"Investigative subpoenas must include a statement that a person may have legal counsel present at all times during questioning, MCL 767A.4(g), and a witness must be advised of his or her constitutional rights against compulsory self-incrimination, MCL 767A.5(5); *People v Stevens (James)*, 461 Mich 655, 659 n 1[] (2000). A person served with an investigative subpoena must appear before the prosecuting attorney and answer questions concerning the felony being investigated. MCL 767A.5(1). The prosecuting attorney is authorized to administer oaths, MCL 767A.5(2), and if a witness testifies falsely under oath during an investigative-subpoena proceeding, perjury penalties apply, MCL 767A.9." *Farquharson*, 274 Mich App at 273.

"If a criminal charge is filed by the prosecuting attorney based upon information obtained pursuant to this chapter, upon the defendant's motion made not later than 21 days after the defendant is arraigned on the charge, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged and may direct the prosecuting attorney to furnish to the defendant the testimony any witness who will testify at the trial gave the prosecuting attorney pursuant to this chapter regarding that crime except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown." MCL 767A.5(6).

"If the defendant requests the testimony of a witness pursuant to this section and the trial judge directs the prosecuting attorney to furnish to the defendant a copy of that witness's testimony, the prosecuting attorney shall furnish a copy of the testimony not later than 14 days before trial. If the prosecuting attorney fails or refuses to furnish a copy of the testimony to the defendant pursuant to this subsection, the prosecuting attorney may be barred from calling that witness to testify at the defendant's trial." MCL 767A.5(6).

"If a person files an objection to, or fails or refuses to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney may file a motion with the judge who authorized the prosecuting attorney to issue the subpoena for an order compelling the person to comply with that subpoena." MCL 767A.6(1). In *People v Seals*, 285 Mich App 1, 8-9 (2009), the defendant argued that the testimony he gave pursuant to an investigative subpoena was involuntary; however, the Court held that "[t]he fact that [the] defendant did not take advantage of his opportunity [under MCL 767A.6(1)] to have the trial court determine whether he was required to respond to the investigative subpoena d[id] not make his testimony forced." Therefore, admission of his testimony at trial did not violate his right against compulsory self-incrimination. *Seals*, *supra* at 9-10.

Disclosure in a civil action of transcripts of testimony obtained pursuant to the investigative subpoena process, during an investigation of alleged criminal conduct, is not authorized by the statutes governing the disclosure of such information, MCL 767A.1 *et seq*. *Truel v City of Dearborn*, 291 Mich App 125, 131-135 (2010). According to the *Truel* Court, MCL 767A.8 "makes several delineated items related to an investigation confidential, including (1) petitions for immunity, (2) orders granting immunity, (3) 'transcripts of testimony delivered to witnesses pursuant to grants of immunity,' and (4) 'records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under [the investigative subpoena statutes].'" *Truel*, *supra* at 133. However, "[items delineated] in [MCL 767A.]8 were meant to address those matters not already covered elsewhere in the [investigative subpoena statutes]." *Truel*, *supra* at 135. Because MCL 767A.5(6) specifically "provides for the limited disclosure of testimony to a defendant who has been charged based upon information obtained pursuant to the investigative subpoena statutes[,]" its disclosure under other circumstances is not expressly or impliedly authorized under other provisions of the investigative subpoena statutes. *Truel*, *supra* at 134-135. The plain language of MCL 767A.5(6) states that "transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial[.]" *Truel*, *supra* at 135. In *Truel*, *supra* at 131-135, the trial court improperly ruled that transcripts of witness testimony obtained under the investigative subpoena statutes, during an investigation into alleged criminal activity, should be disclosed to the defendants named in the plaintiff's civil action.

The Michigan Supreme Court has held that the exclusionary rule does not apply to statutory violations of MCL 767A.1 *et seq*. *People v Earls*, 477 Mich 1119 (2007).

2.7 Preliminary Examination

"The accused has a right to a preliminary examination before the prosecutor files an information in the court having jurisdiction to hear the cause. The accused and the state are entitled to a 'prompt' examination. The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it. As to the timing of the preliminary examination, MCR 6.112(B) provides in pertinent part that unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives preliminary examination." *People v Glass (Willie)*, 464 Mich 266, 277-278 (2001) (internal citations omitted).

A. Initial Bind Over by District Court

There is no constitutional right to a preliminary examination. *People v Yost (Donna)*, 468 Mich 122, 125 (2003). Rather, a defendant's right to a preliminary examination is a statutory right to the determination whether a felony has been committed and whether there is probable cause to believe the defendant committed it. MCL 766.1; *Yost (Donna)*, *supra* at 125-126. It is the magistrate's duty to bind a defendant over for trial if it appears at the conclusion of the preliminary examination that a felony has been committed and that the defendant committed it. MCL 766.13; *People v Abraham (Nathaniel)*, 234 Mich App 640, 655 (1999).

The magistrate's duty extends to judging the weight and competency of the evidence presented and the credibility of the witnesses. *People v Paille*, 383 Mich 621, 627 (1970). The decision to bind over a defendant does not require proof beyond a reasonable doubt, but the magistrate must find that evidence has been presented on each element of the crime charged or that the elements of the crime charged may be inferred from the evidence presented at the defendant's preliminary examination. *People v Hill (Rodney)*, 433 Mich 464, 469 (1989).

A defendant charged with open murder may be bound over on that charge, including the possibility of conviction of first-degree murder, even if premeditation and deliberation are not shown at the preliminary examination. *People v Johnson (Henry)*, 427 Mich 98, 107-109 (1986); *People v Coddington*, 188 Mich App 584, 593-594 (1991) ("the elements of premeditation and deliberation are not required

elements for which evidence must be presented at a preliminary examination in order to bind a defendant over for trial on open murder charges"); MCL 767.71 ("[i]n all indictments for murder . . . it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased . . . .").

Where the law permits a preliminary examination, it must be held within 14 days of arraignment unless adjourned for good cause. MCL 766.4; MCL 766.7; MCR 6.104(E)(4); MCR 6.110(A); MCR 6.110(B). If the parties consent to the adjournment, the trial court may adjourn the preliminary examination for a reasonable time, for good cause shown. MCR 6.110(B). If a party objects to an adjournment, the trial court must make a finding on the record of good cause shown before the trial court may adjourn the preliminary examination. MCR 6.110(B). Examples of good cause are the unavailability of essential witnesses, *People v Horne*, 147 Mich App 375, 377-378 (1985), and the absence of a material witness, *People v Buckner*, 144 Mich App 691, 694 (1985). "Simple docket congestion without a showing of unusual circumstances . . . does not constitute 'good cause' for adjournment of [preliminary] examinations beyond the . . . statutory time limit." *People v Twomey*, 173 Mich App 247, 249 (1988). "The defendant's right to timely examination is superior to any question of the mere convenience of the public officers, and the examination should commence at once unless the accused asks for a delay." *Twomey, supra* at 249. Any violation of the requirements in MCR 6.110(B) is harmless error unless the defendant shows actual prejudice as a result of the violation. MCR 6.110(B). A challenge to the timeliness of the preliminary examination must be raised before the preliminary examination begins. *People v Crawford (David)*, 429 Mich 151, 157 (1987).

MCL 766.4 "requires the examination at the preliminary examination of those witnesses offered in support of the prosecution. The testimony of the complainant is not necessarily required at every preliminary examination if sufficient other evidence is produced." *People v Meadows*, 175 Mich App 355, 358-359 (1989).

MCR 6.110(E) provides that "[i]f, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial." "If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been

charged with that offense." *Id*. See also MCL 766.13; *Yost (Donna)*, 468 Mich at 125-126.

The rules of evidence apply to a preliminary examination, unless otherwise provided by law. MCR 6.110(C). There is an exception to the hearsay rule that is unique to preliminary examinations. MRE 1101(b)(8) provides that at preliminary examinations, "hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry." See *People v Caban*, 275 Mich App 419, 420-422 (2007) ("a hearsay statement regarding the defendant's authority to sell a parcel of real estate [wa]s admissible at a preliminary examination under MRE 1101(b)(8) . . . because it concerned who had an ownership interest in the property, which is one of the purposes allowed under the rules of evidence"). The magistrate may only bind over on legally admissible evidence. *People v Hall*, 435 Mich 599, 624 (1990). Circumstantial evidence can be used. *People v Northey*, 231 Mich App 568, 575 (1998).

> "In a preliminary examination, a district court's function is to determine whether the evidence is sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged. A bindover is not a finding of guilt beyond a reasonable doubt. Rather, [a] preliminary hearing . . . is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *People v Justice*, 454 Mich 334, 343 (1997) (internal citations and quotations omitted).

"Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man [or woman] in the belief that the person accused is guilty of the offense with which he is charged." *People v Waters*, 118 Mich App 176, 183 (1982).

"Because distinctly different probable-cause standards distinguish . . . arrest and bind-over decisions," evidence of an additional crime gathered following a constitutionally valid arrest need not be suppressed as "fruit of the poisonous tree" based solely on a determination that probable cause is lacking to support a bindover on the charge for which the defendant was originally arrested. *People v Cohen (Clarence)*, 294 Mich App 70, 72, 76-77 (2011). In *Cohen (Clarence)*, *supra* at 72, an officer observed cocaine paraphernalia in plain sight near the defendant passenger during a traffic stop. Following the defendant's arrest, it was discovered that he was in possession of a rock of cocaine. *Id*. at 73. The district court bound the defendant over for trial on a charge of possession with

intent to deliver the rock of cocaine, but dismissed a charge of simple possession of cocaine in connection with the cocaine paraphernalia in the car. *Id*. The circuit court granted the defendant's motion to quash, holding that in the absence of probable cause to bind the defendant over for trial on the simple possession charge, the police lacked probable cause for his arrest for that offense, and that the evidence discovered as a result of the arrest must be suppressed as fruit of the poisonous tree. *Id*.

The Court of Appeals "disagree[d] with the circuit court's conclusion that probable cause to support an arrest is equivalent to probable cause to bind a defendant over for trial." *Cohen (Clarence)*, 294 Mich App at 74. "'Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" *Cohen (Clarence)*, *supra* at 75, quoting *People v Champion (Kenneth)*, 452 Mich 92, 115 (1996). In contrast, the prosecution is required to meet a greater probable cause standard at a preliminary examination, presenting "'enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [the defendant's] guilt.'" *Cohen (Clarence)*, *supra* at 74, quoting *People v Perkins*, 468 Mich 448, 452 (2003) (internal quotations omitted). The *Cohen (Clarence)* Court held that probable cause supported the defendant's arrest based on his joint constructive possession of cocaine paraphernalia, which was observed in plain view and within the defendant's reach in a car occupied by only the defendant and the driver. *Cohen (Clarence)*, *supra* at 77. "Thus, sufficient information justified [the] defendant's arrest, rendering admissible the evidence discovered thereafter[,]" regardless of the district court's conclusion that it lacked probable cause to bind the defendant over for trial on the charge for which he was arrested. *Id*.

"In a preliminary examination . . . a report of the findings of a technician of the division of the department of state police concerned with forensic science, signed by that technician, or a notarized copy of the report, may be received in evidence in place of the technician's appearance and testimony." MCL 600.2167(1). "The statute is designed to reduce the number of times a drug analyst is required to testify in criminal proceedings." *People v Anderson (Woodrow)*, 88 Mich App 513, 518 (1979).

Before a preliminary examination "at which the technician's report of findings will be introduced in evidence, 2 copies of the report shall be furnished to the prosecuting attorney," who in turn shall immediately furnish a copy to the defense. MCL 600.2167(2).

However, even if the prosecution does not immediately furnish the report to the defense, use of the report is not precluded where the defense received it sufficiently in advance of the preliminary examination to allow the defense to determine whether it wanted the technician to appear. *Anderson (Woodrow)*, 88 Mich App at 518. In *Anderson (Woodrow)*, there was a five day delay between the time the prosecutor received the report and the time it was furnished to the defense, and there was a period of three weeks between the time the defense received the report and the preliminary examination. *Id*. The Court of Appeals held that this gave the defense "ample time to review the report and determine whether [the defendant] wished the technician to testify in person." *Id*.

After receiving copies of the technician's report, the prosecutor must notify the court before which the preliminary examination will be held that copies of the report are in the prosecutor's possession. MCL 600.2167(3). If, not less than five days before the day set for preliminary examination, the prosecutor fails to notify the court that he or she has received copies of the technician's report, the court must adjourn the preliminary examination. MCL 600.2167(3). The defense may request that the technician testify in person at the preliminary examination by serving written notice on the prosecution not more than five days after receiving a copy of the report from the prosecution. MCL 600.2167(4).

B. Review of District Court's Bindover

If the defendant challenges the factual sufficiency of the evidence presented at the preliminary examination, the defendant has the burden of proving that the examining magistrate abused his or her discretion in binding over the defendant for trial in circuit court. *People v Thomas (James)*, 438 Mich 448, 452 (1991). An abuse of discretion occurs when a trial court chooses an outcome falling outside of the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269 (2003).

A trial court is not bound by a magistrate's evidentiary rulings, such as the suppression of evidence. *People v Solomon*, 82 Mich App 502, 504-506 (1978).

A magistrate's determination at a preliminary examination is reviewed for an abuse of discretion. *People v Doss*, 406 Mich 90, 101 (1979). "'Primarily the question of probable cause is for the consideration of and determination by the examining magistrate. [The reviewing] [c]ourt may not agree with the findings of such magistrate but it has no right to substitute its judgment for [that of the magistrate] except in case of a clear abuse of discretion.'" *Doss*,

406 Mich at 101, quoting *People v Dellabonda*, 265 Mich 486, 491 (1933) (emphasis omitted).

Review of the district court's bindover decision is limited to the preliminary examination transcript. *Waters*, 118 Mich App at 183. The magistrate should not discharge the case when evidence conflicts or raises reasonable doubt of the defendant's guilt, because those types of questions should be left for the trier of fact. *Doss*, 406 Mich at 103. For example, where there is credible evidence presented both to support and negate the existence of malice, a factual question exists that should be left to the jury. *People v Neal*, 201 Mich App 650, 655 (1993).

Pursuant to a proper motion, if the trial court finds error in the probable cause finding, the court must either dismiss the information or remand the case to the district court for further proceedings. MCR 6.110(H).

C. Discharge of Defendant

"If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor for initiating a subsequent prosecution for the same offense." MCR 6.110(F). "Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge." MCR 6.110(F).

"MCR 6.110(F) prevents 'judge shopping' by requiring that a subsequent examination be before the same magistrate, if available, and that additional evidence be presented." *People v Robbins*, 223 Mich App 355, 362 (1997). "[S]ubjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping.'" *Robbins*, *supra* at 363.

D. Motion to Remand for Preliminary Examination

The court may remand the case to the district court for further proceedings if the trial court finds a violation of the court rules governing the preliminary examination. MCR 6.110(C), MCR 6.110(D), MCR 6.110(E), or MCR 6.110(F). MCR 6.110(H).

E. Standard of Review

The trial court has discretion in deciding whether to grant or deny a motion to remand for preliminary examination. *People v Johnson (Van Ray)*, 57 Mich App 117, 121 (1974). In order to prevail, the defendant must demonstrate that prejudice will result if the motion to remand is denied. *Johnson (Van Ray)*, *supra* at 122.

The trial court's decision on a motion to quash is reviewed for an abuse of discretion. *People v Clement*, 254 Mich App 387, 389 (2002). "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson (Donald)*, 469 Mich 1018 (2004). See also *People v Bennett*, 290 Mich App 465, 481 (2010) ("the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless").

2.8 Information or Indictment

A. Content

The required content of an information is mandated by statute. MCL 767.45 requires that an information contain: (1) the nature of the offense, stated in language that will fairly apprise the accused and the court of the offense charged; (2) the time of the offense as near as possible; and (3) the location of the offense. MCL 767.45(1)(a), MCL 767.45(1)(b), MCL 767.45(1)(c); MCR 6.112(D).

Except where time is of the essence of the offense, an error in the time stated is not fatal to the information. MCL 767.45(1)(b).

MCL 767.55 permits allegations in the alternative when an offense "is constituted of 1 or more of several acts, or which may be committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results . . . ."

CJI2d 3.19, *Single Defendant—Multiple Counts—Single Wrongful Act*, concerns the situation in which a defendant is charged with one wrongful act in alternative counts, i.e., the defendant is guilty of one count or the other, but not both. The jury should be instructed that it is to consider the alternatives separately in light of all of the evidence. CJI2d 3.19(2). Further, the jury should be instructed that it may find the defendant not guilty, or guilty of one count, or guilty of the other count. CJI2d 3.19(3).

Examples of alternative theories are: *Operating While Intoxicated* (CJI2d 15.1, CJI2d 15.6, and CJI2d 15.7); First-Degree Felony Murder

(CJI2d 16.4); Second-Degree Murder (CJI2d 16.5); Voluntary Manslaughter (CJI2d 16.8), and *Criminal Sexual Conduct* (CJI2d 20.1, CJI2d 20.2, CJI2d 20.12, and CJI2d 20.13).

Examples of alternative offenses are: *First-Degree Murder/Felony Murd*er (CJI2d 16.25); Attempted Murder (CJI2d 9.1)/Assault with Intent to Murder (CJI2d 17.3); and Armed Robbery (CJI2d 18.1)/ Assault with Intent to Rob While Armed (CJI2d 18.3). It is good practice to inform the jury that it can convict on only one of the alternative charges. *People v Lesperance*, 147 Mich App 379, 386 (1985). But see CJI2d 16.25(3), *Unanimity of Verdict on Premeditated and Felony Murder*, which provides that if the jury returns a verdict of guilty of first-degree murder, the unanimous verdict must specify whether all of the jurors found the defendant guilty of premeditated murder, felony murder, or both.

B. Amendments

Unless a proposed amendment would unfairly surprise or prejudice the defendant, amendments are liberally permitted either before, during, or after trial to correct any defect in form or substance in the information. MCL 767.76; MCR 6.112(H).

Where the prosecution seeks to amend the information to add a criminal charge based on facts or evidence disclosed at the defendant's preliminary examination, a defendant is not unfairly surprised or prejudiced. *People v Fortson*, 202 Mich App 13, 16 (1993).

When a defendant is bound over on any charge cognizable in circuit court following a preliminary examination, the circuit court obtains jurisdiction over the defendant and may permit amendment of the information "to correct a variance between the information and the proofs" as long as the amendment does not unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Unger*, 278 Mich App 210, 221-222 (2008) (amendment of the information to reinstate a previous charge did not unfairly surprise the defendant or deprive him of sufficient notice or opportunity to defend against the charge at trial). See also *People v Russell (Darwin)*, 266 Mich App 307, 316-317 (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination that had been struck from the information in an earlier amendment).

"A new offense may not be added to an information by a motion to amend." *People v McGee (Keangela)*, 258 Mich App 683, 688 (2003).

Any error in amending an information is waived by a party's failure to object to the amendment. *People v Bettistea*, 173 Mich App 106, 120 (1988).

C. Joinder of Counts

1. Single Defendant

MCR 6.120 governs joinder and severance for a single defendant. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. MCR 6.120(A). Additionally, two or more informations or indictments against a single defendant may be consolidated for a single trial. *Id*.

When appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense, the court may—on its own initiative, the motion of a party, or the stipulation of all parties—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. MCR 6.120(B).

Joinder is appropriate if the offenses are related, i.e., they are based on the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1). See *People v Williams (Carletus)*, 483 Mich 226, 233 n 5 (2009).[19] In *Williams (Carletus)*, 483 Mich 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.

Other relevant factors to consider 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. MCR 6.120(B)(2).

On a defendant's motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

[19] *Williams (Carletus)*, 483 Mich at 238, overruled *People v Tobey*, 401 Mich 141 (1977), because *Tobey* construed MCR 6.120 too narrowly.

2. Multiple Defendants

MCR 6.121 governs joinder and severance with regard to multiple defendants. An information or indictment may charge two or more defendants with the same offense. MCR 6.121(A). An information or indictment may charge two or more defendants with two or more offenses when each defendant is charged with accountability for each offense or when the offenses are related as set out in MCR 6.120(B). MCR 6.121(A). When more than one offense is alleged, each offense must be stated in a separate count. *Id*. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment. *Id*.

On the defendant's motion, the court must sever offenses that are not related as set out in MCR 6.120(B). MCR 6.121(B).

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to the substantial rights of a defendant. MCR 6.121(C). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *People v Hana*, 447 Mich 325, 346-347 (1994).

On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. MCR 6.121(D). 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 defendants or the complexity or nature of the evidence; the convenience of the witnesses; and the parties' readiness for trial. *Id*. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Hana*, 447 Mich at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Hana*, *supra* at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Hana*, *supra* at 349, quoting *Yefsky*, *supra* at 897.

3. Standard of Review

"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." Therefore, a trial court's decision regarding joinder "is subject to both a clear error and a de novo standard of review." *Williams (Carletus)*, 483 Mich at 231.

D. Standard of Review

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *McGee (Keangela)*, 258 Mich App at 686-687.

2.9 Arraignment on Information or Indictment

"A defendant has a constitutional right to adequate notice of the charges against him [or her]." *People v Darden*, 230 Mich App 597, 600 (1998). A defendant has a right to be arraigned on the information, at which time the information is read to the defendant or the court informs him or her of the substance of the charges contained in the information. MCR 6.113(A) and MCR 6.113(B).

The circuit court arraignment may be conducted in district court if the defendant, the defense attorney, and the prosecutor consent on the record. MCR 6.111. "A defendant may waive a trial court arraignment by filing a written statement 'acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute.'" *People v Manning*, 243 Mich App 615, 624 n 27 (2000), quoting MCR 6.113(C). See also *People v Payne*, 285 Mich App 181, 191-192 (2009) (trial court properly accepted waiver of arraignment by mail). And see SCAO form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*.[20]

MCR 6.111 also authorizes the district court to accept guilty pleas. See SCAO Model Joint Local Administrative Order 6—Circuit Court Arraignments in District Court.[21]

The court with trial jurisdiction must arraign the defendant on the scheduled date, unless the defendant waives arraignment or the court for good cause, or as otherwise permitted by the court rules, orders a delay.

[20] Available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc261.pdf.

[21] Available at http://courts.michigan.gov/scao/resources/other/lao/LAO6-Model.doc.

MCR 6.113(A). However, failure to hold the arraignment on the scheduled date constitutes harmless error, unless the defendant demonstrates actual prejudice. *Id*. The court may hold the arraignment before the preliminary examination transcript has been prepared and filed. *Id*.

MCR 6.113(B) sets out the arraignment procedure as follows:

> "The prosecutor must give a copy of the information to the defendant before the defendant is asked to plead. Unless waived by the defendant, the court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant. If the defendant has waived legal representation, the court must advise the defendant of the pleading options. If the defendant offers a plea other than not guilty, the court must proceed in accordance with the rules in subchapter 6.300. Otherwise, the court must enter a plea of not guilty on the record. A verbatim record must be made of the arraignment."

A circuit court may submit a local administrative order to the State Court Administrator that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information. MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.[22]

Committee Tip:

Eliminating arraignment in circuit court is an effective case management tool.

Committee Tip:

Before taking a defendant's plea or proceeding to trial, it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

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[22] Available at http://courts.michigan.gov/scao/resources/other/lao/LAO26-model.doc.

"When the record fails to show that a defendant was arraigned, reversal is generally required." *Grigg v People*, 31 Mich 471, 471-472 (1875); *People v Thomason*, 173 Mich App 812, 815 (1988). However, when the record shows that the defendant entered a not guilty plea to the charge and proceeded to trial without objection, automatic reversal is not required. *People v Weeks*, 165 Mich App 362, 364-365 (1911).

Chapter 3: Pretrial Motions & Proceedings

3.1 Discovery 3-2
3.2 Witnesses—Disclosure, Production, and Appointment 3-8
3.3 Special Notice Requirement—Rape Shield Law 3-11
3.4 Alibi Defense 3-15
3.5 Defenses Involving a Defendant's Mental Status 3-18
3.6 Entrapment 3-31
3.7 Pretrial Motions—Generally 3-35
3.8 Motion to Dismiss 3-40
3.9 Change of Venue 3-40
3.10 Separate or Joint Trial 3-43
3.11 Speedy Trial 3-46
3.12 Adjournment or Continuance 3-56
3.13 Motion to Suppress Evidence 3-58
3.14 Motion to Suppress Defendant's Statement 3-61
3.15 Motion to Suppress Identification of Defendant 3-83
3.16 Motions for Rehearing or Reconsideration 3-91
3.17 Search and Seizure Issues—Generally 3-92
3.18 Search and Seizure Issues—Was There a Search or Seizure? 3-93
3.19 Search and Seizure Issues—Does the Defendant Have Standing? 3-96
3.20 Search and Seizure Issues—Where Did the Search Take Place? 3-98
3.21 Search and Seizure Issues—Was a Warrant Required? 3-115
3.22 Search and Seizure Issues—Was There Probable Cause? 3-149
3.23 Search and Seizure Issues—Is Exclusion the Remedy if a Violation Is Found? 3-149
3.24 Search and Seizure Issues—Standard of Review 3-156
3.25 Double Jeopardy Issues 3-157

3.1 Discovery

A. Generally

MCR 6.201[1] governs and defines the scope of criminal discovery in Michigan. *People v Phillips (Paul)*, 468 Mich 583, 588-589 (2003). Either the subject of discovery must be set out in MCR 6.201, or the party seeking discovery must show good cause why the trial court should order the requested discovery. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 448 (2006).

The parties must comply with the requirements of MCR 6.201 within 21 days of a request under the rule, unless otherwise ordered by the court. MCR 6.201(F).

If a party discovers additional information or material subject to disclosure under MCR 6.201 at any time, the party, without further request, must promptly notify the other party. MCR 6.201(H).

B. Mandatory Disclosure

MCR 6.201(A) governs mandatory disclosure and provides that in addition to disclosures required by provisions of law other than MCL 767.94a[2], a party upon request must provide all other parties:

> "(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> "(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> "(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

[1] MCR 6.201 only applies to felony cases. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 450 n 6 (2006).

[2] Discovery in criminal cases is governed by MCR 6.201, not by MCL 767.94a. Administrative Order 1994-10. http://coa.courts.mi.gov/rules/documents/3AdministrativeOrders.pdf.

> "(4) any criminal record that the party may use at trial to impeach a witness;
>
> "(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
>
> "(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence."

MCR 6.201(B) governs discovery of information known to the prosecuting attorney, and provides that upon request, the prosecuting attorney must provide each defendant:

> "(1) any exculpatory information or evidence known to the prosecuting attorney;[3]
>
> "(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
>
> "(3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> "(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> "(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

MCR 6.201(K) states "[e]xcept as otherwise provided in MCR 2.302(B)(6), electronic materials are to be treated in the same manner as nonelectronic materials under [MCR 6.201]. Nothing in [MCR 6.201] shall be construed to conflict with MCL 600.2163a."

A tacit agreement between the prosecution and a witness concerning potential or actual leniency related to the witness's

[3] Due process also requires that the prosecution turn over known exculpatory evidence. *Brady v Maryland*, 373 US 83 (1963).

criminal conduct is favorable evidence subject to disclosure under *Brady v Maryland*, 373 US 83 (1963). *Bell v Bell*, 512 F3d 223, 233 (CA 6, 2008). 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).

"When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder." MCR 6.201(D).

C. Discretionary Disclosure

MCR 6.201(I) governs discretionary disclosure, and provides that "[o]n good cause shown, the court may order a modification of the requirements and prohibitions of [MCR 6.201]."

For example, because a videotape of a defendant's post-arrest Datamaster breath test is not a subject of mandatory discovery expressly listed in MCR 6.201(A), and is not contemplated by the categories of discoverable evidence described in MCR 6.201(B), a trial court may not compel its discovery absent good cause. *Greenfield*, 271 Mich App at 450-452. A prosecutor's failure to produce evidence not addressed by MCR 6.201's description of discoverable evidence does not constitute "good cause" for entry of an order under MCR 6.201(I) to produce such evidence. *Greenfield*, *supra* at 451-454.

D. Prohibited Disclosure/Privilege

MCR 6.201(C)(1) governs prohibited discovery, and provides that "[n]otwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in [MCR 6.201(C)](2)."

MCR 6.201(C)(2) states:

> "If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

> "(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> "(d) The court shall seal and preserve the records for review in the event of an appeal
>
> > (*i*) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > (*ii*) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> "(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

If a defendant can demonstrate a possible need for an informant's testimony, the court should conduct an in camera hearing to interview the informant to determine whether the informant can offer helpful testimony. *People v Underwood (Lanford)*, 447 Mich 695, 706 (1994).

Work product of the prosecution is not discoverable, *People v Gilmore*, 222 Mich App 442, 453 (1997), including attorneys' notes of interviews with witnesses whom the attorney intends to call at trial. *People v Holtzman*, 234 Mich App 166, 168-169 (1999).

E. Discovery Violation

Under MCR 6.201(J), if a party fails to comply with MCR 6.201, the court, in its discretion, may:

> (1) order the party to provide the discovery or permit the inspection of materials not previously disclosed;
>
> (2) grant a continuance;
>
> (3) prohibit the party from introducing in evidence the material not disclosed; or
>
> (4) enter such other order as it deems just under the circumstances.

Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. MCR 6.201(J).

Willful violation by counsel of an applicable discovery rule or an order issued pursuant to an applicable discovery rule may subject counsel to appropriate sanctions by the court. MCR 6.201(J).

A *Brady*[4] violation occurs when the government fails to disclose evidence materially favorable to the accused. *Youngblood v West Virginia*, 547 US 867, 869 (2006). The *Brady* duty extends to impeachment evidence and exculpatory evidence. *Youngblood*, *supra* at 869. A *Brady* violation even occurs when the government fails to turn over evidence that is known only to the police, and not to the prosecutor. *Youngblood*, *supra* at 869-870.

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it by the exercise of reasonable diligence; (3) that the state suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, there exists a reasonable probability that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281 (1998). See *Smith v Cain*, 565 US ___, ___ (2012) (the petitioner established a *Brady* violation where a police investigator's undisclosed notes contained statements directly contradicting an eyewitness's trial testimony; because the eyewitness's testimony constituted the sole evidence linking the petitioner to the crime, the evidence was "material" within the meaning of *Brady*, 373 US at 87).

[4] *Brady v Maryland*, 373 US 83 (1963).

"Where the trial court has discretion as to how to handle claims of noncompliance with discovery orders, a hearing is required, not only to determine whether there has been a noncompliance but to inquire into the causes thereof, its impact, and any circumstances that might bear on the choice of an appropriate remedy." *People v Taylor (Robert)*, 159 Mich App 468, 475 n 9 (1987).

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252 (2002) (trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on prosecution's inadvertent failure to disclose a police report).

If an inadvertent discovery violation is established, a trial court may grant a continuance, if requested, to alleviate any harm by allowing both parties to prepare for the new evidence without requiring the exclusion of relevant evidence. *People v Elston*, 462 Mich 751, 764 (2000).

Where the prosecution's failure to disclose a transcript of a witness's prior statements, given pursuant to an investigative subpoena, violated MCR 6.201(A)(2) but did not implicate the defendant's right to due process because the transcript contained no exculpatory evidence, the remedy fashioned by the trial court—precluding the prosecution from questioning the witness regarding the statements and allowing defense counsel to review the transcript before cross-examining the witness—did not constitute an abuse of discretion. *People v Jackson (Andre)*, 292 Mich App 583, 590-592 (2011).

F. Bill of Particulars

MCR 6.112(E) states that the court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

The provisions of MCL 767.44 are commonly known as "statutory short form." *People v Strutenski*, 39 Mich App 72, 73 (1972). For example, the statutory short form for murder is "A.B. murdered C.D."; the statutory short form for manslaughter is "A.B. killed C.D." MCL 767.44.

"When a statutory short-form information is used, the defendant has a statutory right to a bill of particulars, while when the common law long-form of information is used, the trial court may in its discretion order a bill of particulars." *People v Johnson (Henry)*, 427 Mich 98, 109-110 (1986). "Once a bill of particulars is supplied, a

defendant has a right 'to have the trial confined to the particulars set up therein.'" *Johnson (Henry)*, *supra* at 110, quoting *People v Ept*, 299 Mich 324, 326 (1941). Accordingly, "the procedural implementation of MCL 767.44 assures that the defendant will have notice in advance of trial of the factual basis underlying the alleged offense." *Johnson (Henry)*, *supra* at 110.

Where a preliminary examination adequately informs a defendant of the charge against him or her, the need for a bill of particulars is obviated. *People v Harbour*, 76 Mich App 552, 557 (1977).

G. Standard of Review

A trial court's decision regarding discovery is reviewed for an abuse of discretion. *Phillips (Paul)*, 468 Mich at 587.

A trial court's decision on a motion for mistrial based on a discovery violation is reviewed for an abuse of discretion. *Banks*, 249 Mich App at 252.

A trial court's decision regarding the appropriate remedy for noncompliance with a discovery order is reviewed for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598 (1997).

3.2 Witnesses—Disclosure, Production, and Appointment

A. Witness Disclosure

MCR 6.201(A)(1) requires a party to provide all other parties with the names and addresses of all witnesses the party may call at trial. Alternatively, a party may provide the name of the witness and make the witness available to the other party for interview. *Id*. The witness list may be amended without leave of the court no later than 28 days before trial. *Id*. **Note:** While MCL 767.94a concerns disclosure of certain material or information by the defendant to the prosecuting attorney, MCR 6.201 controls discovery in criminal cases. *People v Phillips (Paul)*, 468 Mich 583, 587-589 (2003); Administrative Order 1994-10[5].

MCL 767.40a(1) requires the prosecuting attorney to attach to the filed information a list of all witnesses known to the prosecuting attorney that may be called at trial, and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement

[5] http://coa.courts.mi.gov/rules/documents/3AdministrativeOrders.pdf.

officers. The prosecuting attorney is under a continuing duty to disclose the names of any further res gestae witnesses as they become known. MCL 767.40a(2).

Ordinarily, late endorsement of witnesses should be permitted and a continuance granted to obviate any potential prejudice that might result. *People v Yost (Donna Alice)*, 278 Mich App 341, 379, 386 (2008). The decision to permit the late endorsement of a witness is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326 (2003).

B. Witness Location and Production

A fundamental element of due process is a defendant's right to present witnesses in his or her favor. *Washington (Jackie) v Texas*, 388 US 14, 19 (1967); US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1.

A prosecutor is obligated to provide reasonable assistance to locate witnesses on a defendant's request. *People v Cook*, 266 Mich App 290, 295 (2005). A prosecutor is not statutorily obligated to locate, endorse, and produce unknown persons who might be res gestae witnesses. *Cook*, *supra* at 295.

1. Material Witness

If there is a material witness without whose testimony an indigent defendant cannot safely proceed to trial, the trial court may, in its discretion, order that a subpoena be issued and served on the defendant's behalf at the state's expense. MCL 775.15; *People v Thomas (William)*, 1 Mich App 118, 125 (1965). To implement a defendant's constitutional and statutory rights to compulsory process when a material witness resides outside of the state, Michigan has adopted the uniform act to "secure the attendance of witnesses from without a state in criminal proceedings." *People v McFall*, 224 Mich App 403, 407-408 (1997); MCL 767.91 *et seq*. To properly invoke the procedures under the act, a defendant must "(1) designate the proposed witness'[s] location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness'[s] testimony is material." *McFall*, *supra* at 409.

If there is a danger of losing the testimony of a material witness, the trial court may require the witness to post bond, following a hearing on the matter. MCL 767.35; MCL 765.29.

The missing witness instruction, CJI2d 5.12, provides: "_____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." It may be appropriate for the trial court to instruct the jury with the missing witness instruction if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused, or if a prosecutor fails to provide reasonable assistance to locate a witness. *People v Perez*, 469 Mich 415, 420 (2003). The propriety of the instruction depends on the individual facts of the case. *Perez*, *supra* at 420-421.

2. Appointment of Expert Witness for Indigent Defendant

In order for a trial court to appoint an expert witness for an indigent defendant, the defendant must show that he or she cannot safely proceed to trial without the witness. MCL 777.15; *People v Lueth*, 253 Mich App 670, 688 (2002) (defendant failed to show that he was unable to safely proceed without an expert accountant, where his motion for appointment of the expert was made two months after he had notice of restitution hearing). Also, a defendant must establish a nexus between the facts of his or her case and the need for an expert. *People v Tanner (Hattie)*, 469 Mich 437, 443 (2003). It is insufficient for a defendant to show a mere possibility that the requested expert will be of assistance. *Tanner (Hattie)*, *supra* at 443. "Without an indication that expert testimony would likely benefit the defense, it [is] not [an abuse of discretion] to deny without prejudice [a] motion for appointment of an expert witness." *Id* (trial court did not abuse its discretion in denying the defendant's motion for an expert witness where the defendant could not show that she could not safely proceed to trial without a DNA expert because the DNA evidence presented by the prosecutor's DNA experts was exculpatory); *People v Jacobsen*, 448 Mich 639, 641 (1995) (not error to deny without prejudice the defendant's motion for appointment of an expert witness because the defendant was unable to show a nexus between the facts of her case and the need for an expert).

On a showing of good cause, a court may order the county to pay for an indigent defendant's independent psychiatric evaluation. MCL 768.20a(3). In prosecutions for being a sexually delinquent person, the court must provide an indigent defendant with expert testimony if the defendant requests it. MCL 767.61a. Qualified interpreters must be provided for a participant in a court proceeding who cannot

understand or speak English, MCL 775.19a, or who is deaf or deaf-blind, MCL 393.503.

"The plain language of MCR 6.201(A) does not permit a trial court to compel creation of a report from either party's expert witnesses where no report exists . . . . Only existing reports that have been 'produced,' or created, by an expert witness are required to be disclosed pursuant to MCR 6.201(A)." *Phillips (Paul)*, 468 Mich at 591.

There is no inherent right to conduct an independent scientific examination with an expert of one's own choice, and a trial court's denial of criminal discovery is generally not reversible if the defendant is afforded a full opportunity for cross-examination. *People v Anderson (Woodrow)*, 88 Mich App 513, 516-517 (1979) (defendant not entitled to conduct an independent analysis of alleged cocaine where defense counsel had unrestricted cross-examination of the analyst who identified the cocaine).

A trial court's decision on an indigent defendant's motion for the appointment of an expert witness is reviewed for an abuse of discretion. *Tanner (Hattie)*, 469 Mich at 442.

3.3 Special Notice Requirement—Rape Shield Law

A. Generally

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are generally not admissible unless the trial court finds that (1) evidence of the victim's past sexual conduct with the actor, and/or (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, is/are material to a fact at issue in the case <u>and</u> that its inflammatory or prejudicial nature does not outweigh its probative value. MCL 750.520j(1).

1. Notice and Timing

If the defendant proposes to offer evidence described in MCL 750.520j(1)(a) or MCL 750.520j(1)(b), the defendant must file a written motion and offer of proof within 10 days after the arraignment on the information. MCL 750.520j(2).

Regarding the initial offer of proof under MCL 750.520j, the defendant is obligated to demonstrate the relevance of the proposed evidence to the purpose for which its admission is

sought. *People v Hackett (Charles)*, 421 Mich 338, 350 (1984). "Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an in camera evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated." *Hackett (Charles)*, *supra* at 350.

"At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues or misleading the jury. . . . [I]n ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." *Hackett (Charles)*, 421 Mich at 350-351 (internal citations omitted).

The accused has a right to be present at the in camera hearing. See, e.g., *People v Brownrigg,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 270303).[6]

2. Failure to Provide Notice

"Failure to comply with the notice requirement of MCL 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant. *People v Dixon (Darrell)*, 263 Mich App 393, 399 (2004). "Where no notice is filed, the trial court must determine whether the evidence is admissible on a case-by-case basis considering whether the defendant's timing of the offer to produce such evidence suggests an improper tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect." *Dixon (Darrell)*, *supra* at 399-400.

[6] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

3. In Camera Hearing to Determine Admissibility of New Information Discovered During the Course of Trial

If new information is discovered during the course of the trial that may make the evidence described in MCL 750.520j(1)(a) or MCL 750.520j(1)(b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under MCL 750.520j(1).

B. Evidence of Victim's Past Sexual Conduct

The admissibility of evidence under the rape-shield statute is a matter left to the court's discretion. *Hackett (Charles)*, 421 Mich at 349. The trial court should err on the side of excluding evidence of a victim's sexual conduct where its exclusion would not unconstitutionally infringe on the defendant's right to confrontation. *Hackett (Charles)*, *supra* at 349.

"Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: [i]n a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]"MRE 404(a)(3) .

Evidence of a victim's sexual reputation and past sexual conduct *with others* is not admissible when offered to prove that the conduct at issue was consensual; this is simply a variation of character evidence as circumstantial evidence of conduct. *Hackett (Charles)*, 421 Mich at 347-348. However, evidence regarding a victim's past sexual conduct *with the defendant* is relevant to a determination of whether the acts between the defendant and the victim that formed the basis of the charge were consensual. *People v Perkins*, 424 Mich 302, 309 (1986). "Past" sexual conduct refers to conduct that occurs before the evidence is offered at trial, and is not limited to conduct that occurred before the alleged crime. *People v Adair*, 452 Mich 473, 482-483 (1996).

Evidence of a victim's past sexual reputation and sexual conduct with others is not admissible for general impeachment; this is a collateral matter bearing only on general credibility. *Hackett (Charles)*, 421 Mich at 347-348.

Evidence of a victim's past sexual conduct to show the witness's bias is almost always material and should be admitted. *Hackett (Charles)*, 421 Mich at 348, citing *Commonwealth v Joyce*, 415 NE2d 181, 183-184,

187 (1981) (in rape prosecution, evidence that the victim had previously been charged with prostitution should have been admitted because it was relevant to show bias, i.e., "that, having been found in a similar situation on two prior occasions, the [victim] was herself arrested and charged with a crime . . . [t]hus, the allegation of rape against the defendant may have been motivated by [the victim's] desire to avoid further prosecution").

Evidence of a victim's sexual conduct may be probative of a victim's ulterior motive for making a false charge. *Hackett (Charles)*, 421 Mich at 348.

Evidence that a victim made false allegations of rape or sexual abuse in the past is admissible, *Hackett (Charles)*, 421 Mich at 348, and does not implicate MCL 750.520j. *People v Jackson (Nicholas)*, 477 Mich 1019 (2007).

Evidence of a victim's virginity admitted to show that because the victim had no prior sexual experience, she was less likely to have consented to sexual relations with the defendant on the night of the incident was a violation of MRE 404(a)(3), which prohibits the admission of such evidence for the purpose of refuting a defense of consent. *People v Bone*, 230 Mich App 699, 701-703 (1998).

Evidence that a victim stated she was "ready to have sex" was relevant, because it had a tendency to make the existence of consent more probable than it would be without the evidence. *People v Ivers*, 459 Mich 320, 324, 330 (1998).

Evidence that a victim is a prostitute is not admissible to impeach her credibility because there is no logical nexus between the victim's reputation as a prostitute and her character for being truthful. *People v Slovinski*, 166 Mich App 158, 173-175 (1988). However, evidence that the victim is a prostitute is admissible on the issues of consent and right of confrontation. *Slovinski*, *supra* at 177.

Evidence of prior sexual conduct involving a child victim to show that age-inappropriate sexual knowledge was not learned from the defendant, and to show motive to make false accusations, may be admissible if the trial court determines that the evidence is relevant; that another person was convicted of criminal sexual conduct involving the victim; and that facts underlying the previous conviction were significantly similar to the charged offenses. *People v Morse*, 231 Mich App 424, 434, 437 (1998).

At the defendant's trial for first-degree criminal sexual conduct (CSC-I), her constitutional right of confrontation was not violated by the exclusion of evidence of the 12-year-old victim's prior sexual experiences, which the defendant sought to introduce "because [the

victim's] trial testimony falsely portrayed him as a sexually innocent, inexperienced virgin, thereby appealing to the jury's sympathy for a sexually uninitiated victim." *People v Benton*, 294 Mich App 191, 194, 198-199 (2011) (holding that the evidence was not necessary to impeach the victim's trial testimony, which did not directly or indirectly indicate that he was a virgin at the time of his sexual contact with the defendant, and that "the victim's sexual experience or history was not legally relevant to any issue in the case . . . [because s]exual penetration with a person under 13 years of age constitutes CSC-I irrespective of the victim's consent or experience[]").

3.4 Alibi Defense

A. Notice and Timing

MCL 768.20 requires the defendant to give written notice to the prosecuting attorney of his or her intent to offer an alibi defense. MCL 768.20(1). Notice must be given at arraignment or within 15 days after arraignment, but not less than ten days before the trial, or at such other time as the court directs. *Id*. The notice must contain the names of witnesses and specific information about the place where the accused claims to have been at the time the charged offense was committed. *Id*.

Within ten days after receipt of the notice, but not later than five days before trial, or at such other time as the court directs, the prosecuting attorney must file and serve on the defendant a notice of rebuttal containing the names of the witnesses the prosecuting attorney proposes to call to controvert the defendant's alibi defense. MCL 768.20(2). Each party has a continuing duty to promptly disclose the names of additional witnesses that come to the respective party's attention who may be called to establish or rebut an alibi defense. MCL 768.20(3). Additional witnesses not identified in the first notices may be permitted to testify if the moving party gives notice to the opposing party and shows that the additional witness's name was not known when the notice required under MCL 768.20(1) and MCL 768.20(2) was due, and could not have been discovered with due diligence. MCL 768.20(3).

Despite the explicit language of MCL 768.20, an alibi notice must be permitted if it is filed not less than ten days before trial, even if it is filed more than 15 days after arraignment. *People v Bennett*, 116 Mich App 700, 704-707 (1982).

Filing a notice of an alibi defense does not require the defendant to proceed with that defense at trial, and no comment should be made

upon the failure to do so. *People v Dean*, 103 Mich App 1, 6-7 (1982). However, if a defendant proffers an alibi defense, the prosecutor may comment on the defendant's failure to produce corroborating witnesses. *People v Fields (Carl)*, 450 Mich 94, 112 (1995).

B. Failure to Provide Notice

MCL 768.21(1) provides that if the defendant fails to give timely notice of his or her intent to raise an alibi defense, the court must exclude evidence offered for the purpose of establishing the alibi. Similarly, MCL 768.21(2) provides that if the prosecuting attorney has failed to give timely notice of rebuttal, the court must exclude that rebuttal evidence. And MCL 768.21(1) and MCL 768.21(2) provide that even if timely notice is given by both parties, the court must exclude testimony from witnesses not particularly identified in the required notices. Despite the statutory language in MCL 768.21 indicating that the sanction of exclusion is mandatory, the Supreme Court has held that the statutory language in MCL 768.20(2) ("or at such other time as the court may direct") "preserves the trial court's discretion to fix the timeliness of notice in view of the circumstances." *People v Travis*, 443 Mich 668, 678-679 (1993).

To determine whether an undisclosed alibi witness's testimony should be admitted, the court should consider:

- the amount of prejudice that resulted from the failure to disclose;
- the reason for nondisclosure;
- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting the defendant's guilt; and
- other relevant factors arising out of the circumstances of the case. *Travis*, 443 Mich at 682.

This test "takes into account not only the diligence of the prosecution, but also the conduct of the defendant and the degree of harm done to the defense. It tends to protect the prosecution in cases where the defendant is at fault or where the defendant suffers little or no prejudice. At the same time, it tends to protect the defendant when the conduct of the prosecution unfairly limits the defendant's choice of trial strategy[.]" *Travis*, 443 Mich at 683.

Even if timely notice of an alibi defense is not given, a defendant may still testify to an alibi without corroborative evidence, and is still entitled to an alibi instruction. *People v McGinnis*, 402 Mich 343, 346 n 4 (1978).

When there is a failure to give timely notice of alibi, a trial court may be required to grant a requested continuance. *Bennett*, 116 Mich App at 707 (trial court reversibly erred in denying the defendant's requested continuance where the defendant asserted his constitutional right to compulsory process and to present a defense; the defendant had a legitimate reason for asserting the right, i.e., if the jury found that his alibi raised a reasonable doubt, he would have been acquitted; the defendant was not negligent in failing to tell defense counsel for several months that he had an alibi; there were no prior adjournments; and the defendant demonstrated prejudice, because he was left without a defense).

C. Impeachment with Alibi Notice

A notice of alibi constitutes an admission by a party opponent under MRE 801(d)(2)(c), and may be used to impeach a defendant's credibility at trial when his or her testimony is inconsistent with the contents of the alibi notice. *People v McCray (Lorenzo)*, 245 Mich App 631, 636-637 (2001). Note that this is distinguishable from a situation in which "a prosecutor attempts to comment on a defendant's failure to put forth an alibi defense after he [or she] has filed a notice of alibi defense, or comment on the defendant's failure to produce a witness listed on a notice of alibi, when the defendant has not presented an alibi defense." *McCray (Lorenzo)*, *supra* at 637 n 1. This is because a defendant is not required to proceed with an alibi defense after filing a notice of an alibi defense. *Dean*, 103 Mich App at 6-7. Therefore, informing the jury of a defendant's failure to produce an alibi witness where the defendant had given notice of an alibi defense "unduly denigrates defendant's case when he [or she] later chooses to present no evidence." *People v Shannon*, 88 Mich App 138, 143 (1979). However, a prosecutor may challenge an alibi defense by commenting on the defendant's failure to produce corroborating witnesses after the defendant has actually put forth an alibi defense. *Shannon*, *supra* at 145.

D. Cross-Examination of Alibi Witness

No special foundation is required before cross-examining an alibi witness about the witness's failure to come forward with the alibi information at an earlier time. *People v Gray (Norman)*, 466 Mich 44, 49 (2002).

E. Jury Instruction

CJI2d 7.4 is the jury instruction for alibi:

> "(1) You have heard evidence that the defendant could not have committed the alleged crime because [he/she] was somewhere else when the crime was committed.
>
> "(2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he/she] was somewhere else.
>
> "(3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find [him/her] not guilty."

Where the defendant raises an alibi defense and requests the instruction, failure to give it is error requiring reversal. *McGinnis*, 402 Mich at 345-347.

F. Standard of Review

The decision of a trial court to permit or preclude alibi witnesses is reviewed for an abuse of discretion. *People v Merritt*, 396 Mich 67, 83-84 (1976).

3.5 Defenses Involving a Defendant's Mental Status

A. Competency Determination

The conviction of a defendant while he or she is incompetent to stand trial violates due process. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17; *People v Newton*, 179 Mich App 484, 487 (1989). "The protection afforded by the Due Process Clause requires that a court sua sponte hold a hearing regarding competency when any evidence raises a bona fide doubt about the competency of the defendant." *In re Carey*, 241 Mich App 222, 227-228 (2000). See *Cooper v Oklahoma*, 517 US 348, 355-356 (1996) (a state may not proceed with a criminal trial after the defendant has demonstrated that he or she is more likely than not incompetent); *Riggins v Nevada*, 504 US 127, 139-140 (1992) ("[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so); *Pate v Robinson*, 383 US 375, 385-386 (1966)

(evidence introduced at trial on behalf of the accused entitled him to a hearing on the issue of whether he was competent to stand trial); and *Dusky v United States*, 362 US 402 (1960) (the test of a defendant's competency to stand trial is whether he or she has sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding, and whether he or she has a rational as well as a factual understanding of the proceedings against him or her; it is not enough that he or she is oriented to time and place and has some recollection of events).

1. General Test

"[A] criminal defendant's mental condition at the time of trial must be such as to assure that he [or she] understands the charges against him [or her] and can knowingly assist in his [or her] defense." *People v McSwain*, 259 Mich App 654, 692 (2003).

MCL 330.2020(1) states that a criminal defendant is presumed competent to stand trial unless

> "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial."

The defendant has the burden of proving incompetence. MCL 330.2020(1). A defendant's competence may be based on the defendant's medicated state. MCL 330.2020(2). The defendant must prove incompetence by a preponderance of the evidence. *Medina v California*, 505 US 437, 440 (1992).

A defendant is not incompetent when medication makes the defendant competent, even if the defendant would be incompetent without the medication. MCL 330.2020(2); *People v Mette*, 243 Mich App 318, 331 (2000). See *Sell v United States*, 539 US 166, 180 (2003) (involuntary administration of drugs solely for trial competence purposes is permitted in certain rare instances).

The standard for competency to plead guilty is the same as that for competency to stand trial. *Godinez v Morin*, 509 US 389, 396-397 (1992); *People v Matheson*, 70 Mich App 172, 179 (1976).

2. Juveniles

"[I]n juvenile competency hearings, competency evaluations should be made in light of juvenile, rather than adult, norms." *Carey*, 241 Mich App at 234. While the Mental Health Code applies to criminal proceedings (juvenile proceedings are not criminal), the Mental Health Code provisions for competency determinations can be used as a guide in juvenile competency assessments, as they provide a standard of competency and a process by which questions of competency can be raised and determined. *Carey*, *supra* at 233-234. "A juvenile need not be found incompetent just because, under adult standards, the juvenile would be found incompetent to stand trial in a criminal proceeding." *Id*. at 234.

3. Raising the Issue of Competence

The issue of competency may be raised at any time during the proceedings against a defendant. MCR 6.125(B). "[C]ompetency is an ongoing matter appropriately raised" any time evidence of incompetence arises, *People v Whyte*, 165 Mich App 409, 414 (1988), "including proceedings in the district court, or subsequent to trial, such as sentencing." 1989 Staff Comment to MCR 6.125.

The question of competency to stand trial may be raised by either party or the court. MCL 330.2024. "Whether [a] defendant is competent to stand trial is an ongoing concern of the court, and the issue of competence may be raised at any time during or after trial." *People v Garfield*, 166 Mich App 66, 74 (1988). A defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his or her competency. *People v Harris (Karen)*, 185 Mich App 100, 102 (1990). In fact, the trial court is obligated to raise the issue of the defendant's competence when "facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence." *Harris (Karen)*, *supra* at 102 (trial court erred when it failed to have the defendant's competence reevaluated before trial where the defendant had a long history of severe mental illness and, at the outset of trial, stated that she was incoherent and felt incompetent to stand trial and requested a court order for hospitalization).

The trial court is not required to accept without question an attorney's representations concerning the competence of his or her client, although counsel's expression of doubt in that regard is a factor that should be considered. *Drope v Missouri*, 420 US 162, 177 n 13 (1975). "[E]vidence of a defendant's

irrational behavior, his [or her] demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but [] even one of th[o]se factors standing alone may, in some circumstances, be sufficient." *Drope*, *supra* at 180. The trial court's ruling "as to the existence of a 'bona fide doubt'" is reviewed for an abuse of discretion. *Harris (Karen)*, 185 Mich App at 102.

4. Order for Examination

A trial court must order a competency examination "[u]pon a showing that the defendant may be incompetent to stand trial[.]" MCL 330.2026(1). The decision whether to refer a defendant for psychiatric testing is within the discretion of the trial court. *Whyte*, 165 Mich App at 411-412.

The examination must be conducted "by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1). On a showing of good cause, the court may order an independent examination. MCR 6.125(D).[7]

"Because of a presumption that the Center for Forensic Psychiatry or other facility officially certified by the Department of Mental Health will properly perform their functions, 'good cause' justifying an independent competency examination should arise only in exceptional cases." 1989 Staff Comment to MCR 6.125.

The record did not establish good cause to order an independent competency examination where the defendant was unable to get along with three different court-appointed defense attorneys, and the defendant testified that he had a head injury, but did not corroborate his assertion beyond the fact that he had an actual bump on his head. *People v Cage*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 273645).[8] See also *People v Buie*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 270414) (trial court properly acted within its discretion in rejecting the defendant's request for an independent competency examination where the request was made solely on the basis of the defendant's

[7] See SCAO form MC 204, *Order for Competency Examination*, available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc204.pdf.

[8] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

unsupported claim of bias by the Center for Forensic Psychiatry).

5. Hearing

A competency hearing must be held within five days of the court's receipt of the examiner's report, or on conclusion of the proceedings then before the court—whichever is sooner—unless an adjournment is granted upon a showing of good cause. MCR 6.125(E); MCL 330.2030(1).

The defendant must prove incompetence by a preponderance of the evidence. *Medina*, 505 US at 440. The Michigan Rules of Evidence apply during the hearing. MRE 1101(a). The court must determine the issue of competency based on evidence admitted at the hearing. MCL 330.2030(2). Absent objection, the written forensic examination report is admissible at the hearing but is not admissible for any other purpose. MCL 330.2030(3). The defense, prosecution, and court may present additional evidence at the hearing. *Id*.

Competency Hearing Checklist

- Competency issue raised
- Court finds a bona fide and legitimate doubt about defendant's competence to stand trial
- Court orders defendant to undergo a competency examination[9]
- After receiving the report, or on conclusion of the proceedings then before the court—whichever is earlier—the court orders a competency hearing and makes a competency finding

SCAO form MC 205, *Finding and Order on Competency*,[10] provides that the following findings/orders are appropriate:

> "(1) The defendant is competent to stand trial and the case shall continue to the next stage of the criminal process.
>
> "(2) The defendant, in order to maintain competency to stand trial, shall be administered appropriate medication pending and during trial.

[9] See SCAO form MC 204, *Order for Competency Examination*, available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc204.pdf.

[10] Available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc205.pdf.

> "(3) The defendant is determined incompetent to stand trial and there is a substantial probability that competence to stand trial will not be attained within the time limit established by law.
>
> "(4) The prosecuting official shall file a petition with the probate court for commencement of civil proceedings pertaining to the defendant.
>
> "(5) The defendant is incompetent to stand trial and there is substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial within the time limit established.
>
> "(6) The State Department of Mental Health is appointed medical supervisor of the defendant's course of treatment and shall fulfill all requirements established by law.
>
> "(7) The defendant shall undergo treatment to render the defendant competent to stand trial.
>
> "(8) Commitment is necessary for the effective administration of the course of treatment and therefore the defendant is committed to the custody of the State Department of Mental Health and placed at the facility recommended by the Center for Forensic Psychiatry.
>
> "(9) Since the defendant is incarcerated pending trial, the liberty of the defendant shall be restricted to the building and grounds of the facility providing treatment.
>
> "(10) If the defendant is under detention, the sheriff shall transport the defendant to and from the facility recommended by the Center for Forensic Psychiatry upon notification by the center."

If the defendant is found incompetent to stand trial, the court must determine whether there is a substantial probability that, if provided treatment, the defendant will attain competence to stand trial within 15 months or within a period of one-third of the maximum possible sentence the defendant could receive if convicted of the offense, whichever is less. MCL 330.2031(2); MCL 330.2034(1).

6. Commitment for Treatment

The court may direct the prosecutor to file a petition asserting that the defendant requires treatment if the court concludes there is not a substantial probability that the defendant will attain competence with treatment during the required time period. MCL 330.2031; MCL 330.2034(1). If the court determines there is a substantial probability that treatment will enable the defendant to attain competency, the court may order treatment and commit the defendant to the custody of the Department of Mental Health for that purpose. MCL 330.2032(3). The court must receive treatment reports as required by MCL 330.2038. The court is required to redetermine the issue of the defendant's competency to stand trial after the receipt of each report, unless the defendant waives a hearing and redetermination. MCL 330.2040(1).

The defendant may not be detained in excess of 15 months or a term longer than one-third of the sentence possible for conviction of the offense, whichever is less, or after charges against the defendant have been dismissed. MCL 330.2034(1). The 15-month period begins on the date at which the hearing determining the defendant's incompetence was held. *People v Bowman*, 141 Mich App 390, 398-399 (1985).

"[A] trial court's failure to dismiss the charges against a defendant does not deprive the trial court of jurisdiction, nor does a violation of [MCL 330.2044(1)(b)],[11] standing alone, furnish a basis on which to reverse an otherwise valid conviction. Absent a claim of prejudice to the defendant's substantive rights, failure to dismiss is a procedural violation on which reversal may not be predicated." *People v Miller (Willie)*, 440 Mich 631, 633 (1992).

7. Motions During Defendant's Incompetence

If the defendant's presence is not essential to a fair hearing and decision, pretrial motions may be heard and decided while a defendant is incompetent. MCR 6.125(F); MCL 330.2022(2).

8. Dismissal

If a defendant is determined to be incompetent to stand trial, the charges must be dismissed when the prosecutor notifies the court of his or her intention not to prosecute the case, or

[11] MCL 330.2044(1)(b) requires the dismissal of charges 15 months after a defendant is found incompetent to stand trial.

after 15 months have passed since the date on which the defendant was originally determined incompetent to stand trial. MCL 330.2044(1). The 15 months of incompetence need not be continuous. *Miller (Willie)*, 440 Mich at 641-642. Charges may be reinstated against a defendant as follows:

- If the charges were dismissed 15 months after the date on which the defendant was originally determined incompetent to stand trial, and if the crime charged was punishable by a life sentence, the prosecutor may at any time petition the court for permission to refile the charges. MCL 330.2044(3).

- If the charges were dismissed 15 months after the date on which the defendant was originally determined incompetent to stand trial, and if the crime charged was not punishable by a life sentence, the prosecutor may, within the period of time after the charges were dismissed equal to 1/3 of the maximum sentence that the defendant could receive on the charges, petition the court for permission to refile the charges. MCL 330.2044(3).

9. Statements to Examiner

MCL 768.20a(5) provides:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

See also *People v Toma*, 462 Mich 281, 292-293 (2000) (the statutory prohibition against using a defendant's statement to a mental health professional "is a clear expression by the Legislature that these statements cannot be admitted at trial except on the issue of insanity[.]").

10. Standard of Review

"[T]he determination of a defendant's competence is within the trial court's discretion." *Harris (Karen)*, 185 Mich App at 102. See also *Newton*, 179 Mich App at 488. "[T]he decision as to the existence of a 'bona fide doubt' will only be reversed where there is an abuse of discretion." *Harris (Karen)*, *supra* at 102.

B. Diminished Capacity

Diminished capacity is not a cognizable defense in Michigan. *People v Carpenter*, 464 Mich 223, 237 (2001); *People v Abraham (Nathaniel)*, 256 Mich App 265, 271 n 2 (2003).

C. Not Guilty By Reason of Insanity

1. Affirmative Defense

Insanity is an affirmative defense for which the defendant has the burden of proof by a preponderance of the evidence. MCL 768.21a(1) and MCL 768.21a(3).

2. Timely Notice Required

The defendant must file and serve on the court and the prosecuting attorney a notice of his or her intention to assert the defense of insanity not less than 30 days before trial, or at another time as directed by the court. MCL 768.20a(1). If the defendant fails to file and serve the written notice prescribed in MCL 768.20a, the court must exclude evidence offered by the defendant for the purpose of establishing the defendant's insanity. MCL 768.21(1).

3. Experts and Reports

The defendant must be referred to the center for forensic psychiatry for an examination. MCL 768.20a(2). See SCAO form MC 206, *Order for Evaluation Relative to Criminal Responsibility*[12].

The defendant must cooperate with the examination. MCL 768.20a(4). The failure to cooperate, if established at a hearing, bars any testimony of insanity, and this bar is constitutional. *Id.*; *People v Hayes (Larry)*, 421 Mich 271, 274-275 (1984).

Both the prosecution and defense may obtain examinations from independent examiners. MCL 768.20a(3). On a showing of good cause, a court may order the county to pay for an indigent defendant's independent psychiatric evaluation. MCL 768.20a(3). The defendant may have an independent psychiatric evaluation by a clinician of his or her choice. MCL 768.20a(3). The defendant must notify the prosecuting attorney

[12] Available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc206.pdf.

at least five days before the independent evaluation that he or she intends to have an evaluation done. *Id*.

Reports are required and must be provided to both parties. MCL 768.20a(6).

Statements made by the defendant during examination are not admissible on any issues other than his or her mental illness or insanity at the time of the alleged offense. MCL 768.20a(5).

"Where expert testimony is presented in support of an insanity defense, the probative value of the expert's opinion depends on the facts on which it is based." *People v Lacalamita*, 286 Mich App 467, 470 (2009). "Further, a trial court must generally defer to a jury's determination, unless '"it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe [the testimony],' or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ." '" *Id*., quoting *People v Musser*, 259 Mich App 215, 219 (2003), quoting *People v Lemmon*, 456 Mich 625, 645-646 (1998).

4. Jury Instruction

If a defendant asserts a defense of insanity in a criminal action tried before a jury, the court must instruct the jury on the definitions of mental illness, mental retardation, and legal insanity immediately before the commencement of testimony, especially expert testimony. MCL 768.29a(1). However, failure to give a preliminary instruction before an offer of testimony on insanity does not require automatic reversal. *People v Grant (Andre)*, 445 Mich 535, 537 (1994).

5. Definitions

MCL 768.21a(1) states that a person is legally insane if, as a result of mental illness or mental retardation, that person lacks substantial capacity either to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of law. Mental illness is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); CJI2d 7.9(2). Mentally retarded is defined as "significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior." MCL 330.2001a(6); CJI2d 7.9(3). "Mental illness or being mentally retarded does not

otherwise constitute a defense of legal insanity." MCL 768.21a(1).

A determination of insanity is not mandated because a person is mentally ill, *People v Bailey*, 142 Mich App 571, 573 (1985), because insanity is an extreme of mental illness. *People v Fultz*, 111 Mich App 587, 590 (1981). And, although all insane persons are mentally ill, not all mentally ill persons are insane. *Fultz*, *supra* at 590. Therefore, once a person is determined to have a mental illness, it must also be determined that he or she lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

A person under the influence of drugs or alcohol that have been voluntarily consumed or injected at the time of the alleged offense should not be considered to have been legally insane solely because of being under the influence of alcohol or controlled substances. MCL 768.21a(2).

6. Test

"An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

CJI2d 7.9(4) states that, "[t]o be legally insane, a person must first be either mentally ill or mentally retarded, as I have defined those conditions. But that is not enough. To be legally insane, the person must, because of [his/her] mental illness or mental retardation, lack substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law."

The "policeman at the elbow" standard alone does not accurately reflect whether the defendant lacked substantial capacity to conform his or her conduct to the requirements of the law. *People v Jackson (Damon)*, 245 Mich App 17, 22 (2001). However, it is proper for the prosecution to ask the defendant and/or the defendant's expert witness whether the defendant would have committed the act if a police officer was at his or her elbow (in order to explore the extent of the defendant's control), and whether there was sufficient evidence to support the court's conclusion about the defendant's sanity. *Jackson (Damon)*, *supra* at 22.

"Under [MCL 768.21a], legal insanity is determined with reference to the moment where a defendant 'commit[s] the acts constituting the offense[;]' [t]hus, what that person does after the offense . . . is not determinative of legal insanity and so is not directly relevant to the question of [defense c]ounsel's ineffectiveness [in failing to present an insanity defense]." *Walker v McQuiggan*, 656 F3d 311, 320-322 (CA 6, 2011) (granting habeas corpus relief to the petitioner and holding that the determination of the Michigan Court of Appeals that the petitioner's actions after his crime suggested that he was conscious of guilt, and thus not legally insane, was unreasonable).

7. Psychiatrists and Privileged Communications

Unless the patient has waived the privilege, privileged communications shall not be disclosed in criminal cases or proceedings, or in proceedings preliminary to such cases or proceedings, except in the circumstances set out in MCL 330.1750. MCL 330.1750(1). For example, MCL 330.1750(2)(f) provides that privileged communications shall be disclosed upon request "[i]f the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial."

8. Waiver of Privilege

"After claiming the defense of insanity and authorizing the release of medical information, [a] defendant can no longer claim an intent to preserve the sanctity of the physician-patient privilege." *People v Sullivan (John)*, 231 Mich App 510, 517 (1998). See also MCR 2.314(B).

D. Guilty but Mentally Ill

1. By Trier of Fact

If a defendant asserts a defense of insanity in compliance with MCL 768.20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following: (1) the defendant is guilty beyond a reasonable doubt of an offense; (2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time the offense was committed; and (3) the defendant

has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law. MCL 768.36(1).

CJI2d 7.12 provides, in part:

> "(2) To find the defendant guilty but mentally ill, you must find each of the following:
>
> "(3) First, the prosecutor has proven beyond a reasonable doubt that the defendant is guilty of a crime.
>
> "(4) Second, that the defendant has proven by a preponderance of the evidence that [he/she] was mentally ill, as I have defined that term for you, at the time of the crime.
>
> "(5) Third, that the defendant has not proven by a preponderance of the evidence that [he/she] lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law."

The purpose behind the creation of the guilty but mentally ill verdict was to limit the number of persons who were improperly being relieved of all criminal responsibility by way of the insanity verdict. *People v Stephan*, 241 Mich App 482, 491-492 (2000).

2. By Plea

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302 (accepting guilty or nolo contendere pleas). MCR 6.303.

E. Acquittal by Reason of Insanity

The court must immediately commit any person who is acquitted of a criminal charge by reason of insanity to the custody of the center for forensic psychiatry for a period not to exceed 60 days. MCL 330.2050(1). The court must forward to the center a full report, in the form of a settled record, of the facts concerning the crime the person committed but of which he or she was acquitted by reason of insanity. *Id*. See SCAO form MC 207, *Commitment Order Not Guilty by Reason of Insanity.*[13]

Within the 60-day period, the center for forensic psychiatry must file a report with the court, prosecuting attorney, and defense counsel. MCL 330.2050(2). The report must contain a summary of the crime the person committed but of which he or she was acquitted by reason of insanity, an opinion as to whether the person meets the criteria of a person requiring treatment or for judicial admission as defined by MCL 330.1404 or MCL 330.1515, and the facts upon which the opinion is based. MCL 330.2050(2).

After receipt of the report, the court may direct the prosecuting attorney to file, with the probate court of the person's county of residence, or of the county in which the criminal trial was held, a petition pursuant to MCL 330.1434 or MCL 330.1516 for an order of hospitalization or an order of admission to a facility. MCL 330.2050(3).

3.6 Entrapment

A. Generally[14]

Michigan has long recognized the defense of entrapment. *People v Sinclair (John)*, 387 Mich 91, 116 (1972). "The overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich 34, 52 (1991). "The challenge focuses exclusively upon the nature of the police conduct which, if improper, will not be mitigated, justified or excused in any fashion by the disposition of the accused." *People v D'Angelo*, 401 Mich 167, 182 (1977).

B. Not an Issue of Guilt or Innocence

A defendant's claim of entrapment does not require an assessment of the defendant's guilt or innocence of the crime charged. *People v White (John)*, 411 Mich 366, 387 (1981). In this respect, the entrapment defense differs from other defenses such as insanity and self-defense. *White (John)*, *supra* at 387. Rather, entrapment is a defense that argues against any prosecution of the defendant's conduct, and in that respect, entrapment is like a jurisdictional defect that is not waived, for example, by a defendant's guilty plea.

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[13] Available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/mc207.pdf.

[14] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 10, for more information on entrapment.

Id. However, "an unconditional plea . . . waives claims that occurred before the entry of the guilty plea." *People v Crall*, 444 Mich 463, 464-465 (1993).

The entrapment defense requires the presentation of evidence that is collateral to the commission of the crime and that justifies the dismissal of charges against the defendant claiming he or she was entrapped. *Juillet*, 439 Mich at 52 (entrapment is not a defense that negates an essential element of the charged crime); *D'Angelo*, 401 Mich at 179 (because test for entrapment focuses on the challenged governmental activity, the defendant is not required to admit the criminal act to raise the issue of entrapment).

C. Hearing

When the defendant raises the issue of entrapment, whether before or during trial, the trial court must conduct an evidentiary hearing outside the presence of the jury. *D'Angelo*, 401 Mich at 177-178. Both the prosecution and the defendant may present evidence, and the defendant has the burden of proving the claim of entrapment by a preponderance of the evidence. *D'Angelo*, *supra* at 178, 183. The trial court must make findings of fact. *Juillet*, 439 Mich at 61. If the trial court concludes that the defendant was entrapped, the case must be dismissed and the defendant must be discharged. *D'Angelo*, *supra* at 184.

D. Test for Entrapment

"Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson (Jessie)*, 466 Mich 491, 498 (2002) (internal citations omitted).

The objective test for entrapment "focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents," while the subjective test "focuses on the defendant's predisposition or motivation to commit a new crime." *Juillet*, 439 Mich at 53. The objective entrapment test "determine[s] whether the police conduct in question has as its 'probable and likely outcome the instigation rather than the detection of criminal activity.'" *Juillet*, *supra* at 53-54, quoting *People v Jamieson (Stephen)*, 436 Mich 61, 77 (1990). "[A]lthough the objective test is mainly concerned with the existence of reprehensible police conduct, consideration must be given to 'the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances.'" *Juillet*, *supra* at 54, quoting

Jamieson, *supra* at 74. That is, "whether the police conduct in question would induce or cause a hypothetical person to engage in criminal activity." *Juillet*, *supra* at 54. Thus, "not all generally offensive police conduct will necessarily support a claim of entrapment." *Id*.

> "When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he [or she] was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make commission of the crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted." *Johnson (Jessie)*, 466 Mich at 498-499.

See, e.g., *People v Fyda*, 288 Mich App 446, 457-460 (2010), for an analysis of several of the factors set out in *People v Johnson (Jessie)*, 466 Mich 491 (2002). In *Fyda*, *supra* at 458-460, the Court of Appeals concluded that the police did not exploit the long-term relationship between the defendant and his confidential informant-friend to manufacture a crime; that a good price was not an inducement that would make soliciting a murder unusually attractive to a hypothetical law-abiding citizen; and that government pressure was not an issue. In sum, the Court of Appeals concluded that "the police actions were 'insufficient to induce or instigate the commission of a crime by the average person, similarly situated to [defendant], who [was] not ready and willing to commit it.'" *Id*. at 460, quoting *People v Juillet*, 439 Mich 34, 55 (1991). The record showed that "the police did 'nothing more than present the defendant with the opportunity to commit the crime of which he was convicted,' which is insufficient to support a finding of entrapment." *Fyda*, *supra* at 460, quoting *People v Sexton*, 250 Mich App 211, 220 (2002).

Note: The United States Supreme Court has never applied the reprehensible conduct test for entrapment, "but has suggested in dictum that it may be available in extreme situations where '[t]he law enforcement conduct . . . [is] shocking to the universal sense of justice . . . .'" *United States v Al-Cholan*, 610 F3d 945, 952 (CA 6, 2010), quoting *United States v Russell*, 411 US 423, 431-432 (1973). The United States Court of Appeals for the Sixth Circuit has also "never applied the 'outrageous government conduct' defense, and ha[s] stated that 'there are . . . strong reasons for concluding that such a defense simply does not exist . . . .'" *Al-Cholan*, *supra* at 952, quoting *United States v Tucker*, 28 F3d 1420, 1427 (CA 6, 1994). The Sixth Circuit noted that "[e]ven if this defense is still available in theory, 'in practice, courts have rejected its application with almost monotonous regularity.'" *Al-Cholan*, *supra* at 952, quoting *United States v Santana*, 6 F3d 1, 4 (CA 1, 1993).

E. Entrapment by Estoppel

Entrapment by estoppel applies "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous[.]" *People v Woods (Robert)*, 241 Mich App 545, 548 (2000). The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable. *Woods (Robert)*, *supra* at 548. "However, when a citizen who should know better unreasonably relies on the agent's erroneous statement, or when the 'statement' is not truly erroneous, but just vague or contradictory, the defense is not applicable." *Id*. at 548-549.

"'The entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law presented, and the substance of the official's statement.'" *Woods (Robert)*, 241 Mich App at 558, quoting *United States v West Indies Transport, Inc*, 127 F3d 299, 313 (CA 3, 1997).

F. Standard of Review

A trial court's finding of entrapment is reviewed for clear error. *Johnson (Jessie)*, 466 Mich at 497.

3.7 Pretrial Motions—Generally

The Michigan Court Rules do not provide for motion practice in criminal proceedings; therefore, the rules for civil motion practice apply. MCR 6.001(D).

A. Form

An application to the court for an order in a pending action must be by motion. MCR 2.119(A)(1). A motion must be in writing (unless made during a hearing or trial); state with particularity the grounds and authority on which it is based; state the relief or order sought; and be signed by the party or attorney. *Id*.

A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based. MCR 2.119(A)(2). Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 double spaced pages, exclusive of attachments and exhibits. *Id*. See *People v Leonard*, 224 Mich App 569, 578-579 (1997) (defendant granted permission to file a brief in excess of the 20-page limit where the matter was "very complicated").

B. Timing

Unless a different period is set by the court rules or by the court for good cause, a written motion, notice of the hearing on the motion, and any supporting brief or affidavits must be served at least nine days (if served by mail), or at least seven days (if served by delivery), before the time set for the hearing. MCR 2.119(C)(1).

Unless a different period is set by the court rules or by the court for good cause, any response to a motion (including a brief or affidavits), required or permitted by the court rules, must be served at least five days (if served by mail), or at least three days (if served by delivery), before the hearing. MCR 2.119(C)(2).

If the court sets a different time for serving a motion or response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order. MCR 2.119(C)(3).

Unless the court sets a different time, a motion must be filed at least seven days before the hearing, and any response to a motion required or permitted by the court rules must be filed at least three days before the hearing. MCR 2.119(C)(4).

C. Pretrial Conference/Scheduling

Because the court rules do not specifically provide for pretrial conferences in felony criminal cases, MCR 2.401 applies. MCR 6.001(D). MCR 2.401 gives the court broad case management authority, including the authority to require the parties to attend scheduled pretrial conferences and the authority to reject untimely plea agreements. MCR 2.401(E); MCR 2.401(F); *People v Grove*, 455 Mich 439, 469 (1997).

At an early scheduling conference under MCR 2.401(B)(1), a pretrial conference under MCR 2.401(C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events as the court deems appropriate, including filing motions, completing discovery, and scheduling a pretrial conference or trial. MCR 2.401(B)(2)(a).

The scheduling of events in a scheduling order must take into consideration the nature and complexity of the case, including the issues involved; the number and location of parties and potential witnesses, including experts; the extent of expected and necessary discovery; and the availability of reasonably certain trial dates. MCR 2.401(B)(2)(b).

The scheduling of events in a scheduling order requires meaningful consultation with all counsel of record, whenever reasonably practicable. MCR 2.401(B)(2)(c).

"The rules of civil procedure apply in criminal cases pursuant to MCR 6.001(D). Under MCR 2.401(B)(1)[(c)], the trial judge may 'enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case.' Taken together, these rules implicitly confer the discretion to decline to entertain actions beyond the agreed time frame. Were the rules not so construed, scheduling orders would quickly become meaningless." *Grove*, 455 Mich at 469.

A trial court has discretion to refuse to accept a plea agreement reached after a "plea cut-off date" established in a pretrial scheduling order. *Grove*, 455 Mich at 469.

D. Evidentiary Hearing

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds (Anthony)*, 93 Mich App 516, 519 (1979). Where a defendant fails to substantiate the claim that the evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional violation, no evidentiary hearing must be held. *People v Johnson (James)*, 202 Mich App 281, 285 (1993).

Under MCR 6.110(D), the court need not conduct an evidentiary hearing during a preliminary examination if there is a preliminary showing that the evidence in question is admissible.

At an evidentiary hearing, burdens of proof and presumptions come into play. The phrase "burden of proof" encompasses both the burden of production and the burden of persuasion. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 178-179 (1987).

The party with the burden of production must introduce sufficient evidence to have the relevant issue considered by the court. *McKinstry*, 428 Mich at 179. The burden of production may shift from one party to the other. *McKinstry, supra* at 179. For example, legal presumptions may help a party meet its burden of production and shift the burden of production to the opposing party. "In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by [MRE 302]." MRE 302(a). In a criminal case, a presumption creates an inference which does not bind the fact-finder. It also places the burden of producing evidence regarding the presumed fact on the defendant, while the ultimate burden of proof remains with the prosecution.

The burden of persuasion—to prove beyond a reasonable doubt that the defendant committed each element of the charged offense—always remains with the prosecution, and the defendant is not required to prove anything. CJI2d 1.9.

If the attorneys for the parties agree, a motion to exclude evidence may be decided on the information contained in the preliminary examination transcript. *People v Kaufman*, 457 Mich 266, 275-276 (1998); MCR 6.110(D). Presumably, the parties can also stipulate to use the transcript of another hearing or stipulate to facts necessary to resolve the motion.

The rules of evidence, except those with respect to privilege, do not apply to the determination of questions of fact preliminary to

admissibility of evidence under MRE 104(a). MRE 1101(b)(1). Preliminary questions arise regarding the admissibility of a great deal of evidence: competency of witnesses, especially expert witnesses; the existence of privileges (e.g., did the privileged relationship exist? was the statement confidential or made in the presence of a third party?); whether foundational requirements for the admission of hearsay under an exception have been met (e.g., unavailability of the declarant, where required); whether a confession was voluntary; whether evidence was seized in accordance with Fourth Amendment requirements, etc. Accordingly, MRE 104(a) is concerned with meeting the technical or constitutional requirements for admissibility.

The question whether the technical requirements of the rules of evidence have been met for the admissibility of evidence must be resolved by the trial court. If there is conflicting proof on the question and credibility is an issue, these disputes must be resolved by the trial court in making its decision.

In determining whether the proffered evidence is admissible under the technical requirements of the rules of evidence, the trial court applies a preponderance of the evidence test. *Bourjaily v United States*, 483 US 171, 175 (1987).

While the court rules do not require the trial court to make findings of fact with respect to pretrial motions, "it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions . . . ." *People v Shields*, 200 Mich App 554, 558 (1993); MCR 2.517(A)(4).

A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 481-482 (1987).

E. Disposition

Although a trial court's findings of fact and conclusions of law may facilitate appellate review, they are unnecessary in motion decisions unless required by court rule. MCR 2.517(A)(4). If the court makes findings and conclusions, they may be stated on the record or in a written opinion. MCR 2.517(A)(3).

A trial court sitting without a jury for a criminal case must make a record of the reasons for its verdict; in other words, the court must articulate its findings of fact for the record. *People v Jackson (Robert)*, 390 Mich 621, 627 (1973). No similar mandate exists for a trial court's disposition of pretrial evidentiary matters. *People v Oliver (Kenneth)*, 63 Mich App 509, 522-523 (1975).

Judges and judicial officers should promptly determine matters submitted to them. Specifically, MCR 8.107(A) provides:

> "Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be."

Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

F. When Findings of Fact and Conclusions of Law Are Required

MCR 2.517(A)(1) requires that, in actions tried without a jury or with an advisory jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." A court's decision should include "[b]rief, definite, and pertinent findings and conclusions on the contested matters . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). The requirement that a trial judge articulate the reasons for a decision in its findings of fact applies to criminal cases as well as civil cases. *Jackson (Robert)*, 390 Mich at 627. A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (Gary) (On Rehearing)*, 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith (Kerry)*, 211 Mich App 233, 235 (1995).

Findings of fact and conclusions of law are required in certain situations, including, but not limited to:

- bench trials, MCR 6.403;
- when there is joint representation of defendants, MCR 6.005(F)(3);
- directed verdicts (reasons required), MCR 6.419(D);
- when evidence of a criminal conviction is used for impeachment purposes, MRE 609;

- when sentencing a juvenile, MCR 6.931(E)(5);
- probation revocation, MCR 6.445(E)(2); and
- post-appeal evidentiary hearings, MCR 6.508(E).

G. Standard of Review

A trial court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. See *People v Collins (Richard)*, 239 Mich App 125, 138-139 (1999) ("the trial court should decide whether a hearing is necessary").

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

3.8 Motion to Dismiss

No court rule or statute specifically addresses a motion to dismiss criminal charges. MCR 2.504 is the civil court rule governing dismissal of actions. Ordinarily a motion to dismiss is used to address issues such as double jeopardy or entrapment, where the remedy is dismissal of the case.

A motion to dismiss challenging the bindover decision after the preliminary examination is typically designated as a motion to quash.

The trial court exceeds its authority when it dismisses the information against a defendant at a pretrial stage of the proceedings, *People v Morrow*, 214 Mich App 158, 165 (1995), because the prosecutor has exclusive authority to decide whom to prosecute. *People v Williams (Anterio)*, 244 Mich App 249, 254 (2001). MCL 767.29 governs the prosecution's practice of *nolle prosequi*.

The court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242 (2005).

3.9 Change of Venue

A. Generally[15]

Venue in a criminal case may be changed "upon good cause shown by either party." MCL 762.7. Generally, defendants must be tried in

[15] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for a discussion of change of venue.

the county where the crime is committed. MCL 600.8312. "[U]nfair and prejudicial news comment on pending trials has become increasingly prevalent," and "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influence." *Sheppard (Samuel) v Maxwell*, 384 US 333, 362 (1966).

The moving party has the burden of showing good cause for a change of venue. MCL 762.7. "The burden of establishing that prospective jurors have been influenced by pretrial publicity is on the party seeking the change of venue, and merely showing that jurors have been exposed to pretrial publicity is not in itself sufficient." *People v Florinchi*, 84 Mich App 128, 135 (1978). "'[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" *Skilling v United States*, 561 US ___, ___ (2010), quoting *Nebraska Press Ass'n v Stuart*, 427 US 539, 554 (1976) ("news stories about Enron did not present the kind of vivid, unforgettable information [the United States Supreme Court] ha[s] recognized as particularly likely to produce prejudice, and [the trial city's] size and diversity diluted the media's impact"). The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought. *In re Attorney General*, 129 Mich App 128, 133 (1983). Convenience of the parties and witnesses does not constitute good cause. *In re Attorney General*, *supra* at 133, 135.

Even though the effects of a crime may extend to more than one county, venue is not proper in a county where none of the criminal acts necessary to the commission of the crime occurred. *People v Webbs*, 263 Mich App 531, 534 (2004). "[T]he plain language of MCL 762.8 requires an act to be done in the perpetration of the felony without regard to where the effects of the crime are felt . . . ." *Webbs*, *supra* at 534. See also *People v Houthoofd*, 487 Mich 568, 583-584 (2010), agreeing with the *Webbs* analysis of MCL 762.8: "MCL 762.8 is unambiguous and clearly provides that when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the acts was committed. The statute does not contemplate venue for prosecution in places where the effects of the act are felt[.]" In *Houthoofd*, *supra* at 571, the defendant was convicted of solicitation to commit murder and witness intimidation. Although MCL 762.8 was inapplicable because neither crime "consist[ed] or [wa]s the culmination of two or more acts[,]" the analysis remained the same: "it is the *act* that constitutes the felony—rather than its effects—that gives rise to venue." *Houthoofd*, *supra* at 584-585. Using that analysis, the Court held that Saginaw County was an improper venue in which to hold the defendant's trial for solicitation to commit murder and witness intimidation, because the defendant "did not commit the act necessary to complete the crime of witness intimidation . . . in Saginaw

County[,]" and "the act required for the crime of solicitation to commit murder, the offer or promise to give something of value for murder, occurred in Arenac County[.]" *Id*. at 586.

Where potential jurors swear that they will put aside preexisting knowledge and opinions about the case and that they will be able to decide the case impartially based on the evidence at trial, such preexisting knowledge and opinions do not constitute good cause justifying a change of venue. *People v DeLisle*, 202 Mich App 658, 662-663 (1993).

"Federal precedent has used two approaches to determine whether the failure to grant a change in venue is an abuse of discretion. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *People v Jendrzejewski*, 455 Mich 495, 500-501 (1997).

In *People v Cline*, 276 Mich App 634, 638-642 (2007), the Court of Appeals reviewed the circumstances of the defendant's case in light of the standards set out in *DeLisle*, 202 Mich App 658, and *Jendrzejewski*, 455 Mich 495, to determine whether the defendant's counsel was ineffective for failing to bring a motion for change of venue. In *Cline*, *supra* at 638-642, the totality of the circumstances surrounding the jury selection—including the fact that nine out of the selected jury panel of 14 heard about the case before trial, and 11 local newspaper articles about the case were published—did not overcome the jurors' assurances that they could decide the case impartially.

B. Timing

It is the preferred practice for the trial court to defer ruling on a motion for change of venue until after jury selection has been attempted in the original county. *People v Harvey (Wayne)*, 167 Mich App 734, 741 (1988).

A district court does not have authority to order a change of venue in a felony case. *In re Attorney General*, 129 Mich App at 131-132.

C. Standard of Review

A trial court's ruling on a motion for change of venue is reviewed for an abuse of discretion. *Jendrzejewski,* 455 Mich at 500. A trial

court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo. *Webbs*, 263 Mich App at 533.

"[B]ecause improper venue is not a constitutional structural error, [it] is subject to a harmless error analysis under MCL 769.26." *People v Houthoofd*, 487 Mich 568, 593 (2010). "Moreover, MCL 600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue." *Houthoofd*, *supra* at 593-594.

3.10 Separate or Joint Trial

A. One Defendant—Multiple Charges[16]

A defendant may be charged with two or more offenses in a single information or indictment filed by the prosecuting attorney. MCR 6.120(A). However, each offense with which a defendant is charged must be stated in a separate count. *Id*. When two or more informations or indictments are filed against a single defendant, they may be consolidated for a single trial. *Id*.

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party's motion, or the stipulation of all parties—may join offenses charged in more than one information or indictment against a single defendant. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party's motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). Joinder is appropriate if the offenses are related, i.e., if the offenses are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1)(a)–MCR 6.120(B)(1)(c). "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." MCR

[16] See also Section 2.8(C)(1) and the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for more information on severance or joinder involving multiple charges against a single defendant.

6.120(B)(2). "If the court acts on its own initiative, it must provide the parties an opportunity to be heard." MCR 6.120(B)(3).

On a defendant's motion, the court must sever unrelated offenses. MCR 6.120(C).

B. Multiple Defendants

"An information[17] or indictment may charge two or more defendants with the same offense." MCR 6.121(A). "An information or indictment may charge two or more defendants with two or more offenses when each defendant is charged with accountability for each offense, or the offenses are related as defined in MCR 6.120(B)." MCR 6.121(A)(1)–MCR 6.121(A)(2). "When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment . . . ." MCR 6.121(A).

On a defendant's motion, the court must sever unrelated offenses. MCR 6.121(B). The court has discretion whether to require separate or joint trials when two or more defendants are jointly indicted for any criminal offense. MCL 768.5; *People v Hana*, 447 Mich 325, 331 (1994), amended 447 Mich 1203 (1994). Michigan law strongly favors joint trials and a decision to join or consolidate two cases will not be reversed on appeal absent a showing of prejudice to an accused's substantial rights. *People v Carroll*, 396 Mich 408, 414 (1976).

Joinder of distinct criminal charges is allowed when (1) there is a significant overlap of issues or evidence, (2) the charges represent a series of events, and (3) there is a "substantial interconnection" between the defendants, the proofs, and the factual and legal bases of the crimes charged. *People v Stricklin*, 162 Mich App 623, 630 (1987).

In a multidefendant trial, if a codefendant's attorney seeks to "stand in" when defense counsel for another defendant is absent for a brief period, the judge must determine on the record that the defendant knowingly and intelligently accepts substitute counsel on those occasions. *Olden v United States*, 224 F3d 561, 568-569 (CA 6, 2000).

If defendants are tried jointly, CJI2d 2.19 or CJI2d 3.7 must be given. Both instructions caution the jury about considering the law and the

[17] See also Section 2.8(C)(2) and the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for more information on separate trials involving multiple defendants.

evidence as it applies to each defendant. CJI2d 2.19 is a procedural instruction that states:

> "(1) There is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
>
> "(2) You should consider each defendant separately. Each is entitled to have [his/her] case decided on the evidence and the law that applies to [him/her].
>
> "[(3) If any evidence was limited to (one defendant/ some defendants) you should not consider it as to any other defendants.]"

CJI2d 3.7 is a composite instruction that states:

> "(1) _____ and _____ are both on trial in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
>
> "(2) You should consider each defendant separately. Each is entitled to have [his/her] case decided on the evidence and the law that applies to [him/her].
>
> "[(3) If any evidence was limited to (one defendant/ some defendants) you should not consider it as to any other defendants.]"

Severance is only mandated under MCR 6.121(C) when a defendant moves for severance and demonstrates that severance is necessary to prevent prejudice to his or her substantial rights. *Hana*, 447 Mich at 331. A defendant is entitled to a separate trial where it appears that a codefendant may testify to exculpate himself or herself and incriminate the defendant. *People v Hurst*, 396 Mich 1, 4 (1976). This rule does not apply to bench trials. *People v Butler (Michael)*, 193 Mich App 63, 66 (1992). To warrant severance, defenses must not only be inconsistent, but also mutually exclusive or irreconcilable. *People v Cadle*, 209 Mich App 467, 469 (1995).

The use of dual juries as an alternative to severance. Dual juries may be used to avoid the problems arising from a joint trial of defendants with antagonistic defenses. *People v Hoffman*, 205 Mich App 1, 19 (1994). The use of separate juries is merely a partial form of severance and should be evaluated using the factors applicable to a motion for separate trials. *Hana*, 447 Mich at 331. The court should determine whether the dual-trial procedure provides defendants

with the same protections they would have gotten through separate trials. *Hana*, *supra* at 351-352.

C. Standard of Review

A trial court's ruling on a motion for joinder or severance is reviewed for an abuse of discretion. *Hana*, 447 Mich at 331; *People v Girard*, 269 Mich App 15, 17 (2005). However, whether the charges are related is a question of law that is reviewed de novo. *Girard*, *supra* at 17.

3.11 Speedy Trial

A. Right to a Speedy Trial[18]

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan Constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. MCR 6.004(A) provides that the defendant and the prosecution are entitled to a speedy trial and to a speedy resolution of all matters before the court. "'The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest.'" *People v Patton*, 285 Mich App 229, 236 (2009), quoting *People v Williams (Cleveland)*, 475 Mich 245, 261 (2006). "Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A). To preserve the issue of speedy trial for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain*, 238 Mich App 95, 111 (1999).

Where there has been a delay of at least six months after a defendant's arrest, further investigation into a claim of denial of the right to a speedy trial is necessary. *People v Daniel (Hank)*, 207 Mich App 47, 51 (1994). Where the delay following a defendant's arrest is less than 18 months, the defendant bears the burden of showing prejudice by reason of the delay. *Hank* (*Daniel)*, *supra* at 51. After a delay of 18 months, prejudice to the defendant is presumed and the burden shifts to the prosecution to rebut the presumption. *People v Collins (Harold)*, 388 Mich 680, 695 (1972).

In deciding whether a defendant has been afforded a speedy trial, the Michigan Supreme Court adopted the general rule established by the United States Supreme Court in *Barker v Wingo*, 407 US 514

[18] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for more information on the right to a speedy trial.

(1972). *Cain*, 238 Mich App at 112. When a defendant claims a violation of the right to a speedy trial, the trial court must consider four factors: (1) the length of delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) any prejudice to the defendant.[19] *People v McLaughlin*, 258 Mich App 635, 644 (2003). Violation of a defendant's constitutional right to a speedy trial requires dismissal with prejudice. MCR 6.004(A).

B. Length of the Delay

The length of the delay itself is not determinative of a speedy trial claim. *People v Hammond*, 84 Mich App 60, 67 (1978). A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue. *Daniel (Hank)*, 207 Mich App at 51. However, where the delay is less than 18 months, the defendant must show prejudice. *Cain*, 238 Mich App at 112. A delay of more than 18 months is presumptively prejudicial to the defendant and shifts the burden to the prosecution to show that the delay has not prejudiced the defendant. *Cain*, *supra* at 112.

C. Reasons for the Delay

Regarding the second prong—reason for delay—the court balances the conduct of both the prosecution and the defendant. *Collins (Harold)*, 388 Mich at 690. The reasons for the delay are examined by the court, and each period of delay is attributed to either the prosecution or the defendant. *People v Ross (Edward)*, 145 Mich App 483, 491 (1985). Ordinarily, "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned[,]" because "assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Vermont v Brillon*, 556 US 81, 92, 94 (2009). However, it is possible that an assigned counsel's delay could be charged to the state if a breakdown in a state's public defender system caused the delay. *Brillon*, *supra* at 94.

"[I]f the defendant has not contributed to the delay, a period of otherwise unexplained inaction in excess of 180 days in the prosecution of a charge pending against an inmate is per se a violation of the statute, unless the people make an affirmative showing of exceptional and unavoidable circumstances which hamper the normally efficient functioning of the trial courts." *People v Forrest*, 72 Mich App 266, 273 (1976).

Unexplained delays are charged to the prosecution. *Ross (Edward)*, 145 Mich App at 491. Delays inherent in the court system (e.g.,

[19] These four factors are known as the *Barker* factors.

docket congestion) are technically attributed to the prosecution but are given a neutral tint and assigned only minimal weight. *People v Gilmore*, 222 Mich App 442, 460 (1997).

Delays occasioned by the prosecution's successful pursuit of an interlocutory appeal are "'taken out of the calculation,'" and therefore, are not attributable to either party when determining whether a defendant's right to a speedy trial has been violated. *People v Waclawski*, 286 Mich App 634, 664 (2009), quoting *People v Missouri*, 100 Mich App 310, 321 (1980).

D. Assertion of the Right

A defendant's failure to assert his or her right to a speedy trial is the third factor the court must consider in determining if the right to a speedy trial has been violated. *Cain*, 238 Mich App at 112. While failure to assert the right to a speedy trial does not automatically constitute a waiver of the right, it is strong evidentiary support for the conclusion that the defendant's right was not violated. *Collins (Harold)*, 388 Mich at 692-694. In *People v Missouri (Milton)*, 100 Mich App 310, 322 (1980), the Court of Appeals concluded that the defendants' assertion of the right to a speedy trial two weeks before trial and nearly 30 months after indictment was strong evidence that the delay had not caused a serious deprivation of their right to a speedy trial.

E. Resulting Prejudice

The final inquiry is whether the defendant experienced any prejudice as a result of the delay. *Collins (Harold)*, 388 Mich at 694. There are two types of prejudice a defendant may experience: (1) prejudice to his or her person; and (2) prejudice to his or her defense. *Collins (Harold)*, *supra* at 694. Prejudice to the defendant's person generally takes the form of oppressive pretrial incarceration leading to anxiety and concern. *Id*. Prejudice to the defendant's defense might include the unavailability of key witnesses. *Id*. Delay that impairs the defendant's defense is the most serious because a defendant's inability to adequately defend against criminal charges skews the fairness of the entire system. *Id*.

General allegations of possible prejudice (e.g., witness's memories fade, financial burden) are insufficient. *Gilmore*, 222 Mich App at 462.

F. Recognizance Release

MCR 6.004(C) [20]provides potential relief for defendants who have been incarcerated and are awaiting trial:

> "In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

The following periods of delay are excluded from the computation of the 28-day or 180-day period:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> "(2) the period of delay during which the defendant is not competent to stand trial,
>
> "(3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> "(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> "(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

[20] See Section 2.3(B).

> "(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C)(1)–MCR 6.004(C)(6).

The moving party has the burden of proof. The party opposing the motion has the burden to show good cause for the delay. MCR 6.004(C)(1)–MCR 6.004(C)(6). The prosecution has the burden of showing that a period of delay resulting from an adjournment requested by the prosecution should not be included in determining whether the defendant has been incarcerated for the requisite period. MCR 6.004(C)(4).

G. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D)(1) provides that, except for crimes exempted by MCL 780.131(2):[21]

> "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."

MCR 6.004(D)(2) describes the remedies for violations of the 180-day rule:

> "In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of

[21] Warrants, indictments, informations, or complaints arising from a criminal offense by an inmate committed while an inmate, or a criminal offense by an escaped inmate committed before the inmate was returned to custody. A community corrections center is a state correctional facility for purposes of the exception in MCL 780.131(2)(a). *People v McCullum*, 201 Mich App 463, 465-466 (1993).

> any further force or effect, and the court shall enter an order dismissing the same with prejudice."

MCL 780.131 "contains no exception for charges subject to consecutive sentencing." *People v Williams (Cleveland)*, 475 Mich 245, 248 (2006), overruling *People v Smith (Rosie)*, 438 Mich 715 (1991), to the extent of its inconsistency with MCL 780.131. Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. *Williams (Cleveland)*, *supra* at 254-255. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his or her right to a speedy trial. *Williams (Cleveland)*, *supra* at 254-255. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Williams (Cleveland)*, *supra* at 265.

The statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. 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." *Williams (Cleveland)*, 475 Mich at 259, overruling *People v Hill (James)*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963), to the extent of their inconsistency with MCL 780.131.

The 180-day rule does not require that trial be commenced within 180 days, but rather, that the prosecution make good-faith efforts on the case during the 180-day period, and that the prosecution then promptly proceed to prepare the case for trial. *People v Hendershot*, 357 Mich 300, 304 (1959). If the prosecution takes preliminary action within the 180-day period but the initial action is followed by inexcusable delay that shows an intent not to promptly bring the case to trial, the court may find the absence of good-faith action and dismiss the case. *Hendershot*, *supra* at 303-304. For example, in *People v Davis (Michael)*, 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 (Michael)*, *supra* at 743.

See also *People v Lown*, 488 Mich 242, 246-247 (2011), which clarified the correct interpretation of the statutory "180-day rule" established by MCL 780.131 and MCL 780.133:

> "[T]he [180-day] rule does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered. Rather . . . it is sufficient that the prosecutor 'proceed promptly' and 'move[] the case to the point of readiness for trial' within the 180-day period. *People v Hendershot*, 357 Mich 300, 304 (1959). Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith *exception* to the rule. Instead, as originally articulated in *Hendershot*, good faith is an implicit component of proper action by the prosecutor, who may not satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably. . . . [T]he statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the DOC [Department of Corrections]. Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor's initial steps are 'followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . .' Accordingly, a court should not calculate the 180-day period by apportioning to each party any periods of delay after the DOC delivers notice. . . . [A] violation of the 180-day rule—which deprives the court of 'jurisdiction,' MCL 780.133—specifically divests the court of *personal jurisdiction* over the defendant for the particular action."

In *Lown*, 488 Mich at 247, the statutory 180-day rule was satisfied "because the prosecutor commenced action well within 180 days after receiving notice from the DOC, 'proceed[ed] promptly and

with dispatch thereafter toward readying the case for trial,' and '[stood] ready for trial within the 180-day period . . . .'"

H. Detainers

A detainer, under the Interstate Agreement on Detainers Act (IAD), MCL 780.601 *et seq*., is generally defined as "a notification filed with the institution in which an individual is serving a sentence, advising that the prisoner is wanted to face pending charges in the notifying state." *People v Shue*, 145 Mich App 64, 70 (1985). "The purpose of the IAD is to facilitate the prompt disposition of outstanding charges against an inmate incarcerated in another jurisdiction." *People v Patton*, 285 Mich App 229, 232 (2009). "'Once a detainer is filed, it is then that the IAD is triggered and compliance with the provisions of the agreement is required.'" *Patton*, *supra* at 232, quoting *People v Gallego (Luis)*, 199 Mich App 566, 574 (1993). The IAD applies only to prisoners serving a prison sentence; it does not apply to a person in custody awaiting extradition. *People v Monasterski*, 105 Mich App 645, 653 (1981).

Article III of the IAD involves notice instituted by the prisoner, and has a time limit of 180 days. *People v Waclawski*, 286 Mich App 634, 646 (2009). Article IV of the IAD involves notice instituted by the prosecutor, and has a time limit of 120 days. *Waclawski*, *supra* at 646.

Article III requires that a defendant be brought to trial within 180 days of the prosecutor's receipt of the defendant's request for disposition of charges pending against the defendant. *People v Swafford*, 483 Mich 1, 3, 17 (2009). There is no requirement that the detainer be lodged during the defendant's term of imprisonment, only that the detainer be lodged at the time the defendant requests disposition of the pending charges. *Swafford*, *supra* at 9-10. In addition, there is no requirement that the detainer be sent to the institution in which the defendant is imprisoned if all parties are aware of the detainer and it follows the defendant to the institution where he or she is imprisoned when the defendant files for final disposition of the pending charges. *Id*. at 13-14. In sum, "[t]he clear language of the IAD, MCL 780.601, states that if the prosecutor fails to bring a defendant to trial within 180 days of receiving the defendant's request for a final disposition made while the defendant is serving a term of imprisonment if a 'detainer has been lodged against the prisoner,' the court 'shall enter an order dismissing the [complaint] with prejudice.'" *Swafford*, *supra* at 17. In *Swafford*, *supra* at 3, that is "precisely what happened," and the trial court properly dismissed with prejudice the charges pending against the defendant.

Article III(c) of the IAD provides that "[t]he warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him [or her] of the source and contents of any detainer lodged against him [or her] and shall also inform him [or her] of his [or her] right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." However, the IAD does not expressly provide for a remedy in cases involving a violation of Article III(c). "'The IAD [only] expressly requires dismissal of a criminal charge in three circumstances: (1) if, after a prisoner has made the required request pursuant to Article III, trial does not occur within the required 180 days; (2) when trial does not occur before the prisoner, having been transferred to the receiving state, is sent back to the sending state; or (3) when the receiving state fails or refuses to accept temporary custody of the prisoner.'" *Patton*, 285 Mich App at 232-233, quoting *Lara v Johnson*, 141 F3d 239, 243 (CA 5, 1998), mod 149 F3d 1226 (CA 5, 1998). In *Patton*, *supra* at 232, the defendant was not notified that a detainer had been lodged against him until six months after its entry (i.e., he was not "promptly inform[ed]" of the detainer as required by Article III(c)). However, the defendant was not entitled to have his conviction vacated and the charge dismissed because the IAD does not expressly provide for the remedy of dismissal for a violation of Article III(c). *Patton*, *supra* at 235.

Article IV (120-day time limit) was triggered when the prosecution sent Form V of the IAD (*Request for Temporary Custody*) to bring the defendant back to Michigan to face untried charges before any action was taken by the defendant under Article III. *People v Waclawski*, 286 Mich App 634, 652 (2009). The form "clearly list[ed] the charges against [the] defendant and state[d] that the prosecutor 'request[ed] temporary custody of the prisoner pursuant to Article IV(a) of the Interstate Agreement on Detainers (IAD).'" *Waclawski*, *supra* at 651. Once the prosecutor initiated the form, the IAD was triggered and compliance with the 120-day time limit in Article IV(c) was required. *Waclawski*, *supra* at 652. The defendant's later completion of Form I of the IAD (*Notice of Untried Indictment, Information or Complaint and of Right to Request Disposition*), which demands trial within 180 days under Article IV, and Form II (*Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Informations or Complaints*), did not constitute a valid request for extradition under the IAD because the forms were never mailed or received by the court. *Waclawski*, *supra* at 650-651. Therefore, the 180-day time limit of Article III was never triggered, and the defendant was entitled to trial within the 120-day time limit set out in Article IV. *Waclawski*, *supra* at 650-652.

"But for good cause shown in open court," Article IV(c) of the IAD requires that trial begin against a prisoner within 120 days of the

prisoner's arrival in the receiving state. *People v Harris (Michael)*, 148 Mich App 506, 513 (1986). The phrase "but for good cause shown" applies only to adjournments and other delays caused by the prosecution; a trial court should not include adjournments requested by the defendant or other delays caused by the defendant in calculating the actual delay attributable to the prosecution. *Harris (Michael)*, *supra* at 513.

However, the 120-day time limit may be tolled when the delay was caused by defense counsel's motion to withdraw from representing a defendant due to a conflict of interest. *People v Stone*, 269 Mich App 240, 244-245 (2005). In *Stone*, *supra* at 245-246, the trial court properly excluded the 13-day period from the IAD's time limit calculations because defense counsel's withdrawal on the basis of a conflict of interest is an act "typically [done] [] for the benefit of the defendant." Where a delay results from action taken to accommodate the defendant's interests, the period of delay is properly excluded from the IAD's 120-day limit. *Id*.

MCR 1.108 provides the method for computing time. *People v Sinclair (Jody)*, 247 Mich App 685, 687-688 (2001). "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order." MCR 1.108(1).

I. Standard of Review

The trial court's findings with regard to an alleged violation of the defendant's right to a speedy trial are reviewed for an abuse of discretion. *People v Krum*, 374 Mich 356, 363 (1965). A defendant's unconditional guilty plea waives appellate review of the violation of the right to a speedy trial. *People v Depifanio*, 192 Mich App 257, 258 (1991).

Whether a defendant was denied his or her constitutional right to a speedy trial is a mixed question of law and fact. *Gilmore*, 222 Mich App at 459. An appellate court reviews de novo questions of law, and reviews for clear error a trial court's factual findings. *Gilmore*, *supra* at 459.

3.12 Adjournment or Continuance

A. Generally[22]

MCL 768.2 provides that the trial court, in a criminal case, has discretion to adjourn or continue a criminal case for good cause shown in the manner provided for civil cases. The statute states that where the prosecution and the defendant consent to an adjournment, there shall be a showing to the court that the consent is "founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." MCL 768.2.

"The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E).

Denial of a continuance may violate a defendant's right to due process in certain circumstances. *Ungar v Sarafite*, 376 US 575, 589 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar*, *supra* at 589.

The moving party has the burden of establishing good cause for the adjournment. MCL 768.2; MCR 2.503(B)(1).

B. Factors

If the defendant requests an adjournment, the following factors should be considered:

- whether the defendant is asserting a constitutional right (e.g., the right to counsel);
- whether the defendant has a legitimate reason for asserting the right (e.g., a bona fide irreconcilable dispute with counsel over whether to call alibi witnesses);
- whether the defendant was negligent with regard to any delay in his or her request;

[22] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for more information on adjournment and continuance.

- whether the defendant requested previous adjournments; and

- whether the defendant can demonstrate that prejudice would result from a denial of the request. *People v Williams (Charles)*, 386 Mich 565, 575-578 (1972); *People v Lawton*, 196 Mich App 341, 348 (1992).

Adjournments were properly granted in the following situations:

- When defense counsel was permitted to withdraw. *Williams (Charles)*, 386 Mich at 575-576.

- Preparation of defense expert witness endorsed on the day of trial. *People v Wilson (Roy)*, 397 Mich 76, 81-82 (1976).

- New witness listed by prosecutor or codefendant turns state's evidence shortly before trial. *People v Suchy*, 143 Mich App 136, 139-143 (1985).

- New statements made by witnesses shortly before trial. *Suchy*, 143 Mich App at 142-146.

- Defendant requested properly fitted clothes to replace ill-fitting clothes brought for trial. *People v Turner (Clarence Duane)*, 144 Mich App 107, 110-111 (1985).

A trial court's desire to expedite the court's docket is not a sufficient reason to deny an otherwise proper request for a continuance. *Williams (Charles)*, 386 Mich at 577.

C. Standard of Review

A trial court's grant or denial of a party's request for a continuance is reviewed for an abuse of discretion. *People v Jackson (Walter)*, 467 Mich 272, 276 (2002).

Even if the trial court abused its discretion in denying a defendant's request for a continuance, the defendant must still establish that he or she was prejudiced by the court's decision. *Williams (Charles)*, 386 Mich at 574.

3.13 Motion to Suppress Evidence

A. Burden

The defendant[23] has the burden of going forward on a motion to suppress. See, e.g., *Nardone v United States*, 308 US 338, 341 (1939) ("[t]he burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction" that the wiretap used was illegal).

Although it is generally stated that the defendant has the burden of "proving" or "establishing" his or her claim, the standard of persuasion is not always clear. The general rule is a preponderance of the evidence. But it is difficult to generalize because in many circumstances, the burden of persuasion is either on the prosecution once the issue is raised, or may shift upon the presentation of some evidence. In many circumstances, the Constitution requires that the prosecution carry the burden, and by a particular evidentiary standard. See *Coolidge v New Hampshire*, 403 US 443, 454-455 (1971) (searches conducted outside of the judicial process are per se unreasonable under the Fourth Amendment, subject to a few exceptions; there must be a showing by those who seek an exemption that the exigencies of the situation made the course taken necessary); *United States v Jeffers*, 342 US 48, 51 (1951) (mandate of the Fourth Amendment requires adherence to judicial processes; burden is on those seeking the exemption to show the need for it); and *Nardone*, 308 US at 341 (defendant has the burden in the first instance of proving that an illegal wiretap was used in procuring evidence, and, once established, must be given the opportunity to prove that a substantial portion of the case against him or her was therefore unlawfully procured; this leaves the prosecution an ample opportunity to convince the trial court that its proof had an independent origin).

B. Timing

Ordinarily, a motion to suppress evidence must be made before trial; however, the trial court may permit it during trial. *People v Ferguson*, 376 Mich 90, 93-94 (1965); *People v Gentner, Inc*, 262 Mich App 363, 368 (2004). The trial court need not permit an untimely motion to suppress when the factual circumstances giving rise to the issue were known to the defendant before trial and could have been raised in advance. *Ferguson*, *supra* at 94-95.

[23] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions*.

C. Evidentiary Hearing

An evidentiary hearing is required where the admissibility of evidence is challenged on constitutional grounds and questions of fact exist. *People v Wiejecha*, 14 Mich App 486, 488 (1968); *Jackson (Nathan) v Denno*, 378 US 368, 376-377 (1964) (voluntariness of confession).

If the parties stipulate, a motion to suppress evidence may be decided on the basis of the information contained in the preliminary examination transcript. *People v Kaufman*, 457 Mich 266, 276 (1998); MCR 6.110(D).

MRE 104(b) provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Often, evidence is only relevant if other facts are also demonstrated. For example, evidence proffered under MRE 404(b) of uncharged misconduct by the defendant may only be relevant if it is shown that the misconduct occurred and that the defendant committed the misconduct. Accordingly, the question with conditional relevance is: have the facts upon which the proffered evidence depends for its relevance been demonstrated?

At an evidentiary hearing on those types of issues, the court must only find that there is sufficient evidence for the trier of fact to find by a preponderance of the evidence, that the conditional fact has been proven. *Huddleston v United States*, 485 US 681, 690 (1988). Unlike preliminary questions of admissibility, the ultimate resolution of the question of conditional relevance is for the jury. Stated another way, whether the conditional fact has actually been proven is for the fact-finder to decide at trial. *Huddleston*, *supra* at 690-691.

Because, unlike preliminary questions of admissibility, the ultimate determination of whether the condition has been met for conditional relevance is for the jury, the rules of evidence apply. MRE 104(b); MRE 1101(a).

Because MRE 104(b) provides that the evidence is admissible upon submission of evidence "sufficient to support a finding" of that upon which its relevance is conditioned, the standard of persuasion for proving that conditional fact is a preponderance of the evidence. Accordingly, in order to be admissible, there must be evidence presented, consistent with the rules of evidence, upon which the jury could find by a preponderance of the evidence that the condition has been satisfied. *Huddleston*, 485 US at 690.

With conditional relevance, then, the role of the trial court is not to find that the facts upon which the evidence relies have been proven by a preponderance of the evidence, but only that the evidence is sufficient to allow the jury to make that conclusion; the trial court must not determine the credibility of witnesses or resolve conflicts in their testimony. *Huddleston*, 485 US at 690.

If the defendant testifies at an evidentiary hearing, the defendant's testimony is not admissible at trial on the question of guilt or innocence. *People v Walker (Lee)*, 374 Mich 331, 338 (1965).

D. Disposition

The court is the trier of fact in evidentiary hearings. *People v Yacks*, 38 Mich App 437, 440 (1972). Oral or written findings of fact and conclusions of law are required. *People v LaBate*, 122 Mich App 644, 647-648 (1983). MCR 2.517(A)(1) provides:

> "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment."

According to the Court in *LaBate*, 122 Mich App at 647, the language used in the court rule meant that a trial court was required to make a record of its findings of fact and conclusions of law in every case in which a dispute existed and the parties presented evidence to support their respective positions. Specifically, the Court noted:

"Clearly, the term 'actions' as used in [MCR 2.517(A)(1)][24] contemplates a finding of fact and a statement of law in all contested matters where evidence is presented to the trial judge for his [or her] decision." *LaBate*, 122 Mich App at 647.

E. Interlocutory Appeal

MCR 7.205(E)(3)[25] provides:

> "Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the

[24] Formerly GCR 1963, 517.1.

[25] Effective January 1, 2012, ADM 2008-36 amended MCR 7.205(E) ("Emergency Appeal[]") by adding subsection (3), which generally requires the trial court to stay proceedings pending resolution of an interlocutory application for leave to appeal from an evidentiary ruling.

> application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate."

F. Standard of Review

A trial court's factual findings at a suppression hearing are reviewed for clear error, and the ultimate ruling on a motion to suppress is reviewed de novo. *People v Jones (Jeffrey)*, 279 Mich App 86, 90 (2008).

3.14 Motion to Suppress Defendant's Statement[26]

A. Admissibility

"No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Pennsylvania v Muniz*, 496 US 582, 588 n 5 (1990).

Generally, a defendant's statement is admissible as nonhearsay under MRE 801(d)(2), or under the statement against interest exception to the hearsay rule, MRE 804(b)(3), if the declarant is unavailable as defined in MRE 804(a). A defendant may be unavailable to testify by exercising his or her constitutional right to remain silent.

MRE 410 precludes the admission of statements made during plea discussions or in connection with a plea that was withdrawn. However, a statement can include testimony at a prior proceeding, including a guilty plea proceeding involving an unrelated crime. *People v Plato*, 114 Mich App 126, 134-135 (1981).

A statement can also be used for impeachment under MRE 613(b), the rule governing the use of a prior inconsistent statement when the statement is offered to prove inconsistency, and not to show the

[26] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions*.

truth of the matter asserted. See *People v Jenkins (Steven)*, 450 Mich 249, 256 (1995) (witness's claim that he did not remember making prior inconsistent statement was sufficient foundation for prosecution to introduce extrinsic evidence of prior statement to impeach witness, but not to prove the contents of the statement).

The *Miranda*[27] rule bars only testimonial, not physical evidence. *United States v Patane*, 542 US 630, 636 (2004). Physical (nontestimonial) evidence obtained as a direct result of unwarned but voluntary statements given in violation of *Miranda* is not covered by the exclusionary rule. *Patane*, *supra* at 637.

In the absence of police misconduct, the exclusionary rule does not apply to prohibit the admission of evidence obtained as a result of a defendant's confession even when the defendant's confession was obtained in violation of the defendant's Sixth Amendment right to counsel and is inadmissible in the prosecution's case-in-chief. *People v Frazier (Corey)*, 478 Mich 231 (2007). The exclusionary rule does not apply because excluding a confession (and evidence discovered as a result of the confession) that did not result from police misconduct would not further the purpose of the exclusionary rule—to deter future police misconduct. *Frazier (Corey)*, *supra* at 252. The *Frazier (Corey)* Court further commented that even if the defendant's confession did result from police misconduct, the exclusionary rule did not apply because any connection between the misconduct involved in obtaining the defendant's confession, and the witness's testimony obtained as a result, was sufficiently attenuated to dissipate any taint. *Id*. at 253.

B. Corpus Delicti Rule

According to Michigan common law, a defendant's confession is inadmissible unless the corpus delicti of the offense is established. *People v Modelski*, 164 Mich App 337, 341 (1987). "Corpus" means body, and "delict" means wrong or injury; therefore, the corpus delicti of a homicide, for example, is established (and a defendant's confession may be admitted) when the prosecution demonstrates that the victim is dead and that the death resulted from criminal agency. *Modelski*, *supra* at 341.

"The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict him [or her] of a crime that did not occur." *People v Ish*, 252 Mich App 115, 116 (2002). "[A] defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing

[27] *Miranda v Arizona*, 384 US 436 (1966).

(1) the occurrence of a specific injury (for example, death in cases of homicide), and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270 (1995). "Once this showing has been made, '[a] defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.'" *Ish*, *supra* at 117, quoting *People v Cotton*, 191 Mich App 377, 389 (1991). Accordingly, "it is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Ish*, *supra* at 117.

"The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438 (2002). Proof beyond a reasonable doubt is unnecessary. *Modelski*, 164 Mich App at 341-342 ("[p]rosecutor established corpus delicti of homicide by showing that [the victim] could not be located and ha[d] not been heard from since her sudden disappearance and by showing that [the] defendant had a motive to kill her, his deteriorating marriage and his claim of infidelity, and by showing that [the] defendant's actions suggest[ed] that he had murdered [the victim]").

When the corpus delicti of the underlying crime is established, admission of a defendant's confession to being an accessory after the fact requires no independent evidence showing that the principal was assisted after committing the crime; "[t]he corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself." *People v King (Genevieve)*, 271 Mich App 235, 237 (2006). See also *People v Williams (John L Jr)*, 422 Mich 381, 388-392 (1985), for a discussion of the history and development of the corpus delicti rule.

C. Evidentiary ("*Walker*") Hearing

A defendant may move to suppress his or her statement, either because it was involuntary, or because it was otherwise obtained in violation of his or her constitutional rights. Hearings on the admissibility of confessions must be conducted outside the presence of the jury. MRE 104(c). If the accused testifies, he or she does not become subject to cross-examination on other issues in the case. MRE 104(d). The hearing is typically called a *Walker* hearing. *People v Walker (Lee)*, 374 Mich 331, 338 (1965). With the exception of the rules of evidence regarding privilege, the rules of evidence do not apply to *Walker* hearings. MRE 104(a); *People v Richardson (Derrie)*, 204 Mich App 71, 80 (1994).

MRE 104(c) requires that hearings be conducted outside the presence of the jury on other preliminary matters when the interests of justice require it or when a defendant is a witness and requests that the hearing be conducted outside the presence of the jury.

The prosecution bears the burden of showing the admissibility of a confession. *Brown (Richard) v Illinois*, 422 US 590, 604 (1975).

D. Voluntary, Knowing, and Intelligent Confession

Statements made by a defendant during custodial interrogation are not admissible against the defendant unless he or she makes a voluntary, knowing, and intelligent waiver of his or her Fifth Amendment rights. *People v Howard (Connell)*, 226 Mich App 528, 538 (1997).

"Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *People v Abraham (Nathaniel)*, 234 Mich App 640, 644-645 (1999) (internal citations omitted).

See also *People v Arroyo*, 138 Mich App 246, 256-258 (1984), for a comprehensive discussion and application of factors relevant to assessing the voluntariness of a defendant's confession.

A waiver is "knowing and intelligent" if the suspect is aware of the nature of the rights being abandoned and the consequences of the decision to abandon them. *Moran v Burbine*, 475 US 412, 421 (1986) (addressing the issue of waiver where the defendant was not informed that his sister had retained counsel for him and that counsel had contacted the police on his behalf).

Whether a confession is voluntary is a question of law for the court. *People v Bender (Jamieson)*, 208 Mich App 221, 226 (1994). The prosecution has the burden of proving voluntariness by a preponderance of the evidence. *Bender (Jamieson)*, *supra* at 226-227. The trial court should make factual findings because, on appeal, while the reviewing court examines the entire record to make an independent determination of voluntariness, it defers to the trial court's superior ability to judge the credibility of the witnesses, and will not reverse the trial court's factual findings unless they are clearly erroneous. *Id*. at 227.

Severe intoxication from drugs or alcohol may preclude an effective waiver of *Miranda* rights, but it is not dispositive; the totality of the circumstances must be examined. *People v Leighty*, 161 Mich App 565, 571 (1987).

"'[Even though] language difficulties may impair the ability of a person in custody to waive [his [or her] *Miranda*] rights in a free and aware manner[.]'" evidence that the accused spoke and understood English supports the validity of the accused's *Miranda* waiver. *United States v Al-Cholan*, 610 F3d 945, 954 (CA 6, 2010), quoting *United States v Heredia-Fernandez*, 756 F2d 1412, 1415 (CA 9, 1985) (where the police knew that the defendant had lived in the United States for 12 years and, as part of the naturalization process, had passed an English proficiency test and sworn under penalty of perjury that he could speak and understand English, his written English-language *Miranda* waiver was valid).

A defendant's Fifth Amendment right to counsel is violated when a law enforcement officer interrogates the defendant after he or she expresses his or her desire to speak with an attorney and provides the officer with the attorney's name and telephone number. *Abela v Martin (William)*, 380 F3d 915, 925-927 (CA 6, 2004). Unlike the circumstances in *Davis (Robert) v United States*, 512 US 452, 462 (1994), where the United States Supreme Court concluded that the defendant's statement—"[m]aybe I should talk to a lawyer"—was "not sufficiently clear such that a reasonable police officer in the circumstances would have understood the statement to be a request for an attorney," the defendant in *Abela* "named the specific individual with whom he wanted to speak and then showed [the police officer] the attorney's business card." *Abela*, *supra* at 926.

Under the circumstances in *Abela*, the Sixth Circuit found that a reasonable officer should have recognized that the defendant was making an unequivocal request for counsel. *Abela*, 380 F3d at 926. Once a defendant makes such a request, the rule of *Edwards v Arizona*, 451 US 477, 484-485 (1981), prohibited the police from further interrogation until the defendant's counsel was present or the defendant initiated further communication with the police. *Abela*, *supra* at 927.

The "valid waiver rule" of *Edwards*, 451 US 477, was not applicable to the subsequent interrogation of a suspect who was not held in continuous custody between his first interrogation (at which he requested counsel and denied involvement in the crime), and his second interrogation 11 days later (at which he acknowledged his right to counsel and implicated himself in the crime). *People v Harris (Isaiah)*, 261 Mich App 44, 54 (2004). Notwithstanding the time that passed between interrogations in *Harris (Isaiah)*, and the fact that the

defendant was not held in custody during that time, the Court of Appeals found that the prosecution established by a preponderance of the evidence that the defendant executed a valid waiver of his right to counsel at the second interrogation. *Harris (Isaiah)*, *supra* at 55. Two police officers involved in the defendant's interrogation refuted the defendant's claim that he requested counsel at the second interrogation, and the prosecution's evidence included the defendant's videotaped acknowledgement of his right to counsel and a signed waiver of that right. *Id*.

A break in custody of 14 days ends the presumption of involuntariness established in *Edwards v Arizona*, 451 US 477 (1981), because that duration "provides plenty of time for the suspect to get reacclimated to his [or her] normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his [or her] prior custody." *Maryland v Shatzer*, 559 US ___, ___ (2010). The Court also held that when an individual is interrogated while in prison for an unrelated crime, released back into the general prison population, then questioned again at a later time, the situation constitutes a break in custody for purposes of *Miranda v Arizona*, 384 US 436 (1966). *Shatzer*, *supra* at ___. According to the Court, "[w]ithout minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*." *Shatzer*, *supra* at ___. See also *Howes v Fields*, 565 US ___, ___ (2012) (holding that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*[]"; rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted[]").

The Michigan Court of Appeals set out four factors to consider in determining whether a defendant's statement was given voluntarily:

> "(1) the duration and conditions of detention,
>
> "(2) the attitude of the police towards the accused,
>
> "(3) the physical and mental state of the accused, and
>
> "(4) the diverse pressures which sap or sustain the accused's power of resistance or self-control." *Arroyo*, 138 Mich App at 256.

In *People v Cipriano*, 431 Mich 315, 334 (1988), the Michigan Supreme Court elaborated on the four factors first discussed in *Arroyo*, 138 Mich App at 256. According to the *Cipriano* Court, the following

factors are relevant to determining whether a defendant's statement was voluntary:[28]

> (1) the age of the accused;
>
> (2) the accused's lack of education or intelligence level;
>
> (3) the extent of the accused's previous experience with the police;
>
> (4) the repeated or prolonged nature of the questioning;
>
> (5) the length of detention before the accused gave the statement;
>
> (6) lack of any advice to the accused regarding his or her constitutional rights;
>
> (7) an unnecessary delay in bringing the accused before a magistrate before the accused gave the confession;
>
> (8) whether the accused was injured, intoxicated, drugged, or ill when he or she gave the statement;
>
> (9) whether the accused was deprived of food, sleep, or medical attention;
>
> (10) whether the accused was physically abused; and
>
> (11) whether the accused was threatened with abuse. *Cipriano*, 431 Mich at 334.

"The legal analysis [applicable to determining whether a confession was voluntary] is essentially the same with respect to examining the 'voluntary' prong of a *Miranda*[29] waiver." *People v Ryan (Sean)*, 295 Mich App 388, 397 (2012). For a confession to be voluntary, it "'must have been . . . the product of a free and deliberate choice rather than intimidation, coercion or deception[.]'" *Ryan (Sean), supra* at 397, quoting *People v Daoud*, 462 Mich 621, 635 (2000).

A defendant made a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant was intoxicated and suicidal at the time of the confession. *People v Tierney*, 266 Mich App 687, 709-710 (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano* factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. *Tierney, supra* at 709-710. The Court noted that any effect that the defendant's intoxication may have had on the

[28] Known as the "Cipriano factors."

[29] *Miranda v Arizona*, 384 US 436 (1966).

defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (e.g., medical care) were not withheld from the defendant during police questioning. *Id*. at 709.

One of the most influential personal characteristics of a suspect is his or her mental capacity. On numerous occasions, the United States Supreme Court has referred to the education and IQ of a suspect in finding that he or she was highly susceptible to coercion and that the police overpowered the suspect's will in obtaining an incriminating statement. See *Culombe v Connecticut*, 367 US 568, 620 (1961) (involving a defendant with mental retardation); *Spano v New York*, 360 US 315, 316, 321-322 (1959) (involving a foreign-born defendant with a junior high education who was described as "emotionally unstable"), and *Payne v Arkansas*, 356 US 560, 562 n 4 (1958) (involving a 19-year-old with a fifth-grade education who was described as "mentally dull" and "slow to learn").

A defendant's mental incompetence alone does not render a defendant's confession involuntary; for a confession to be involuntary, evidence of police misconduct or coercion must exist. *Colorado v Connelly*, 479 US 157, 164 (1986). While psychological interrogation tactics may make a suspect's mental condition more significant, mental illness by itself and apart from its relation to official coercion should never decide the question of voluntariness. *Connelly, supra* at 164. "[Although] mental illness does not affect the voluntariness prong under *Miranda*[,]" "[t]he Supreme Court has never directly addressed under what circumstances a suspect's mental illness can impede his [or her] ability to knowingly and intelligently waive his [or her] *Miranda* rights." *Daoud v Davis*, 618 F3d 525, 530 (CA 6, 2010). However, "[m]ost courts have recognized that mental illness is a factor to consider in determining whether a waiver was knowing and intelligent." *Daoud*, *supra* at 530. In *Daoud*, *supra* at 530-531, three experts could not agree on whether the mentally ill defendant knowingly and intelligently waived his *Miranda* rights, but agreed that he "comprehended what was said to him and understood that the officers would use his statements against him." "Because a defendant does not have to understand 'every possible consequence of a waiver,' and the evidence demonstrate[d] that [the defendant] had an understanding of his rights, the Michigan Supreme Court[reasonably] conclu[ded] that [the defendant's] waiver was knowing and intelligent[.]" *Daoud*, *supra* at 531, quoting *Colorado v Spring*, 479 US 564, 574 (1987).

Police promises or threats can make a statement involuntary. "[A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of

leniency and that promise caused the defendant to confess." *People v Conte*, 421 Mich 704, 712 (1984). To determine whether a promise of leniency exists requires an analysis of whether the defendant reasonably understood the officer's statements to be a promise of leniency. *Conte*, *supra* at 712. To determine whether the officer's promise of leniency caused the defendant to confess requires an analysis of whether the defendant relied on the promise when he or she decided to offer inculpatory evidence and whether, in fact, the promise of leniency prompted the defendant to make the incriminating statements. *Id*.

"'Use' immunity protects a witness [] from the prosecutorial use of compelled testimony." *People v Jones (Bennie)*, 236 Mich App 396, 399 n 1 (1999). "A witness granted 'use' immunity may still be prosecuted for a crime in which he [or she] was involved and to which his [or her] immunized testimony relates." *Jones (Bennie)*, *supra* at 399 n 1. That is, while a coerced confession is inadmissible in a criminal trial, it does not bar prosecution. *Kastigar v United States*, 406 US 441, 461 (1972).

E. Inadmissible Confessions

Confessions obtained in violation of constitutional rights are inadmissible. Possible challenges to the constitutionality of a defendant's confession include:

1. Illegal Arrest

A confession obtained following an illegal arrest is inadmissible. Detention is unlawful where the police do not have probable cause to arrest the individual. *People v Mosley (Richard)*, 400 Mich 181, 183 (1977). To determine whether the illegal arrest caused the confession, the court should consider the time between the illegal arrest and confession, whether the official misconduct was flagrant, whether there were intervening circumstances, and any events that occurred before the arrest. *People v Mallory,* 421 Mich 229, 243 n 8 (1984).

2. Unlawful Detention

A confession obtained during an unlawful detention is inadmissible. According to *People v Lewis (James)*, 160 Mich App 20, 25 (1987), there must be a warrant or probable cause to arrest, or the detention is illegal and "any evidence obtained as a result of that unlawful detention or any statement made [by an individual] while unlawfully detained must be suppressed." See also *People v Dowdy*, 211 Mich App 562, 569 (1991), where an initial warrantless entry was unconstitutional

but a defendant's statement was admissible because it was made after police had probable cause to arrest the defendant.

Where the defendant comes forward with proof that his or her confession was involuntary and was obtained as a result of a statutorily unlawful detention, the prosecution has the burden of proving that the confession was voluntary and admissible. *People v Jordan (Timothy)*, 149 Mich App 568, 577 (1986).

3. Unreasonable Prearraignment Delay

A confession obtained during an unreasonable prearraignment delay may be inadmissible. *Mallory*, 421 Mich at 243; *People v White (James)*, 392 Mich 404, 424 (1974).

Although the "48 hour" rule established in *Riverside v McLaughlin*, 500 US 44 (1991), forms a presumption of unreasonableness, the delay is only one factor to be considered in determining whether the statement was involuntary. *People v Manning*, 243 Mich App 615, 642-643 (2000).

4. Violation of the Right to Counsel

Confessions obtained in violation of the Sixth Amendment right to counsel are inadmissible. *People v Gonyea*, 421 Mich 462, 478 (1984). The failure of police to inform a suspect that counsel has been retained and is available before obtaining a confession precludes a knowing and intelligent waiver of the defendant's rights to counsel and to remain silent. *People v Bender (Jamieson Todd)*, 452 Mich 594, 597 (1996). See *People v Crockran*, 292 Mich App 253, 256-264 (2011) (no *Bender* violation occurred and suppression was not warranted where the evidence showed that an attorney-client relationship existed before the defendant's confession; therefore, the defendant was aware that counsel was available to him and that counsel was at his disposal).

In *Escobedo v Illinois*, 378 US 478, 490-491 (1964), the United States Supreme Court held that where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and the suspect has been taken into custody for interrogation, any statement elicited by the police cannot be used against the defendant unless he or she was given an opportunity to consult with counsel and was advised of his or her right to remain silent, because such a situation constitutes a denial of the assistance of counsel in violation of the Sixth Amendment.

To use a confession deliberately elicited following arraignment in its case-in-chief, the prosecution must prove that police obtained a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel before they interrogated the accused. *Patterson v Illinois*, 487 US 285, 292-293 (1988); *Brewer v Williams (Robert)*, 430 US 387, 409-410 (1977).

5. Violation of Right Against Self-Incrimination

Confessions obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda*, 384 US at 474-477; *People v Hill (ML)*, 429 Mich 382, 394-395 (1987). *Miranda* warnings are constitutionally required and apply to the admissibility of statements made during custodial interrogations in both federal and state courts. *Dickerson v United States*, 530 US 428, 432, 442 (2000). If a defendant asserts his or her right to counsel, the interrogation must cease until counsel is present, or, after the lapse of a significant period of time, the defendant knowingly and intelligently waives his or her right to counsel. *People v Parker (Jeffrey)*, 84 Mich App 447, 457 (1978).

When a defendant contends that his or her confession was involuntary, the prosecution must make an affirmative showing that *Miranda* warnings were given prior to the custodial interrogation and that a waiver was properly obtained before the defendant's statements may be admitted in the prosecution's case-in-chief. *Miranda*, 384 US at 444; *Arroyo*, 138 Mich App at 249-250. In *Miranda*, *supra* at 444-445, the United States Supreme Court held that the prosecution must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with counsel and to have counsel present during a custodial interrogation. If the defendant claims that he or she did not validly waive *Miranda* rights, the prosecution has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Connelly*, 479 US at 168; *People v Daoud*, 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of a purported waiver of *Miranda* rights. *Fare v Michael C*, 442 US 707, 724-725 (1979).

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action

in any significant way." *Miranda*, 384 US at 444. Whether a suspect is in custody or deprived of his or her freedom of action in any significant manner requires a two-pronged analysis. *Thompson (Carl) v Keohane*, 516 US 99, 112 (1995). First, the reviewing court must look at the circumstances surrounding the interrogation. *Thompson (Carl)*, *supra* at 112. Second, the reviewing court must determine whether, given those circumstances, a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave. *Id*. See *People v Vaughn (Joseph)*, 291 Mich App 183, 186-190 (2010) (*Miranda* warnings not required where plainclothes police officers entered the defendant's home with the defendant's mother's permission, did not draw their weapons, requested the defendant to come from the basement to the main floor, did not handcuff him or otherwise restrict his movement, and questioned him in his mother's presence). See also *People v Zahn*, 234 Mich App 438, 449 (1999) ("[t]o determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he [or she] was not free to leave . . . [t]he determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned").

Additional factors to consider in evaluating a custody determination are: "'(1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.'" *Coomer v Yukins*, 533 F3d 477, 486 (CA 6, 2008), quoting *United States v Salvo*, 133 F3d 943, 950 (CA 6, 1998).

In *Coomer*, 533 F3d at 486, the Court determined that the defendant's oral confession in her apartment was properly admitted even though some facts could have supported a finding that the confession resulted from an improper custodial interrogation. For example, evidence established that as many as eleven officers, both uniformed and in plain clothes, arrived at the defendant's apartment late at night and that more than one police vehicle blocked the defendant's

vehicle in her driveway. *Coomer*, *supra* at 486. Material facts on which the Sixth Circuit based its conclusion that the defendant's confession was not obtained during a custodial interrogation in violation of the defendant's *Miranda* rights included: (1) the defendant voluntarily permitted the police officers to enter her apartment and the questioning took place in the defendant's own home; (2) the defendant's confession spanned approximately 30 minutes, was primarily the defendant's own narrative, and involved only intermittent questioning by the police; and (3) the police informed the defendant on several occasions that she was not under arrest and that the officers would leave if she asked them to do so. *Coomer*, *supra* at 486-487. The Court explained that although the defendant testified that she did not feel free to leave, she also testified that her confession was not coerced. *Id*. at 487. The Court further noted that

> "[the defendant] moved freely around her apartment, offered the officers refreshments, and told the officers to stay quiet out of respect for her sleeping son. These facts imply that [the defendant] exercised control over her surroundings in her own home, not that *she* was controlled by her interrogators, as was the concern in *Miranda*." *Coomer*, 533 F3d at 487.

The age of a child subjected to police questioning "properly informs the *Miranda* custody analysis." *JDB v North Carolina*, 564 US ___, ___ (2011). In *JDB*, *supra* at ___, a uniformed police officer removed a 13-year-old student ("JDB") from his seventh-grade classroom and escorted him to a conference room, where, upon interrogation by police, he confessed his involvement in two home break-ins. In the ensuing juvenile proceedings, JDB sought suppression of his statements, asserting that he had been subjected to a custodial interrogation without being afforded *Miranda* warnings. *Id*. at ___. The United States Supreme Court, addressing the state supreme court's refusal to "'extend the test for custody to include consideration of [a suspect's] age[,]'" held that JDB's age at the time of the interrogation was relevant to the custody analysis. *Id.* at ___ (internal citation omitted). "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. . . . [C]ourts can account for that reality without doing any damage to the objective nature of the custody analysis." *Id.* at ___. Although officers are not required to consider a suspect's subjective state of mind or other unknowable circumstances, a child's age is a fact that "yields objective conclusions" that "are

self-evident to anyone who was a child once . . . , including any police officer or judge[;]" thus, "a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his [or her] freedom of action." *Id*. at ___. Cautioning that "a child's age will [not] be a determinative, or even a significant, factor in every case[,]" the Court concluded that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id*. at ___.

"[O]rdinarily a motorist detained for a routine traffic stop or investigative stop is not in custody within the meaning of *Miranda* [*v Arizona*, 384 US 436 (1966)]." *People v Steele (James)*, 292 Mich App 308, 319 (2011) ("[g]iven the circumstances that justified the *Terry* [*(John) v Ohio*, 392 US 1 (1968)] stop, [the police officer] was permitted to temporarily detain [the] defendant and make a reasonable inquiry into possible criminal activity"; "[the police officer's] brief questioning was within the scope of the stop and confirmed the officer's suspicions concerning the presence of narcotics without subjecting [the] defendant to custodial interrogation").

Interrogation involves questioning or its functional equivalent which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980).

Two Circuit Courts of Appeal (the Second and Third Circuits) "have concluded that informing the accused that he had been implicated in a crime by a co-defendant constitutes interrogation under the [*Rhode Island v*] *Innis*[, 446 US 291 (1980)] definition." *Shaneberger v Jones*, 615 F3d 448, 453 (CA 6, 2010). In *Shaneberger*, *supra* at 451, after the defendant was given *Miranda* warnings and asked to speak to his father who would decide whether to obtain counsel, the detectives ceased questioning the defendant because they understood the defendant's statement to be an invocation of his right to counsel. One detective, however, remained in the room and told the defendant that his co-defendant had implicated the defendant in the robbery. *Id*. The detective instructed the defendant not to say anything and left the room without giving the defendant an opportunity to respond. *Id*. Later, the defendant initiated conversation with a different detective during which he confessed to participating in the crime. *Id*.

"While [the courts] do not focus on the intent of the police, a practice that is subjectively intended to elicit an incriminating response will very likely produce a finding that the police should have known that such a result would occur." *Shaneberger*, 615 F3d at 453. The Sixth Circuit noted that whether the detective who informed the defendant of his co-defendant's statement implicating the defendant "*should have known* that his comments would elicit an incriminating response is a close question," however the Court concluded that a state court could reasonably answer the question in the negative under the circumstances in the case. *Shaneberger*, *supra* at 454. In *Shaneberger*, *supra* at 454, because the defendant was given no opportunity to respond to the detective's statement and in fact, was instructed not to respond, and because the defendant initiated the conversation in which he confessed after some time had passed and with a different detective, the Court concluded that the detective's statement did not constitute interrogation after the defendant's invocation of counsel and therefore, the trial court did not err in admitting the defendant's confession at trial.

Where the defendant asserted his right to remain silent after a detective provided him with *Miranda* warnings, the detective's statement to the defendant that he "hope[d] that the gun [was] in a place where nobody [could] get a hold [sic] of it and nobody else [could] get hurt by it[]" did not constitute the "functional equivalent of interrogation" under *Innis*, 446 US at 299-303, and the trial court therefore erred in suppressing the defendant's subsequent incriminating statements. *People v White (Kadeem)*, 294 Mich App 622, 624-625, 628-635 (2011), lv gtd 491 Mich 890 (2012). "[T]he detective specifically told [the] defendant that he was *not* asking him any questions, but was instead 'telling' him that he hoped the gun was not found by anyone who could get hurt[;]" furthermore, "nothing in the record suggest[ed] that the detective was aware of any peculiar susceptibility of [the] defendant (or that [the defendant] even had any)[,]" and the detective's comment was neither "'evocative[]'" nor part of "'a lengthy harangue[.]'" *White (Kadeem)*, *supra* at 631-632, quoting *Innis*, *supra* at 302-303. Accordingly, the detective "should not have reasonably expected [the] defendant to make an incriminating statement[,]" and the detective's "use of 'okay[?]' and 'all right[?]' [(following the detective's statement about the gun) could] reasonably be seen as seeking confirmation from [the] defendant that he heard the cursory comment, and not to elicit a response." *White (Kadeem)*, *supra* at 631-632.

~~"A *Miranda* warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of prison[;]" there does not have to be a nexus between the elements of custody and interrogation for *Miranda* to apply. *Fields v Howes*, 617 F3d 813, 815, 820, 822-823 (CA 6, 2010) (*Miranda* warnings required for a defendant incarcerated for disorderly conduct but interrogated about an unrelated sexual relationship with a minor).~~ There is no "categorical rule . . . that the questioning of a prisoner is always custodial [within the meaning of *Miranda*, 384 US 436,] when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." *Howes v Fields*, 565 US ___, ___ (2012). Rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Fields, supra* at ___ (holding that *Miranda* warnings were not required where the respondent, a jail inmate, was escorted to a conference room and questioned by officers regarding allegations that he had committed an unrelated offense prior to his incarceration; "[t]aking into account all of the circumstances of the questioning[,]" including that the respondent was not physically restrained or threatened, that he was interviewed under conditions that were not uncomfortable, and, "especially[,] . . . that [he] was told that he was free to end the questioning and to return to his cell[,] . . . [the] respondent was not in custody within the meaning of *Miranda*[]").[30] ~~See also *Mathis v United States*, 391 US 1 (1968). However,~~See also *People v Elliott (Samuel)*, ___ Mich App ___, ___, ___ n 3 (2012) (the questioning of a jailed defendant by a parole officer, four days after the defendant's arrest for allegedly violating his parole by committing an armed robbery, constituted a custodial interrogation for purposes of *Miranda*; "[t]he 'inherently compelling pressures' that were lacking in *Fields*[, *supra* at ___,] were present" where, "[i]n contrast [to *Fields*], the authorities did not question [the] defendant . . . while he was serving a prison sentence[, but] rather[] . . . questioned [him] shortly after he was arrested, and the questioning focused on the reason for his arrest[]").

[30] Cf. *Mathis v United States*, 391 US 1, 3-5 (1968) (holding that a state prisoner was entitled to *Miranda* warnings before being questioned by a federal revenue agent, and rejecting the Government's assertions that *Miranda* was inapplicable where "(1) . . . the[] questions were asked as a part of a routine tax investigation where no criminal proceedings might even [have been] brought, and (2) . . . the [prisoner] had not been put in jail by the officers questioning him, but was there for an entirely separate offense[]").

Miranda warnings were not required where "[an incarcerated] defendant was questioned by a corrections officer regarding an offense within the prison and for the purpose of maintaining prison safety, . . . was presented with very limited evidence of his guilt, and . . . was restrained and isolated pursuant to [Michigan Department of Corrections (MDOC)] procedure when dangerous weapons are found in an inmate's area of control[.]" *People v Cortez (Burton)*, 294 Mich App 481, 504 (2011) (stressing that the defendant was questioned by an MDOC officer, as opposed to an outside state official, and concluding that "the questioning was more like general on-the-scene questioning . . . and questioning essential to the administration of a prison . . . than the type of custodial interrogation requiring *Miranda* warnings[]").

"[A] parole officer is a 'law enforcement officer' for purposes of *Miranda*[, 384 US 436, and] . . . [s]tatements made by a parolee to a parole officer during a custodial interrogation are [therefore] inadmissible in a subsequent trial where, before questioning, the parolee invoked his [or her] right to counsel." *Elliott*, ___ Mich App at ___ (parole officer improperly questioned the defendant "in an attempt to obtain [his] 'statement'" about a robbery where the defendant, who was in jail following his arrest for allegedly violating his parole by committing the robbery, had previously invoked his right to counsel).

However, individuals not acting on the government's behalf may not be required to give *Miranda* warnings before eliciting a statement. See *People v Anderson (Robert)*, 209 Mich App 527, 533-534 (1995) (a juvenile corrections officer whose job duties did not require the interrogation of suspects, who did not wear a badge or uniform or carry a gun, and who did not have authority to arrest or detain citizens, was not required to give a defendant *Miranda* warnings). See also *People v Porterfield*, 166 Mich App 562, 567 (1988) (a protective services caseworker not charged with enforcement of criminal laws and not acting on behalf of police, is not required to advise an individual of *Miranda* rights), and *People v Faulkner*, 90 Mich App 520, 525 (1979) (a private investigator is not required to advise individuals of their constitutional rights before eliciting a statement).

There is no requirement that an electronic recording be made when a defendant is informed of his or her *Miranda* rights, *People v Geno*, 261 Mich App 624, 627-628 (2004), or that a defendant's statement be recorded by audio or visual means. *People v Fike*, 228 Mich App 178, 186 (1998).

6. Public Safety Exception to *Miranda*

The *Miranda* rule does not apply "in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *New York v Quarles*, 467 US 649, 656 (1984); *People v Attebury*, 463 Mich 662, 670 (2001). To excuse the *Miranda* warnings, the circumstances must present an immediate threat to public or police safety and the questions posed to the accused must be objectively reasonably necessary to protect the public or the police from an immediate danger. *Quarles*, *supra* at 655-658; *Attebury*, *supra* at 664, 670-671, 674 (officers executing an arrest warrant for assault with a dangerous weapon were justified in questioning the defendant about the location of his gun before giving him *Miranda* warnings, where the questioning was "directly related to an objectively reasonable need to secure protection from the possibility of immediate danger associated with the gun").

F. Use of Improper Confession

An involuntary statement may not be used for any purpose. *People v Tyson*, 423 Mich 357, 377 (1985). "A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564 (2003) (internal citation omitted). "The burden is on the prosecution to prove voluntariness by a preponderance of the evidence." *Akins*, *supra* at 564. In *Lego v Twomey*, 404 US 477, 489 (1972), the United States Supreme Court held that the prosecution must prove by a preponderance of the evidence that a defendant's confession was voluntary, but noted that states are free to set a higher burden of proof.

A statement taken in violation of a defendant's *Miranda* rights may be used in limited situations:

- Impeachment. *People v Stacy*, 193 Mich App 19, 24-25 (1992) (voluntary statements taken in violation of a defendant's right to counsel may be used for impeachment purposes, even though they cannot be used in the prosecution's case-in-chief). Defendant's voluntary statement solicited in violation of his or her Sixth Amendment right to counsel may be used for impeachment purposes if the defendant waives the Fifth Amendment privilege against self-incrimination and testifies. *People v Frazier (Corey)*, 270 Mich App 172, 180-183 (2006), rev'd in part on other grounds and vacated in part on other grounds 478 Mich 231, 235 n 1 (2007).

- Testimony of witnesses discovered as a result of the *Miranda* violation. *People v Kusowski*, 403 Mich 653, 662 (1978).

- Physical (nontestimonial) evidence discovered as a result of unwarned but voluntary statements given in violation of *Miranda*. *Patane*, 542 US at 636-637.

G. Assertion of *Miranda* Rights

After a *Miranda* warning, the questioning may continue until and unless a suspect clearly requests an attorney. *Davis (Robert)*, 512 US at 458. When a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver of this right in a police-initiated custodial interview is ineffective; once invoked, a defendant's Sixth Amendment right to counsel may be waived only when the *defendant* initiates contact with the police officer *and* makes a valid waiver of his or her once-invoked right to counsel. *People v Harrington*, 258 Mich App 703, 706 (2003). See also *Edwards*, 451 US at 484-485 (once an accused has asserted the right to counsel, further interrogation is precluded unless he or she initiates communication with the police).

In determining whether a defendant's right to remain silent was fully respected, five factors should be considered: "(1) whether the suspect was advised prior to initial interrogation that he [or she] was under no obligation to answer question[s]; (2) whether the suspect was advised of his [or her] right to remain silent prior to the reinterrogation; (3) the length of time between the two interrogations; (4) whether the second interrogation was restricted to a crime that had not been the subject of [the] earlier interrogation; and (5) whether the suspect's first invocation of rights was honored." *United States v Alvarado-Saldivar*, 62 F3d 697, 699 (CA 5, 1995), citing *Michigan v Mosley (Richard Bert)*, 423 US 96, 104-105 (1975).

"[A] defendant's nonverbal conduct [sitting with his head in his hands, looking down] cannot be characterized as 'silence' that is inadmissible per se under the Michigan Constitution." *People v McReavy*, 436 Mich 197, 205, 222 (1990).

A defendant's refusal to write out the first statement he made to the police did not constitute an invocation of his right to silence; therefore, the defendant's second custodial interrogation did not violate his *Miranda* rights. *People v Williams (Reginald)*, 275 Mich App 194, 197-200 (2007).

"Statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial where, before

questioning, the parolee invoked his [or her] right to counsel." *People v Elliott (Samuel)*, ___ Mich App ___, ___ (2012) (parole officer improperly questioned the defendant "in an attempt to obtain [his] 'statement'" about a robbery where the defendant, who was in jail following his arrest for allegedly violating his parole by committing the robbery, had previously invoked his right to counsel).

On a defendant's motion to suppress his or her statement allegedly obtained in violation of *Miranda*, the prosecution must prove waiver by a preponderance of the evidence. *Connelly*, 479 US at 168. The prosecution also bears the burden of proving by a preponderance of the evidence that the confession was voluntary. *Lego*, 404 US at 489.

H. Waiver of Miranda Rights

A suspect may waive his or her *Miranda* rights. *Moran*, 475 US at 421.

"[A suspect] must be warned prior to any questioning (1) that he [or she] has the right to remain silent, (2) that anything he [or she] says can be used against him [or her] in a court of law, (3) that he [or she] has the right to the presence of an attorney, and (4) that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires." *Miranda v Arizona*, 384 US 436, 479 (1966).

The following is an example of a *Miranda* waiver form:

> *MIRANDA* WARNING
>
> 1. You have the right to remain silent.
>
> 2. Anything you say can and will be used against you in a court of law.
>
> 3. You have the right to talk to a lawyer and have him or her present with you while you are being questioned.
>
> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you at county expense before any questioning, if you wish.
>
> 5. If you give up your right to remain silent, and later wish to stop answering questions, no further questions will be asked.
>
> *MIRANDA* WAIVER
>
> 1. Do you understand each of these rights I have explained to you?

2. Having these rights in mind, do you wish to talk to me now?

Time_____
Signature_____

Date_____

Officer advising rights_____

"[A]dvice that a suspect has 'the right to talk to a lawyer before answering any of [the law enforcement officers'] questions,' and that he [or she] can invoke this right 'at any time . . . during th[e] interview,' satisfies *Miranda*." *Florida v Powell*, 559 US ___, ___ (2010). Because "[t]he first statement communicated that [the defendant] could consult with a lawyer before answering any particular question, and the second statement confirmed that [the defendant] could exercise that right while the interrogation was underway[,]" the United States Supreme Court held that "[i]n combination, the two warnings reasonably conveyed [the defendant's] right to have an attorney present, not only at the outset of interrogation, but at all times." *Powell*, 559 US at ___.

A waiver must be the "product of a free and deliberate choice, rather than intimidation, coercion, or deception."*Moran*, 475 US at 421. That is, a waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran*, *supra* at 421. A waiver does not have to be explicit; it can be determined by the surrounding facts and circumstances. *North Carolina v Butler (Willie)*, 441 US 369, 375-376 (1979). "[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Butler (Willie)*, *supra* at 373. However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 US at 475.

"[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his [or her] *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis v Thompkins*, 560 US ___, ___ (2010). During the three-hour interview in *Berghuis*, *supra* at ___, the defendant did not invoke his right to remain silent, because he never said "that he wanted to remain silent or that he did not want to talk with the police." Further, the record demonstrated that the defendant waived his right to remain silent by knowingly and voluntarily making a statement to the police, where (1) "there [wa]s no contention that [he] did not understand his rights; and from this it follows that he knew what he gave up when he spoke"; (2) his

response to a detective's question regarding "whether [he] prayed to God for forgiveness for shooting the victim [wa]s a 'course of conduct indicating waiver' of the right to remain silent"; and (3) there was no evidence that his statement was coerced. *Id*. at ___, quoting *North Carolina v Butler (Willie)*, 441 US 369, 373 (1979). Additionally, the police were not required to obtain a waiver of the defendant's right to remain silent before questioning him, because "after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights." *Berghuis*, *supra* at ___.

"When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent." *McReavy*, 436 Mich at 222. A defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent. *People v Davis (Leroy)*, 191 Mich App 29, 35-36 (1991).

A *Miranda* waiver made midway through an interrogation does not permit the use of a confession obtained before the *Miranda* warning was given. *Missouri v Seibert*, 542 US 600, 609-610, 613, 617 (2004).

While intoxication may preclude an effective waiver of *Miranda* rights, the fact that an individual is under the influence of drugs does not automatically render that person's statement involuntary. *People v Lumley*, 154 Mich App 618, 624 (1986).

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was knowingly, intelligently, and voluntarily given. *Tierney*, 266 Mich App at 709-710. In *Tierney*, the defendant's college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court's conclusion that the defendant's confession was voluntary and properly admitted at trial. *Tierney*, *supra* at 709-710.

The prosecution bears the burden of proving that a suspect's waiver of his or her rights was voluntary, knowing, and intelligent. *People v Bishop*, 117 Mich App 553, 559 (1982). The burden is satisfied if the prosecution proves the validity of the waiver by a preponderance of the evidence. *Connelly*, 479 US at 168.

There is a distinction between determining whether a defendant's waiver of his or her *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowing and intelligent. *People v Garwood*, 205 Mich App 553, 555 (1994). A valid waiver of *Miranda*

rights requires a showing that the waiver was voluntarily made—the result of the defendant's uncoerced choice—and that the waiver was made with complete awareness of the rights waived and the consequences of waiving those rights. *Garwood*, *supra* at 556.

A preponderance of the evidence proved that a deaf-mute defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights when she made inculpatory statements during interrogation after a detective placed a constitutional rights form within the defendant's range of vision, read portions of the form aloud while a sign language interpreter signed and mouthed the detective's words to the defendant, and the defendant signed the form. *People v McBride (Mary Ann)*, 480 Mich 1047 (2008); *People v McBride (Mary)*, 273 Mich App 238, 240-244 (2006).

I. Standard of Review

The trial court's decision regarding application of the corpus delicti rule is reviewed for an abuse of discretion. *Burns*, 250 Mich App at 438.

The trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights are reviewed for clear error. *Daoud*, 462 Mich at 629.

A defendant is required to testify to preserve for review a challenge to the trial court's ruling in limine allowing the prosecution to admit evidence of the defendant's exercise of the *Miranda* right to remain silent. *People v Boyd*, 470 Mich 363, 365 (2004).

A trial court's determination that the entire context of a given pretrial statement is admissible to explain the statement, is reviewed for an abuse of discretion. *People v Badour*, 167 Mich App 186, 191 (1988), rev'd on other grounds *People v Beckley*, 434 Mich 691 (1990).

"Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo." *Frazier (Corey)*, 478 Mich at 240.

3.15 Motion to Suppress Identification of Defendant

A. Generally

Identification testimony is[31] admissible unless a pretrial identification procedure was impermissibly suggestive; however, even if a pretrial identification procedure was impermissibly suggestive, identification testimony is admissible if it did not create a substantial risk of misidentification considering the totality of the circumstances. *Manson v Braithwaite*, 432 US 98, 110, 114 (1977); *Neil v Biggers*, 409 US 188, 199-200 (1972). "'[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *People v Hickman*, 470 Mich 602, 607 (2004), quoting *Moore (James) v Illinois*, 434 US 220, 227 (1977).

In assessing the reliability of the identification testimony in light of the suggestive identification procedure, the court must consider:

- The opportunity of the witness to observe the criminal at the time of the crime;
- The degree of attention of the witness at the time of the crime;
- The accuracy of the witness's prior description of the criminal;
- The level of certainty demonstrated by the witness at pretrial confrontation; and
- The length of time between the crime and the pretrial confrontation. *Manson*, 432 US at 114-116.

Any discrepancy between a victim's initial description and the defendant's actual appearance is relevant to the weight of the evidence, not to its admissibility. *People v Davis (Thomas)*, 241 Mich App 697, 705 (2000).

"[U]nder MRE 801(d)(1)(C), statements of identification are not hearsay when the identifier is subject to cross-examination." *Hickman*, 470 Mich at 607.

If the totality of circumstances support the reliability of a witness's pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification may be used to advance

[31] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 6: Pretrial Motions* for more information about eyewitness identification.

the witness's identification of the defendant at trial. *Howard (Frank) v Bouchard*, 405 F3d 459, 472-474 (CA 6, 2005).

Absent an intelligent waiver by the defendant, counsel is required to be present at a lineup. *Frazier (Corey)*, 478 Mich at 244 n 11, citing *United States v Wade (Billy)*, 388 US 218, 237 (1967). The prosecution has the burden of proving by clear and convincing evidence that the defendant waived his or her right to counsel. *People v Daniels (Chris)*, 39 Mich App 94, 96-97 (1972). Additionally, when counsel is not present at the lineup, the prosecution bears the burden of proving that the lineup was not unduly suggestive. *People v Young (Donnie)*, 21 Mich App 684, 693-694 (1970). When counsel is present at the lineup, the defendant bears the burden of proving that the lineup was unduly suggestive. *People v Morton*, 77 Mich App 240, 244 (1977).

If the court finds a violation of the right to counsel, or that a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence that the in-court identification is based on observations of the suspect other than at the illegal pretrial identification. *People v Gray (Allen)*, 457 Mich 107, 115 (1998).

"An appellate court reviews a trial court's determination following a *Wade*[32] hearing[33] by examining the totality of the circumstances surrounding the challenged pretrial identification and determining whether those procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of misidentification." *People v Hampton*, 138 Mich App 235, 238 (1984).

B. Evaluating the Lineup's Suggestiveness

A lineup may be so suggestive and conducive to irreparable misidentification that an accused is denied due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967). "[D]ue process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v New Hampshire*, 565 US ___, ___ (2012). When the police use such a procedure, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Perry, supra* at ___, quoting *Neil v Biggers*, 409 US 188, 201 (1972). "Where the 'indicators

[32] *United States v Wade (Billy)*, 388 US 218 (1967).

[33] "Where the risk of a tainted in-court identification is alleged, this procedure is a useful tool to aid the trial court's determination of whether an independent basis for that identification exists." *People v Baker*, 103 Mich App 255, 258 (1981).

of [a witness's] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed[;] . . . [o]therwise, the evidence (if admissible in all other respects) should be submitted to the jury." *Perry, supra* at ___, quoting *Manson v Brathwaite*, 432 US 98, 114, 116 (1977).

A court must consider the totality of the circumstances to determine whether an identification procedure is fair. *People v Kurylczyk*, 443 Mich 289, 311-312 (1993). The test is whether the totality of the circumstances shows the procedure to be reliable. *People v Davis (Melvin)*, 146 Mich App 537, 548 (1985). However, "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry*, 565 US at ___. Rather, "[w]hen no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Perry, supra* at ___, ___ (where an eyewitness, in response to a police officer's request for a more specific description of the perpetrator of a theft, pointed out her window at the petitioner, who was standing near another officer, the trial court did not err in denying the petitioner's motion to suppress the identification without first conducting a preliminary assessment of its reliability; no such inquiry was required because "law enforcement officials did not arrange the suggestive circumstances surrounding [the] identification[]").

If counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286 (1996). If counsel was not present at the pretrial identification procedure, the prosecution has the burden of establishing that the procedure was not impermissibly suggestive. *Young (Donnie)*, 21 Mich App at 693-694. If the prosecution claims the defendant waived the right to have counsel present at the lineup, the burden is on the prosecution to establish the waiver. *Wade (Billy)*, 388 US at 240.

Where the differences in the lineup participants' physical appearances from the defendant's physical appearance were minimized at the lineup and the store employees identified the defendant as the armed robber at both the lineup and in court, and testified that differences in appearance did not influence their

identification, there was no error requiring reversal in the lineup identification. *People v Hornsby*, 251 Mich App 462, 466-467 (2002).

C. Right to Counsel

"Defendants who face incarceration are guaranteed the right to counsel at all critical stages of the criminal process by the Sixth Amendment, which applies to the states through the Due Process Clause of the Fourteenth Amendment." *People v Willing*, 267 Mich App 208, 219 (2005). "The right attaches and represents a critical stage in the proceedings only after adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *People v Marsack*, 231 Mich App 364, 376-377 (1998).

"[T]he right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *Hickman*, 470 Mich at 603. In *Hickman*, *supra* at 610, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled its previous decision in *People v Anderson (Franklin)*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman*, *supra* at 605. "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings." *Id*. at 607. "This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman*, *supra* at 608. The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant. *Id*. at 607. In *Hickman*, *supra* at 609 n 4, the Michigan Supreme Court declined to address whether a defendant has the right to an attorney during a photographic lineup after the initiation of adversarial judicial proceedings, because *Hickman* involved a corporeal identification conducted before the initiation of adversarial judicial proceedings.

There is no right to counsel at precustodial investigatory photographic lineups. *Kurylczyk*, 443 Mich at 302.

There is no right to have counsel present at a post-lineup interview of a witness. *People v Sanger*, 222 Mich App 1, 3-4 (1997).

D. Photo Lineup

A photographic lineup should not be used if a suspect is in custody or if the suspect could be compelled to take part in a corporeal lineup. *People v Strand*, 213 Mich App 100, 104 (1995) (photographic lineup was permissible because defendant not in custody at the time; because he was also not under arrest, he could not be compelled to participate in a corporeal lineup).

The same standard of "unduly suggestive" applies to photo lineups as well as corporeal lineups:

"A suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification." *Kurylczyk*, 443 Mich at 306 (internal citation omitted).

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Gray (Allen)*, 457 Mich at 111.

Showing a witness only a single photograph or a group in which one person is singled out can be impermissibly suggestive. *Gray (Allen)*, 457 Mich at 111.

Mug shots, unless edited, are not admissible because they may suggest bad character, *People v Jones (Alphonzo)*, 228 Mich App 191, 202 (1998), or a past criminal record. *People v Heller*, 47 Mich App 408, 411 (1973).

E. Defendant's Request for a Lineup

A trial court has discretion to grant a defendant's motion for a lineup. *People v McAllister*, 241 Mich App 466, 471 (2000). "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister*, *supra* at 471. Where the defendant meets his or her requisite burden, he or she has a due process right to a lineup. *People v Gwinn*, 111 Mich App 223, 249 (1981). In determining whether the defendant's due process rights have been implicated, the court should consider the benefits of a lineup to an accused; the burden

on the prosecution, police, courts, and witnesses; and the timeliness of the motion involved. *Gwinn*, *supra* at 249.

F. Identification of Defendant's Voice

1. Voice Identification Lineup

A defendant can be required to speak during a lineup to determine if his or her voice is recognized. *People v Hayes (Phillip)*, 126 Mich App 721, 725 (1983). Care should be taken to determine that there is a basis for familiarity with a voice (e.g., familiarity, peculiarity) and a reasonably positive identification. *Hayes (Phillip)*, *supra* at 725-726; *People v Bozzi*, 36 Mich App 15, 18-22 (1971).

The trial court properly admitted the victim's identification of the defendant based on the defendant's appearance and his voice where the victim "had ample opportunity to hear and see the [defendant] robber with the shotgun," and "the totality of the circumstances, combined with [the victim's] certainty regarding his identification of [the] defendant, supplied sufficient reliability of the voice identification." *People v Murphy (Bernard) (On Remand)*, 282 Mich App 571, 584 (2009).

Even where a defendant is not entitled to have counsel present during a victim's voice identification, the identification must still be suppressed if it is unduly suggestive. *People v Williams (Kevin)*, 244 Mich App 533, 542-544 (2001) (a tape recording containing three voices, two of which were identified as police officers, was unduly suggestive).

2. Voice Demonstration

The use of voice exemplars solely to measure physical properties of the voice does not implicate the Fifth Amendment privilege against self-incrimination. *People v Henderson*, 69 Mich App 418, 421 (1976). Courts have attempted to distinguish between something like a demonstration, and testimony, which would violate the prohibition against self-incrimination. See *Pennsylvania v Muniz*, 496 US 582, 590-592, 600 (1990) (admission of the fact that a drunk-driving suspect's speech was slurred did not violate his privilege against self-incrimination, because slurred speech is a physical characteristic, and is not testimonial). "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 35 (2003).

G. In-Court Identification

1. Pretrial Identification Challenged

A pretrial motion to suppress an in-court identification by a witness may be brought if it is asserted that the identification is the product of a prior, illegal confrontation. For example, the defendant may claim that the prior confrontation was the result of a lineup conducted after arrest and appointment of counsel but without the presence of that counsel, *Wade (Billy)*, 388 US at 236-237, or that the pretrial identification procedure was impermissibly suggestive in some other manner. *Simmons v United States*, 390 US 377, 384 (1968); *Stovall*, 388 US at 301-302.

2. Independent Basis for Identification

If the pretrial identification procedure violated the defendant's right to counsel or due process, then the prosecution must establish by clear and convincing evidence that the in-court identification has a basis independent of the illegal procedure. *Wade (Billy)*, 388 US at 240; *People v Colon*, 233 Mich App 295, 304 (1999).

Courts should weigh the following factors when determining if an independent basis exists to admit an in-court identification:

> (1) prior relationship with or knowledge of the defendant;
>
> (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act;
>
> (3) length of time between the offense and the disputed identification;
>
> (4) accuracy of the description compared to the defendant's actual description;
>
> (5) previous proper identification or failure to identify the defendant;
>
> (6) any identification prior to the lineup of another person as the defendant;
>
> (7) the nature of the offense, including the age, intelligence, effect of any drugs on the victim, and the psychological state of the victim; and

(8) any idiosyncratic or special features of the defendant. *Gray (Allen)*, 457 Mich at 116-124.

A defendant is not entitled to an evidentiary hearing on suggestiveness simply by making a vague claim of suggestiveness. *People v Johnson (James)*, 202 Mich App 281, 286-287 (1993) (trial court properly denied defendant's motion for an evidentiary hearing to evaluate the identification procedures because defendant's assertion that he appeared at the lineup in the same clothing he wore when he committed the crimes did not automatically render the lineup impermissibly suggestive, especially where the victim testified that she was able to identify defendant by his facial features and had a substantial independent basis for the in-court identification). Generally, the use of surveillance photographs or videos of the actual events surrounding an offense are not impermissibly suggestive. *Kurylczyk*, 443 Mich at 309-310 (surveillance photographs had potential suggestive influence because they refreshed and enhanced bank tellers' memory of the robbery; however, trial court did not clearly err in concluding that the tellers would have recognized defendant as the robber, regardless of the publication of the surveillance photographs).

H. Standard of Review

A trial court's decision to admit identification evidence is reviewed for clear error. *People v Harris (Isaiah)*, 261 Mich App 44, 51 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Harris (Isaiah)*, *supra* at 51.

3.16 Motions for Rehearing or Reconsideration

"[A] circuit court, sitting as an appellate court, [may] reconsider a judgment or order." *People v Walters (Jayne)*, 266 Mich App 341, 349 (2005).

"Unless another rule provides a different procedure for reconsideration of a decision[], a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." MCR 2.119(F)(1). No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The standard for granting or denying motions for rehearing or reconsideration is set out in MCR 2.119(F)(3):

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Walters (Jayne)*, 266 Mich App at 350-352. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters (Jayne)*, *supra* at 350.

The rehearing procedure contained in MCR 2.119(F) "allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties." *People v Turner (Clarence Jr)*, 181 Mich App 680, 683 (1989).

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Walters (Jayne)*, 266 Mich App at 352. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Walters (Jayne)*, *supra* at 352.

3.17 Search and Seizure Issues—Generally

The federal and state constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417 (2000). The reasonableness of a search or seizure is determined by balancing the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. *Terry (John) v Ohio*, 392 US 1, 20-21 (1968). "'The Fourth Amendment does not require a police[officer] who lacks the precise level of information necessary for probable cause to arrest to simply shrug his [or her] shoulders and allow a crime to occur or a criminal to escape.'" *People v Nelson*, 443 Mich 626, 638 (1993), quoting *Adams (Frederick) v Williams (Robert)*, 407 US 143, 145 (1972).

The protections against unreasonable searches and seizures provided in the United States and Michigan constitutions apply to three categories of encounters between the police and citizens:

- Arrests, for which the Fourth Amendment requires that the police have probable cause to believe that a person has committed or is committing a crime, *People v Shabaz*, 424 Mich 42, 59 (1985);

- Investigatory stops (*Terry*[34] stops), which are limited to brief, non-intrusive detentions. In order to justify an investigatory stop, the police must have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime, *Shabaz*, 424 Mich at 57; and

- Situations in which there is no restraint upon the citizen's liberty and the officer is seeking the citizen's voluntary cooperation through non-coercive questioning, *Shabaz*, 424 Mich at 56-57.

The burden is on the prosecution to show that a warrantless search or seizure challenged by a defendant was justified by a recognized exception to the warrant requirement. *People v Galloway*, 259 Mich App 634, 638 (2003).

When addressing a challenged search or seizure, several preliminary questions may be appropriate:

- Was there a search or seizure?

- Does the defendant have standing to challenge the search?

- Where did the search take place?

- Was a warrant required?

- Was there probable cause?

- Is exclusion the remedy if a violation is found?

A detailed discussion of each of these questions follows.

3.18 Search and Seizure Issues—Was There a Search or Seizure?

A "search" within the context of the Fourth Amendment involves

> "'some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive or accomplished by force, and it has been held that a search

[34] *Terry (John) v Ohio*, 392 US 1 (1968).

> implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinary searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."'" See *Brown (Delbert) v State of Alaska*, 372 P2d 785, 790 (Alas, 1962), quoting *People v West (Billy)*, 300 P2d 729, 733 (Cal App, 1956).

A "seizure" of property within the context of the Fourth Amendment occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113 (1984).

~~No search occurs unless it is shown~~"[A Fourth Amendment] violation occurs when government officers violate a person's 'reasonable expectation of privacy[.]'" *United States v Jones (Antoine)*, 565 US ___, ___ (2012), quoting *Katz v United States*, 389 US 347, 360 (1967) (Harlan, J., concurring). Establishing such a violation requires "first that a person ha[s] exhibited an actual (subjective) expectation of privacy, and, second, that the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz~~ v United States~~*, *supra* at ~~389 US 347,~~ 361~~ (1967)~~. Urine and breath tests, even though they are less intrusive than blood tests, are searches within the meaning of the Fourth Amendment. *People v Chowdhury*, 285 Mich App 509, 523-524 (2009) (preliminary breath test (PBT) constituted a search under the Fourth Amendment). See also *Kyllo v United States*, 533 US 27, 34 (2001) (scanning with a thermal imaging device was a search because it was similar to a physical intrusion).

When police conduct does not affect a defendant's legitimate interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US 405, 408 (2005), citing *Jacobsen*, 466 US at 123. Because a defendant has no legitimate interest in possessing contraband, no legitimate interest is implicated when police conduct reveals only the defendant's possession of contraband. *Caballes*, *supra* at 408, citing *Jacobsen*, *supra* at 123. However, see *Jones (Antoine)*, 565 US at ___ (noting that the concept of "reasonable expectation of privacy" as discussed in *Katz*, 389 US at 360-361 [Harlan, J., concurring], and its progeny "did not narrow the Fourth Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy).

"[T]he attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search . . . within the meaning of the Fourth Amendment." *Jones (Antoine)*, 565 US at ___, ___, ___. In *Jones, supra* at ___, police officers installed a GPS tracking device on the undercarriage of a vehicle known to be used by the respondent, who was suspected of trafficking in narcotics. Over a 28-day period, data concerning the vehicle's location was collected by use of the device, connecting the respondent to a house containing large amounts of cash and cocaine. *Id*. at ___. The respondent's ensuing drug conspiracy conviction was reversed by the federal court of appeals on the ground that "admission of the evidence obtained by warrantless use of the GPS device . . . violated the Fourth Amendment." *Id*. at ___. The United States Supreme Court affirmed. *Id*. at ___. Noting its obligation to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted[,]'" the Court reaffirmed that "a vehicle is an 'effect' as that term is used in the [Fourth] Amendment[,]" which has historically "embod[ied] a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id*. at ___, ___ (citations omitted). Accordingly, when "[t]he Government physically occupied private property for the purpose of obtaining information[,]" it conducted a search in violation of the Fourth Amendment's warrant requirement. *Id*. at ___.

An individual who does not submit to an officer's show of authority is not seized, and the Fourth Amendment does not apply to any item the individual abandons during his or her attempt to avoid seizure. *United States v Martin (Rickey)*, 399 F3d 750, 753 (CA 6, 2005). In *Martin (Rickey)*, two police officers saw the defendant trespassing and stopped their patrol car to arrest him. *Martin (Rickey)*, *supra* at 752. The defendant ran from the officers and, as he fled, discarded a revolver. *Id*. Although the gun resulted from the defendant's conduct after the officers' show of authority, the gun did not result from the defendant's seizure—lawful or unlawful—because the defendant discarded the weapon before submitting to the officers' show of authority. *Id*. at 753.

The following instances are not searches:

- When the object is in the officer's plain view, smell, hearing, or touch. When an officer is able to detect something by utilizing one or more of his or her senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment. *Coolidge v New Hampshire*, 403 US 443, 468 (1971).

- The use of a flashlight or other form of illumination to see an area that is obscured by darkness is not a search. *United States v Lee (James)*, 274 US 559, 563 (1927).

- The use of binoculars, telescopes, or photo enlargements, so long as they are used to observe more clearly or carefully that which was in the open, or in order to view at a distance that which could have lawfully been observed from a closer proximity. *United States v Lace*, 669 F2d 46, 51 (CA 2, 1982).

- The use of trained dogs to detect the presence of explosives or narcotics. *United States v Place*, 462 US 696, 697-698 (1983).

- A canine sniff, "as long as the sniffing canine is legally present at its vantage point when its sense is aroused." *People v Jones (Jeffrey)*, 279 Mich App 86, 93 (2008).

3.19 Search and Seizure Issues—Does the Defendant Have Standing?

There is no "automatic standing." Fourth Amendment rights are personal in nature and may only be asserted by one whose own constitutional rights were violated by the search and seizure. A defendant must demonstrate that he or she personally had an expectation of privacy in the object of the search and seizure, and that the expectation is one that society recognizes as reasonable. *People v Smith (Lee)*, 420 Mich 1, 28 (1984). The defendant has the burden of establishing standing, *People v Lombardo*, 216 Mich App 500, 505 (1996), and in deciding the issue, the court should consider the totality of the circumstances. *People v Perlos*, 436 Mich 305, 317-318 (1990). The "reasonable expectation of privacy test" applies to issues of warrantless searches and seizures. *Smith (Lee)*, *supra* at 28. In other words, "the central legal question [is] whether, under Fourth Amendment jurisprudence, the defendant could assert a privacy right under the circumstances." *People v Antwine*, 293 Mich App 192, 195 n 1 (2011), citing *Rakas v Illinois*, 439 US 128, 139 (1978). However, see *United States v Jones (Antoine)*, 565 US ___, ___ (2012) (noting that the concept of "reasonable expectation of privacy" as discussed in *Katz v United States*, 389 US 347, 361 [1967] [(Harlan, J., concurring], and its progeny "did not narrow the Fourth Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy).

For a discussion of factors that are relevant to a determination of standing, see *People v Brown (Craig)*, 279 Mich App 116, 130-131 (2008) (the defendant did not have standing to challenge the warrantless search of a computer he did not own but to which he was allowed access

because he exercised no control over others' access to the computer and he did not own the residence in which the computer was located).

An individual may abandon property for purposes of the Fourth Amendment without losing his or her ownership interest in that property. *People v Henry (Darrin)*, 477 Mich 1123 (2007). Under the circumstances present in *Henry (Darrin)*, the Court explained that for Fourth Amendment purposes, the defendant abandoned the property at issue when

> "[he] placed a bag containing illegally copied recordings on an electric box attached to a utility pole when he saw an unmarked police car approaching him. In doing so, defendant left the bag in a public place where any passerby could have access to it. Defendant thus voluntarily 'left behind or otherwise relinquished his interest' in the bag. He had no reasonable expectation of privacy in the bag once he abandoned it by the pole. [*United States v*] *Colbert*, [] [474 F2d 174,] 176 [(CA 5, 1973)]. Moreover, he did not object or assert his ownership when the police officer walked over to the bag and looked inside. Defendant's silence reflects his intent to distance himself from any connection with the bag when he set it down.
>
> "Fourth Amendment abandonment is distinguishable from abandonment in the property law context . . . . [W]hile abandonment in the property law context looks to whether the person relinquished his *ownership* in the property, abandonment under the Fourth Amendment inquires whether 'the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in it].'" *Henry (Darrin)*, 477 Mich at 1123, quoting *Colbert*, 474 F2d at 176.

However, a person can abandon property and entirely deprive him- or herself of the ability to contest a search and seizure of that property. *People v Zahn*, 234 Mich App 438, 448 (1999). The search and seizure of property that has been abandoned is "presumptively reasonable," because the owner no longer has an expectation of privacy in the abandoned property. *People v Rasmussen*, 191 Mich App 721, 725 (1991). The defendant bears the burden of showing that the property searched was not abandoned. *Rasmussen*, *supra* at 725. Whether an owner abandoned his or her property is an ultimate fact that turns on a combination of act and intent. *People v Shabaz*, 424 Mich 42, 65-66 (1985).

There exists no reasonable expectation of privacy in information a defendant has exposed to third parties (banks and vendors, for example)

in the course of transacting his or her business or personal matters. *People v Gadomski*, 274 Mich App 174, 179 (2007). Consequently, a defendant lacks standing to contest on constitutional grounds the admission of that information against him or her at trial. *Gadomski*, *supra* at 179.

3.20 Search and Seizure Issues—Where Did the Search Take Place?

The rules pertaining to search and seizure vary depending upon the location of the search. Courts have justified the different levels of protection by examining the expectation of privacy a person might have in a particular location or object and balancing the level of intrusiveness of the search and any overriding societal interests.

A. Dwelling Searches

1. Generally

The federal constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and further requires that any search warrant issued be based "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. Michigan's Constitution protects "[t]he person, houses, papers and possessions of every person . . . from unreasonable searches and seizures." Const 1963, art 1, § 11. "No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." *Id*.

An individual's expectation of privacy in his or her residence extends to the curtilage, i.e., the area immediately surrounding the dwelling. *United States v Dunn*, 480 US 294, 300 (1987). In evaluating whether an area is included in the curtilage of a dwelling, the court should examine four factors (the "*Dunn* factors"):

> (1) the proximity of the area claimed to be curtilage to the home;
>
> (2) whether the area is included within an enclosure surrounding the home;
>
> (3) the nature of the uses to which the area is put;

> (4) and the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 480 US at 301.

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, 266 Mich App 687, 697 (2005). In *Tierney, supra* at 701-702, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed, it was unheated and used as a storage area, not a living area. *Id*. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. *Id*. at 701. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. *Id*. Based on the trial court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of privacy in the porch area. *Id*. at 703.

A person's privacy expectation in his or her own dwelling is such that warrantless searches are allowed only in limited—or exigent—circumstances. The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *People v Cartwright*, 454 Mich 550, 558 (1997).

An individual may lack a reasonable expectation of privacy with respect to a search of a dwelling that he or she owns but illegally occupies. *People v Antwine*, 293 Mich App 192, 195-196, 198 (2011), citing *Rakas v Illinois*, 439 US 128 (1978), and other cases cited therein. The Court of Appeals stated:

> "[F]irst, an overall reasonable expectation of privacy—not the existence (or the lack) of a property right—controls the analysis and, second, wrongful presence [on the property] weighs against a reasonable expectation of privacy." *Antwine, supra* at 198.

In *Antwine*, 293 Mich App at 195-196, police officers received a report that someone was illegally occupying the defendant's house, which had been condemned as "unfit for human occupancy or use." The defendant allowed the officers to enter

and admitted that he had removed a condemnation notice that had been posted on the house. *Id.* at 196. "[O]nce the officers confirmed that [the] defendant resided in the condemned house illegally, it was reasonable for them to secure the home and look for other illegal residents[.]" *Id.* at 200. Accordingly, the Court of Appeals found that the "defendant had no reasonable expectation of privacy that precluded the police from conducting the initial search of his house during which they discovered drugs in plain view." *Id.* at 202. Moreover, the trial court's concern that the officers were not *actually* motivated to look for other individuals in the house was misplaced, because the officers' subjective intentions were "irrelevant to the Fourth Amendment analysis." *Id*. at 200-201, citing *Whren v United States*, 517 US 806, 813 (1996) (additional citations omitted).

2. Standing

Defendants may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated; there is no "automatic standing." *United States v Salvucci*, 448 US 83, 85 (1980). A defendant has the burden of establishing standing, and in deciding the issue, the court should consider the totality of circumstances. *People v Powell (Paul)*, 235 Mich App 557, 561 (1999). Whether a defendant has standing is determined by discerning whether he or she had a reasonable expectation of privacy in the area that was searched. *Powell (Paul)*, *supra* at 561. "A defendant must satisfy a two-pronged test to show a legitimate expectation of privacy: (1) he [or she] must manifest an actual, subjective expectation of privacy; and (2) that expectation is one that society is prepared to recognize as legitimate." *United States v Pollard*, 215 F3d 643, 647 (CA 6, 2000). "When determining the legitimacy of a defendant's subjective expectation of privacy, [a court should] consider all of the facts and circumstances of the case, and 'no single factor invariably will be determinative' in deciding the reasonableness of asserted privacy expectations." *United States v Domenech*, 623 F3d 325, 329 (CA 6, 2010), quoting *United States v Smith (Steven)*, 263 F3d 571, 586 (CA 6, 2001) (internal quotation marks omitted).

An individual who is an overnight guest in a dwelling may establish that he or she has a reasonable expectation of privacy recognized by the Fourth Amendment in the home of his or her host. *Minnesota v Olson*, 495 US 91, 96-97 (1990). Conversely, a person who is briefly present in a dwelling, with the owner's consent, may not claim the protections intended by

the Fourth Amendment. *Minnesota v Carter (Wayne)*, 525 US 83, 90 (1998).

"[A] hotel guest has a periodic right to occupy a room, not a permanent one." *United States v Lanier*, 636 F3d 228, 232 (CA 6, 2011). "'Once a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room or in any article therein of which the hotel lawfully takes possession.'" *Lanier*, *supra* at 232, quoting *United States v Allen*, 106 F3d 695, 699 (CA 6, 1997) (internal quotation omitted). "'[A] hotel guest's right to a room is limited to a predetermined period of occupancy,' and it is reasonable to presume as a general matter 'that hotel guests will check out at the designated time and their right in the premises does not automatically continue for some indefinite period.'" *Lanier*, *supra* at 232, quoting *United States v Washington*, 573 F3d 279, 285 (CA 6, 2009). However, "a hotel's practices and communications with the guest may modify the general rule." *Lanier*, *supra* at 232. "'[T]he policies and practices of a hotel may result in the extension past checkout time of a defendant's reasonable expectation of privacy.'" *Id*., quoting *United States v Dorais*, 241 F3d 1124, 1129-1130 (CA 9, 2001). "[T]hese practices often take two forms: giving a guest permission to stay until a later check-out time or generally acquiescing when a guest stays until a later check-out time." *Lanier*, *supra* at 232. In *Lanier*, *supra* at 232-233, "[t]he general rule, not the exceptions, applie[d] to [the defendant]" where the search occurred after the appointed check-out time, the defendant did not ask the hotel to extend his stay or receive permission from the hotel for a later check-out time, and the hotel had no history of acquiescing in delayed departures by the defendant. Accordingly, the defendant did not have a reasonable expectation of privacy in his hotel room after the appointed check-out time, and, accordingly, did not have standing to challenge the search of his hotel room which yielded a substantial quantity of drugs. *Id*. at 230-233.

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, 409 F3d 297, 300-302 (CA 6, 2005).

3. Factors Involved in Dwelling Searches

▸ Knock and Announce

The knock and announce statute, MCL 780.656, requires that police executing a search warrant give notice of their authority

and purpose and be refused entry before forcing their way in. *People v Fetterley*, 229 Mich App 511, 521 (1998). Specifically, MCL 780.656 provides:

> "The officer to whom a warrant is directed, or any person assisting him [or her], may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his [or her] authority and purpose, he [or she] is refused admittance, or when necessary to liberate himself [or herself] or any person assisting him [or her] in execution of the warrant."

The interests protected by the knock and announce rule include:

- protection of human life and limb (because an unannounced entry may provoke violence when a surprised resident acts in self-defense);
- protection of property; and
- protection of those elements of privacy and dignity that can be destroyed by a sudden entrance. *Hudson (Booker) v Michigan*, 547 US 586, 593-594 (2006).

Evidence seized pursuant to a violation of the knock and announce rule need not always be suppressed. *People v Howard (Troy)*, 233 Mich App 52, 60-61 (1998). Suppression is appropriate for violations of the "knock and announce" statute only where the police conduct is unreasonable by Fourth Amendment standards. *Howard (Troy)*, *supra* at 60-61. Further, where an interest that is violated is not an interest protected by the knock and announce rule, the exclusionary rule is inapplicable. *Hudson (Booker)*, 547 US at 594. Interests protected by the knock and announce rule include the protection of human life and limb, the protection of property, and the protection of those elements of privacy and dignity that can be destroyed by a sudden entrance. *Hudson (Booker)*, *supra* at 594. The knock and announce rule does not protect an individual's interest in preventing the police from seeing or taking evidence described in a warrant. *Id*.

a. Knock and Talk

> "[T]he knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that

is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v Frohriep*, 247 Mich App 692, 697 (2001).

The knock and talk procedure is constitutional, but it is subject to judicial review to ensure compliance with general constitutional protections. *Frohriep*, 247 Mich App at 698. "Whenever the knock and talk procedure is utilized, the ordinary rules that govern police conduct must be applied to the circumstances of the particular case." *People v Galloway*, 259 Mich App 634, 639 (2003). "Knock and talk . . . does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search." *Galloway*, *supra* at 640.

b. "No Knock" Entry

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by… allowing the destruction of evidence. This standard . . . strikes the appropriate balance between legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Richards (Steiney) v Wisconsin*, 520 US 385, 394-395 (1997).

c. Warrantless Entry

The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *Cartwright*, 454 Mich at 558. Additionally, a police officer may enter a dwelling without a warrant where it is reasonable to believe that a person inside the dwelling is in need of immediate medical assistance. *People v Davis (Harriet)*, 442 Mich 1, 14 (1993); *People v Ohlinger*, 438 Mich 477, 483-484 (1991); see

also *People v Slaughter*, 489 Mich 302, 316-317 (2011) (extending the "community caretaking exception" discussed in *Davis (Harriet)*, *supra* at 20-23, to "a firefighter, responding to an emergency call involving a threat to life or property, [who] reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside[]"). The officer must limit his or her actions to those that are necessary to assess the situation and deliver any assistance that is required. *Ohlinger*, *supra* at 484; see also *Slaughter*, *supra* at 320-321, quoting *Davis (Harriet)*, *supra* at 26 (firefighter entering residence pursuant to community caretaking function must limit scope of entry to "what [is] 'reasonably necessary' to abate the hazard"); *Tierney*, 266 Mich App at 704-705 (emergency aid exception justified police officers' warrantless entry into a home after the officers saw through a window in the front door that a motionless person was slumped over the kitchen table and a rifle and ammunition were in close proximity to the person).

With respect to abandoned or vacant structures, several factors must be evaluated on a case-by-case basis to determine whether police officers may enter a dwelling without securing a warrant:

> "(1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure." *People v Taylor (Paul)*, 253 Mich App 399, 407 (2002).

The *Taylor (Paul)* Court further advised that the listed factors were "not exhaustive or otherwise dispositive[; rather], a trial court must necessarily place them into the totality of the circumstances equation where a vacant structure is at issue." *Taylor (Paul)*, 253 Mich App at 407.

B. Automobile Searches

1. Generally

"[A] vehicle is an 'effect' as that term is used in the [Fourth] Amendment." *United States v Jones (Antoine)*, 565 US ___, ___ (2012) (citing *United States v Chadwick*, 433 US 1, 12 [1977], and holding that "the Government's installation of a [Global-Positioning-System (GPS)] device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search[]'").

However, a warrantless search of a vehicle is permissible under certain circumstances. See *People v Levine (Brian)*, 461 Mich 172, 178-179 (1999) (exception to warrant requirement applies to vehicle search, but only if the search is based on facts that would have justified the issuance of a warrant).

When police have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody. *People v Carter (Deborah)*, 250 Mich App 510, 516 (2002).

If probable cause exists to believe that a vehicle contains contraband, the ability to conduct a warrantless search extends to closed containers that might conceal the object of the search. *People v Kazmierczak*, 461 Mich 411, 422 (2000).

If a driver or other occupant of a vehicle is lawfully arrested, the police may search the arrestee and the area within his or her immediate control, including a search of the passenger compartment of an automobile occupied by the arrestee as a contemporaneous search incident to that arrest. *People v Eaton (Charles)*, 241 Mich App 459, 463 (2000), citing *New York v Belton*, 453 US 454, 460 (1981).[35] The police may also examine the contents of any containers found within the passenger compartment. *Eaton (Charles)*, *supra* at 463. "Container" means "any object capable of holding another object," i.e., "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment . . . ."

[35] See, however, *Arizona v Gant*, 556 US 332, 343-344, 351 (2009), in which the United States Supreme Court curtailed application of *Belton*, 453 US at 460, and "adopted a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'" *Davis v United States*, 564 US ___, ___ (2011) (citations omitted).

Belton, *supra* at 460 n 4. The search for a weapon is limited to the area where the weapon may be placed or hidden. *Michigan v Long (David)*, 463 US 1032, 1049 (1983).

"[Police officers] may order out of a vehicle both the driver and any passengers; perform a 'patdown' of a driver and any passengers on reasonable suspicion that they may be armed and dangerous; conduct a '*Terry*[36] patdown' of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon; and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Knowles v Iowa*, 525 US 113, 118 (1998) (internal citations omitted).

"To justify a patdown of the driver or a passenger during a traffic stop . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v Johnson (Lemon)*, 555 US 323, 327 (2009).

Warrantless searches of automobiles are permissible upon a showing of probable cause. Courts have justified the automobile exception to the warrant requirement in two ways. Some courts have found that a defendant has a lower expectation of privacy with regard to an automobile than he or she has in a dwelling. See *Chambers (Frank) v Maroney*, 399 US 42, 48 (1970). Other courts have used the justification that the mobility of an automobile requires that the police have the flexibility to search the vehicle without a warrant. See *Carroll v United States*, 267 US 132, 153 (1925).

2. Standing

> "Under the Fourth Amendment, a search occurs when an individual has a reasonable expectation of privacy in the area examined. Thus, before a person may attack the propriety of a search and seizure of property and receive the panoply of Fourth Amendment safeguards, that search or seizure must have infringed upon an interest of the person which the Fourth Amendment was designed to protect. This initial inquiry regarding standing depends upon whether, in light of the totality of the circumstances, the defendant had an expectation of privacy in the object of the search

[36] *Terry (John) v Ohio*, 392 US 1 (1968).

> and seizure, and whether that expectation is one that society is prepared to recognize as reasonable.
>
> * * *
>
> "Fourth Amendment rights are personal in nature and may not be asserted vicariously, but rather only 'at the instance of one whose own protection was infringed by the search and seizure.'" *People v Armendarez*, 188 Mich App 61, 70-71 (1991) (internal citations omitted).

The police can search a passenger's personal belongings inside an automobile that they have probable cause to believe the belongings contain contraband. *Wyoming v Houghton*, 526 US 295, 302 (1999).

A passenger in a vehicle stopped by the police is seized for purposes of the Fourth Amendment and may properly challenge the constitutionality of the traffic stop. *Brendlin v California*, 551 US 249, 251 (2008). According to the *Brendlin* Court, the time of the passenger's formal arrest did not constitute the time at which the passenger was seized; rather, the passenger was seized at the moment the car in which he was riding came to a stop on the side of the road. *Brendlin*, *supra* at 263.

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Johnson (Lemon)*, 555 US at 333. "An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id*. In *Johnson (Lemon)*, *supra* at 334, a policewoman "was not constitutionally required to give [the defendant, who was a backseat passenger,] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."

See also *People v Corr*, 287 Mich App 499, 507 (2010), where the Court of Appeals found that "it was reasonable, for the officer[s'] safety as well [as] for [the] defendant[-passenger]'s safety, for the officers to command [the] defendant to remain in the vehicle while they completed their noninvestigatory

duties at the traffic stop, particularly considering that [the] defendant was intoxicated and aggressive toward the officers during the stop, bystanders had arrived on the scene, and the weather conditions were dangerous." The Court noted that under the circumstances, the officers needed to maintain control over the scene even though the driver of the car— the defendant's son—had been arrested and secured in the police car. *Corr*, *supra* at 507, citing *Johnson (Lemon)*, 555 US 323. The Court concluded that "the officers' commands to stay in the vehicle, which resulted in [the] defendant's detention beyond the time of the driver's arrest but before the officers had completed their duties at the scene, to be lawful." *Corr*, *supra* at 508. The Court further held that "by ordering [the] defendant to stay in the vehicle, the officers were merely attempting to keep [the] defendant safe and maintain order and control over the scene so they could perform their noninvestigatory police functions." *Id*.

3. Probable Cause to Search an Automobile

An exception to the warrant requirement exists for searches of automobiles, but the exception only applies to searches supported by probable cause. *Levine (Brian)*, 461 Mich at 179. The exception was established because of the mobility of vehicles and because of the reduced expectation of privacy regarding automobiles. *Carter (Deborah)*, 250 Mich App at 515, 517.

Under the automobile exception to the warrant requirement, police may search a vehicle without a warrant if there is probable cause to believe that the vehicle contains evidence of a crime. *United States v Ross (Albert Jr)*, 456 US 798, 799 (1982).

As long as the initial seizure (in this case, a traffic stop) was lawful and police conduct did not prolong the seizure beyond the time reasonably required to process the traffic stop information, an individual's constitutional protection from unreasonable searches and seizures is not implicated. *Illinois v Caballes*, 543 US 405, 407 (2005). Because a defendant has no legitimate interest in possessing contraband, *Caballes*, *supra* at 408, the police may search a vehicle without a warrant if they have probable cause to believe that the vehicle contains contraband. *Pennsylvania v Labron*, 518 US 938, 940 (1996). If there is probable cause to believe that contraband is present in the vehicle, an occupant may be temporarily detained during the search of the vehicle. *Michigan v Summers*, 452 US 692, 702-703 (1981).

An initial traffic stop occasioned by a defendant's traffic violation is based on probable cause, and is therefore reasonable. *People v Williams (John Lavell)*, 472 Mich 308, 314 (2005). "A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *Williams (John Lavell)*, *supra* at 315. "[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Id*. There is no Fourth Amendment violation where an officer asks reasonable questions to ascertain additional information about the underlying offense and the circumstances leading to its commission. *Id*. at 316. "Implicit in the authority to ask these questions is the authority to ask follow-up questions when the initial answers given are suspicious." *Id*. When a defendant then voluntarily consents to a search of his or her vehicle, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

The following rules are applicable with respect to stopping, searching, and seizing motor vehicles and their contents:

- Reasonableness is the test that is to be applied for both stopping and searching moving motor vehicles;
- Reasonableness is to be determined from the facts and circumstances of each case;
- Fewer foundation facts are necessary to support a finding of reasonableness when a moving vehicle, rather than a house, is involved;
- A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search are conducted by the police. *People v Whalen*, 390 Mich 672, 682 (1973). See also *United States v Arvizu*, 534 US 266, 273 (2002) (Fourth Amendment protections are satisfied if the police action is supported by reasonable suspicion to believe that criminal activity may be afoot).

4. Searching a Container Located in an Automobile

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross (Albert*

Jr), 456 US at 825. That is, "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v Acevedo*, 500 US 565, 580 (1991). Further, the police may "open and search any container placed or found in an automobile, as long as they have the requisite probable cause with regard to such a container, even if such probable cause focuses specifically on the container and arises before the container is placed in the automobile." *People v Bullock*, 440 Mich 15, 24 (1991).

Thus, all containers large enough to hold the object of the search may be opened without a warrant during an automobile search. *United States v Johns*, 469 US 478, 484 (1985). And, if the container may be searched at the scene, it may also be seized and searched without a warrant shortly thereafter, at the police station. *Johns*, *supra* at 485.

In the context of automobile searches, a computer may be considered a container of the data stored in the computer's memory. *People v Dagwan*, 269 Mich App 338, 345 (2005).

The search of a passenger's backpack did not violate her constitutional right to be free of unreasonable searches and seizures, where the driver consented to a search of the vehicle following a lawful traffic stop and, under those circumstances, the police were authorized to search the entire passenger compartment, including the passenger's backpack. *People v Labelle*, 478 Mich 891 (2007).

5. Searching an Automobile Incident to Arrest

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v Gant*, 556 US 332, 351 (2009). "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Gant*, *supra* at 351. In *Gant*, *supra* at 335-336, the defendant was arrested for driving with a suspended license. After the police handcuffed the defendant and locked him in the back of a patrol car, they searched his car and found drugs in a jacket on the backseat. *Id*. The United States Supreme Court held that the search was improper because *Belton* "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the

interior of the vehicle." *Gant*, *supra* at 335. Further, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id*. at 335. "Because [the] police could not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search [] was unreasonable." *Id*. at 344.

Subject to the limitations and qualifications set out in *Gant*, 556 US at 335, see also *Belton*, 453 US at 460 (when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous search incident to that arrest, search the passenger compartment of that automobile, and examine the contents of any container found within the passenger compartment whether it is open or closed because the lawful custodial arrest justifies the infringement of any privacy interest), and *Thornton v United States*, 541 US 615, 622-624 (2004) (a police officer may lawfully search an individual's vehicle incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle).

Where an officer received information that the defendant was driving erratically, was confused, and was taking oxycontin for pain following surgery, there was "reason[] to believe [the defendant's] vehicle might contain evidence of . . . the 'offense of arrest[]'" within the meaning of *Gant*, 556 US at 351, and the officer therefore lawfully searched the defendant's vehicle for evidence of narcotics or other drugs after arresting him for drunk driving and placing him in a police car. *People v Tavernier*, ___ Mich App ___, ___ (2012).

Where police searched an automobile in objectively reasonable reliance on *Belton*, 453 US 454, and other binding appellate precedent, the exclusionary rule did not apply to evidence obtained in that search, even though the search was subsequently rendered unconstitutional under *Gant*, 556 US at 351. *Davis v United States*, 564 US ___, ___ (2011).[37] In *Davis*, *supra* at ___, officers conducted a routine traffic stop that resulted in the arrests of the driver and a passenger. After securing the occupants in police vehicles, the officers searched the driver's vehicle and discovered a revolver in the passenger's jacket pocket; the passenger was subsequently convicted of possession of a firearm by a convicted felon. *Id*. at

[37] See Section 3.23(C) for additional discussion of *Davis*, 564 US ___.

___. While the passenger's appeal was pending, the United States Supreme Court decided *Gant*, *supra*. *Davis*, *supra* at ___. The *Davis* Court held that although the search incident to arrest was unconstitutional under *Gant*, "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity[;]'" accordingly, the Court concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis*, *supra* at ___.

See also *People v Mungo (On Second Remand)*, ___ Mich App ___, ___ (2012) (holding that, under *Davis*, 564 US ___, the exclusionary rule did not apply to evidence discovered in the defendant's car during a search conducted after a passenger was arrested based on outstanding traffic warrants and after the passenger and the defendant were secured in police vehicles; although the search was rendered impermissible under the United States Supreme Court's subsequent decision in *Gant*, 556 US at 351, the good-faith exception to the exclusionary rule applied because the officer who conducted the search "had a good-faith basis to rely on *Belton*[, 453 US at 460,] . . . [which] authorized a search incident to an arrest of [any] recent occupant of a vehicle[]").

C. Search or Seizure of Containers or Personal Effects

Rules regarding the search or seizure of containers or personal effects apply both to those items that are in the possession of the suspect as well as those that are not.

Acevedo, 500 US at 580, "interpret[ed] *Carroll*[, 267 US 132,] as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

The following are possible bases for a warrantless search of containers and other personal effects:

- Search of the object incident to the arrest of its possessor on the ground that it is within his or her "immediate control." *Chimel v California*, 395 US 752, 762-763 (1969).

- Inventory of the object subsequent to the arrest of its possessor so long as the inventory search is conducted according to established policy. *Colorado v Bertine*, 479 US 367, 374 (1987). See also *People v Toohey*, 438 Mich 265, 280 (1991) ("the police are not required to pursue less intrusive

alternatives when their decisions are in accordance with standardized procedures regarding impoundment").

- Reasonable search of the object for reasons unrelated to the obtaining of evidence of a crime. See *United States v Dunavan*, 485 F2d 201, 204-205 (CA 6, 1973), where the search was not a pretext but rather was done as a matter of the police performing their general duties owed to the public, e.g., rendering emergency life-saving assistance.

- Search following a "controlled delivery" of the object by police or a police agent or suspect. Where the police know that an object containing contraband has been delivered to a suspect, they may search the object upon its receipt by the suspect. See *United States v DeBerry*, 487 F2d 448, 450-451 (CA 2, 1973).

D. Searches That Take Place in a School

Searches that take place in schools may be properly conducted based on a level of suspicion less than probable cause. Courts have justified searches of students based on reasonable suspicion. The child's interest in privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. *New Jersey v TLO*, 469 US 325, 341-343 (1985).

"[A] school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" *Safford Unified School Dist #1 et al. v Redding*, 557 US 364, ___ (2009), quoting *TLO*, *supra* at 342. In *Safford*, *supra* at ___, "a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school . . . [b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear[.]" That is, "the content of the suspicion failed to match the degree of intrusion." *Id*. at ___.

E. Searches That Take Place in an Airport

An airport screening search is constitutionally reasonable provided that it is not more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons and/or explosives, and that it is confined in good faith to those purposes. *United States v Aukai*, 497 F3d 955, 962 (2007).

F. Searches That Take Place at Border Crossings

Border searches are considered reasonable based on the single fact that the person or item is entering the country from the outside. *United States v Ramsey*, 431 US 606, 620 (1977).

G. Searches of Parolees or Probationers

The search of a parolee or probationer may be justified on a showing of less than probable cause. The justification for this has often been that the state's interest in administering the criminal justice system requires that the state have greater flexibility in monitoring the activities of those persons on parole or probation. *Griffin (Joseph) v Wisconsin*, 483 US 868, 873-875 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity). See also *United States v Knights*, 534 US 112, 122 (2001) (permitting a search based on a probation condition and reasonable suspicion).

The United States Supreme Court has held that a suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US 843, 849-850, 857 (2006). The *Samson* case involved a California statute authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee. *Samson*, *supra* at 857. The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Id*. at 847. The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at 852, 857.

A parolee living in a community residential home[38] while "physically connected . . . to a device that monitored his every movement and made him obtain approval before leaving the walls of [the] home," is treated as a prisoner, not as a parolee. *United States v Smith (Rickey)*, 526 F3d 306, 309 (CA 6, 2008). Accordingly, the police have as much freedom to enter and search that parolee's

[38] "'Community residential home' means a location where electronic monitoring of prisoner presence is provided by the [D]epartment [of Corrections] 7 days per week, 24 hours per day . . . ." MCL 791.265a(9)(b).

community residential home as they do to enter and search a defendant's prison cell; just as with an incarcerated offender, a community-resident prisoner has no legitimate expectation of privacy from unannounced searches, with or without suspicion. *Smith (Rickey)*, *supra* at 309.

H. Searches That Take Place in Prison or Jail

In *Hudson (Ted) v Palmer*, 468 US 517, 525-526 (1984), the United States Supreme Court held that Fourth Amendment protections do not apply to a prison cell. The correctional facility's interest in security outweighs a prisoner's already lowered expectation of privacy. *People v Herndon*, 246 Mich App 371, 397 (2001).

The Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

I. The Use of Roadblocks/Checkpoints

The United States Supreme Court has held that the use of roadblocks to enforce regulations concerning the use of vehicles, including the use of checkpoints to check driver's licenses and vehicle registrations, to make safety inspections of vehicles, to check sobriety, or to inspect cargo trucks or similar containers is permissible. *Michigan Dep't of State Police v Sitz*, 496 US 444, 455 (1990). However, the Michigan Supreme Court has held that the Michigan Constitution provides greater protection against warrantless seizures than does the federal constitution, and that the use of sobriety checkpoints violates Const 1963, art 1, § 11. *Sitz v Dep't of State Police*, 443 Mich 744, 746-747 (1993).

3.21 Search and Seizure Issues—Was a Warrant Required?

There is a strong preference that searches and seizures be made pursuant to a search warrant. *United States v Ventresca*, 380 US 102, 106 (1965).

A. Search Warrants

1. Generally

A magistrate may only issue a search warrant when it is supported by probable cause. MCL 780.651(1); *People v Ulman*, 244 Mich App 500, 509 (2001). Probable cause exists when all the facts and circumstances would allow a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched. *Ulman*, *supra* at 509. The magistrate's findings of probable cause must be based on all the facts set out in the affidavit. MCL 780.653; *Ulman*, *supra* at 509. Ordinarily, requests for search warrants are addressed to the district court.

2. Probable Cause

Under both the state and federal constitutions, unreasonable searches and seizures are prohibited. US Const, Am IV; Const 1963, art 1, § 11. Both constitutions require that search warrants shall be issued only upon probable cause supported by oath or affirmation. The issuance of search warrants is governed by statute. MCL 780.651, MCL 780.652, MCL 780.653, and MCL 780.654.

"The passage of time is a valid consideration in deciding whether probable cause exists. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal [defendant], the thing to be seized, the place to be searched, and the character of the crime." *People v Brown (Craig)*, 279 Mich App 116, 128 (2008). The search of a defendant's urine was constitutional where, despite the defendant's contention that the search warrant authorizing the search was stale because there was no evidence that he recently used steroids, a reasonably cautious person could have concluded that there was a substantial basis for a finding of probable cause, based on the defendant's knowledge, use, and likely possession of steroids. *Brown (Craig)*, *supra* at 128-129.

In determining whether information is stale, the court should consider the following factors: (1) the character of the crime (is it a chance encounter or recurring conduct?); (2) the criminal (is he or she "nomadic or entrenched?"); (3) the thing to be seized (is it "perishable and easily transferrable or of enduring utility to its holder?"); and (4) the placed to be searched (is it a "mere criminal forum of convenience or [a] secure operational base?"). *United States v Frechette*, 583 F3d 374, 378 (CA 6, 2009).

In *Frechette*, *supra* at 378-379, the court applied the above-listed factors to conclude that 16-month-old evidence that the defendant subscribed to a child pornography website was not stale, because the crime of child pornography is not fleeting; the defendant lived in the same house for the time period at issue; child pornography images can have an infinite life span; and the place to be searched was the defendant's home.

3. Affidavit/"*Franks*" Hearing[39]

The affidavit in support of a search warrant may be based on information supplied to the complainant by a named or unnamed person. MCL 780.653. If the person is named, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information. *Id*. If the person is unnamed, the affidavit must include affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable. *Id*. The affidavit must be read in a commonsense and realistic manner. *People v Whitfield*, 461 Mich 441, 444 (2000).

"*Franks v Delaware*, 438 US 154, 155-156 (1978), requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224 (1992).

"Determining that a defendant has Fourth Amendment standing is a prerequisite to granting a motion for a *Franks* hearing." *United States v Mastromatteo*, 538 F3d 535, 544 (CA 6, 2008). Standing is determined by examining whether the defendant is able to establish a legitimate expectation of privacy in the area to be searched or the items to be seized. *Mastromatteo*, *supra* at 544. "A defendant's standing is determined independently from his co-defendant's standing with regard to the same items and places that are searched." *Id*. In *Mastromatteo*, the defendant lacked standing to challenge the search at issue because, unlike his codefendant, he was unable to demonstrate that he had a legitimate expectation of privacy in the place that was searched. *Id*.

"In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged

[39] *Franks (Jerome) v Delaware*, 438 US 154 (1978).

false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Stumpf*, 196 Mich App at 224.

"At a *Franks* hearing, evidence may be suppressed only upon a showing that false material essential to probable cause was knowingly or recklessly included. Both the [prosecution] and the defendant may present evidence." *People v Reid*, 420 Mich 326, 336 (1984).

Exclusion of evidence is not necessarily the remedy for noncompliance with the statutory affidavit requirements for obtaining a valid search warrant. *People v Hawkins*, 468 Mich 488, 500, 510-512 (2003) (Court of Appeals erred in holding that suppression of the evidence was required as a remedy for a violation of the affidavit requirements for an unnamed person in MCL 780.653(b)). See *People v Mullen*, 282 Mich App 14, 16 (2008), where the Michigan Court of Appeals found that despite a police officer's intentional or reckless omission of material information from the affidavit, as well as his intentional or reckless inclusion of false information, probable cause still existed to issue a search warrant. In *Mullen*, *supra* at 16-19, the defendant was stopped and arrested for operating a motor vehicle while intoxicated. The arresting police officer filed an affidavit seeking a search warrant to test the defendant's blood alcohol content. *Id.* at 19. The trial court determined that the officer both included false information in, and omitted material information from, the affidavit. *Id.* at 23. For example, although the officer failed to properly conduct a few of the field sobriety tests, the officer indicated that the defendant performed poorly on the tests. *Id.* at 20. In addition, the officer failed to indicate that the defendant had a piece of paper in his mouth a few minutes before taking a preliminary breath test (PBT). *Id.* at 20, 23. The Michigan Court of Appeals agreed with the trial court's factual determinations, but disagreed with its decision to suppress the evidence because

"the evidence presented . . . did not establish that the 0.15 PBT test result was significantly unreliable as to preclude the reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication. Given the absence of any basis to significantly call into question the 0.15 PBT result, and given the other circumstantial evidence that defendant was intoxicated, we find that the circuit court erred by determining that a reasonable magistrate

would not have found probable cause to issue a search warrant." *Mullen*, 282 Mich App at 28.

Information received from a fellow officer may be used as the basis for a warrant affidavit. *People v Mackey*, 121 Mich App 748, 753 (1982). When one police officer receives information from another, the law assumes the source is credible and the magistrate may likewise consider the source credible. *Mackey, supra* at 754. However, this does not relieve the affiant of the obligation to inform the magistrate of the fact that the information was received from a fellow officer and the reason or reasons for finding the information reliable. *Id*. Crime victims and identified citizens are also presumptively reliable. *People v Powell (Adie)*, 201 Mich App 516, 521-523 (1993).

As long as an informant's statement is reasonably corroborated by other matters within a police officer's knowledge, the officer may rely on information received through an informant, as opposed to information received through his or her direct observations. *United States v Williams (David)*, 544 F3d 683, 690 (CA 6, 2008).

It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007). In *Keller, supra* at 477, the information contained in the affidavit supported the magistrate's conclusion that it was fairly probable that contraband would be found in the defendants' home because the affidavit was based in part on the small amount of marijuana discovered in the defendants' trash. Although the evidence discovered in the defendants' trash did not support the anonymous informant's allegation that the defendants were engaged in drug trafficking, the evidence from the defendants' trash adequately established the probable cause necessary to justify a search of the defendants' home for additional contraband. *Id*. at 483. In other words, even though the anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supports the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability does not come into play." *Id*.

When the police act in reasonable and good faith reliance on a search warrant, the item seized may not be suppressed if the warrant is later declared invalid. *People v Goldston*, 470 Mich 523, 526 (2004), relying on *United States v Leon*, 468 US 897

(1984), which adopted a good faith exception to the exclusionary rule and specifically held that the exclusionary rule does not bar the admission of evidence seized in reasonable, good faith reliance on a search warrant ultimately found to have been defective.

4. Description

The Fourth Amendment requires that a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. "A search warrant shall be directed to the sheriff or any peace officer, commanding the sheriff or peace officer to search the house, building, or other location or place, where the person, property, or thing for which the sheriff or peace officer is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized." MCL 780.654(1).

The test for determining the sufficiency of the description of the place to be searched is:

> (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort; and
>
> (2) whether there is any reasonable probability that another premises might be mistakenly searched. *People v McGhee (Larry Arnold)*, 255 Mich App 623, 626 (2003).

The affidavit or warrant request must state a nexus between the place to be searched and the evidence sought, and the belief that the items sought will be found at the search location must be supported by more than mere suspicion. *Williams (David)*, 544 F3d at 686. "A magistrate may infer a nexus between a suspect and his [or her] residence, depending upon 'the type of crime being investigated, the nature of [the] things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.'" *Williams (David)*, *supra* at 687, quoting *United States v Savoca*, 761 F2d 292, 298 (CA 6, 1985).

"[A]n issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *Williams (David)*, 544 F3d at 687.

MCL 780.652(1) states that "[a] warrant may be issued to search for and seize any property or other thing that is 1 or more of the following:

> "(a) Stolen or embezzled in violation of a law of this state.
>
> "(b) Designed and intended for use, or that is or has been used, as the means of committing a crime.
>
> "(c) Possessed, controlled, or used wholly or partially in violation of a law of this state.
>
> "(d) Evidence of crime or criminal conduct.
>
> "(e) Contraband.
>
> "(f) The body or person of a human being or of an animal that may be the victim of a crime.
>
> "(g) The object of a search warrant under another law of this state providing for the search warrant. If there is a conflict between this act and another search warrant law, this act controls."

MCL 780.652(2) states that "[a] warrant may be issued to search for and seize a person who is the subject of either of the following:

> "(a) An arrest warrant for the apprehension of a person charged with a crime.
>
> "(b) A bench warrant issued in a criminal case."

"[T]he purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure. . . . The degree of specificity required depends on the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15 (1988) (internal citations omitted). See *People v Martin (Bobby)*, 271 Mich App 280, 304-305 (2006), for an example of warrants that described with sufficient particularity the items to be seized ("[t]he search warrants authorized the search for equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the bar . . . further qualified by the reference to the drug trafficking and prostitution activities that were thought to take place there").

A search warrant authorizing the seizure of "any evidence of homicide" met the particularity requirement because the executing officers were limited to searching only for "items that might reasonably be considered 'evidence of homicide,'" and because "[a] general description, such as 'evidence of homicide,' is not overly broad if probable cause exists to allow such breadth." *People v Unger*, 278 Mich App 210, 245-246 (2008), relying on *Zuccarini*, 172 Mich App 11, and *Martin (Bobby)*, 271 Mich App 280.

To determine whether a warrant is constitutional in its scope, a court must determine whether the search warrant is supported by valid portions of the affidavit on which the warrant is based. *Keller*, 479 Mich at 478. To properly evaluate the defendant's claim that the warrant was unconstitutional because it was overbroad, the *Keller* Court relied on federal case law[40] involving the severability of invalid portions from an affidavit to determine whether the remaining valid portions of the affidavit were sufficient to support the warrant's issuance. *Keller*, *supra* at 478 n 30. According to the *Keller* Court:

"[T]here is a 'multiple-step analysis to determine whether severability is applicable.' [*United States v Sells*, 463 F3d 1148, 1151 (CA 10, 2006).] First the Court must divide the warrant into categories. Then, the Court must evaluate the constitutionality of each category. If only some categories are constitutional, the Court must determine if the valid categories are distinguishable from the invalid ones and whether the valid categories 'make up the great part of the warrant.' [*Sells*, *supra* at 1151.] Here, the warrant authorizes the seizure of three categories of evidence: marijuana; distribution evidence, such as currency and packaging paraphernalia; and possession evidence, such as proof of residency. Of these three categories, the only one that is arguably invalid is the distribution evidence. If it were invalid, that category would be severable from the others.

"While all three categories are related to marijuana crimes, the distribution evidence relates to a distinct crime. Furthermore, when determining whether a valid portion constitutes the greater part of a warrant, 'merely counting parts, without any evaluation of the practical effect of those parts, is an improperly "hypertechnical" interpretation of the search authorized by the warrant.' [*Sells*, 463 F3d at 1160.] Instead, a court should 'evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant.' [*Sells*, *supra* at 1160.]

[40] *United States v Sells*, 463 F3d 1148, 1150 n 1 (CA 10, 2006).

In this case, the authorized search for marijuana permitted police officers to search the entire house and to investigate containers in which marijuana might be found. Hence, the scope of the search authorized by the valid portion of the search [warrant] was extremely broad and allowed police officers to search in almost every place which the authorization to search for distribution evidence permitted. For this reason, the valid portion of the warrant, in our judgment, formed the greater part of the search warrant. Therefore, even if the warrant is overbroad, the distribution category is severable." *Keller*, 479 Mich at 478-480.

5. Execution

Although an affidavit becomes part of the "copy of the warrant" that must be left pursuant to MCL 780.655, failure to comply with that statutory requirement does not require suppression of evidence where the defendant has the opportunity to challenge probable cause and the requirement is merely procedural. *People v Garvin (Demar)*, 235 Mich App 90, 99-100 (1999). See also *People v Sobczak-Obetts*, 463 Mich 687, 710-712 (2001) (nothing in the language of MCL 780.655 provides any basis to infer that it was the Legislature's intent that the drastic remedy of exclusion be applied to a violation of the statute).

6. Anticipatory Search Warrants

"'An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of a crime will be located at a specified place.'" *People v Kaslowski*, 239 Mich App 320, 324 (2000), quoting *People v Brake*, 208 Mich App 233, 244 (1994). A magistrate issuing such a warrant "should take care to require independent evidence establishing probable cause that the contraband will be located at the premises at the time of the search." *Kaslowski*, *supra* at 325. Further, although not required, the magistrate should protect against premature execution of the warrant by listing the conditions governing its execution. *Id*.

Anticipatory search warrants are constitutional. *United States v Grubbs*, 547 US 90, 94-95 (2006). "They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." *Grubbs*, *supra* at 96. Further, the condition triggering execution of the warrant need not be stated in the warrant; the Fourth Amendment's

"particularity requirement" demands only that "the place to be searched" and "the persons or things to be seized" be set out in a warrant. *Id*. at 97-98.

7. Pen Register Warrants

Pen register warrants are requests for telephone records under federal law. In Michigan, the requests are addressed to the circuit court because 18 USC 3127(2)(B) requires that "a court of general criminal jurisdiction of a State authorized by the law of that State" issue the order authorizing the pen register. If the application for the warrant is properly made, i.e., it complies with 18 USC 3122, the court shall enter the order. 18 USC 3123(a). 18 USC 3123(b) covers the contents of the order. The application and order are in a standard form. The requirements are not as stringent as those for a search warrant. There is no Michigan statute that addresses the issuance of pen register warrants.

8. Standard of Review

The propriety of a search warrant is determined by whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *People v Russo*, 439 Mich 584, 603 (1992).

"[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts insure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Russo*, 439 Mich at 604, quoting *Illinois v Gates (Lance)*, 462 US 213, 238 (1983).

"Review of the sufficiency of evidence supporting [a] probable cause determination is limited to the information contained in the four corners of the affidavit." *Ellison v Balinski*, 625 F3d 953, 958 (CA 6, 2010) (42 USC 1983 claim). A reviewing court may only consider the information available to the magistrate and on which the magistrate relied in issuing the warrant. *People v Sloan*, 450 Mich 160, 168-169 (1995), overruled on other grounds by *Hawkins*, 468 Mich 488. A reviewing court should confirm that the magistrate's decision was based on actual facts rather than on unsupported assertions of the affiant. *Sloan*, *supra* at 168-169.

When a warrant was issued on the basis of an affidavit later challenged by the defendant, the reviewing court must give great deference to the magistrate's determination of probable cause. *Keller*, 479 Mich at 476-477. De novo review of an affidavit's sufficiency is not appropriate after the warrant supported by the affidavit has already been issued and executed. *Keller*, *supra* at 474.

B. Exceptions to the Warrant Requirement

Warrantless searches are permitted under specific circumstances. Exceptions to the warrant requirement include:

1. Exigent Circumstances, Emergency Doctrine, Hot Pursuit, and Community Caretaking

The exigent circumstances exception is a recognized exception to the Fourth Amendment warrant requirement. *People v Cartwright*, 454 Mich 550, 558-559 (1997).

Pursuant to the exigent circumstances exception, a police officer may enter a dwelling without a warrant if the officer possesses probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993). The police must further establish the existence of an actual emergency—the exigent circumstances—on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *In re Forfeiture of $176,598*, *supra* at 271.

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown (Dois)*, 449 F3d 741, 748-750 (CA 6, 2006). According to the *Brown (Dois)* Court:

> "In this case, [the officer] responded to a burglar alarm that he knew had been triggered twice in a relatively short period of time and arrived within just a few minutes of the first activation. He was not met by a resident of the house, but by the neighbor who directed him to the basement door. The sounding alarm, the lack of response from the

> house, and the absence of a car in the driveway, made it less likely that this was an accidental activation. Investigating, [the officer] found the front door secured but the basement door in the back standing ajar. While [the officer] did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false alarm but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through that same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement." *Brown (Dois)*, 449 F3d at 748-749.

To justify the warrantless entry of a residence, the officer must articulate specific and objective facts that reveal an actual emergency amounting to more than a mere possibility of an immediate risk of the destruction or removal of evidence. *People v Blasius*, 435 Mich 573, 593-594, 598 (1990).

A police officer's conduct before the exigency must be reasonable to justify a warrantless search under exigent circumstances. *Kentucky v King*, 563 US ___, ___ (2011). In *King, supra* at ___, police officers pursued a suspect into an apartment building and, fearing the destruction of evidence because of sudden movement inside, eventually entered into one of two apartments where they thought the suspect was hiding. Inside, the officers found drugs and drug paraphernalia, but not the suspect (he was in the other apartment). *Id.* at ___. The United States Supreme Court concluded:

> "[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent destruction of the evidence is reasonable and thus allowed." *King*, 563 US at ___.

The *King* Court went on to reject other requirements used by some courts when examining whether exigent circumstances existed at the time of the search. *King*, 563 US at ___. Courts need not evaluate (1) an officer's motive; (2) whether it was

reasonably foreseeable that the officer's tactics would create the exigent circumstances; (3) the officer's failure to seek a warrant after establishing sufficient probable cause to search the premises; (4) whether the course of an officer's investigation was "'contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)[;]'" or (5) whether officers "'engage[d] in conduct that would cause a reasonable person to believe that entry [was] imminent and inevitable.'" *Id.* at ___, quoting *United States v Gould*, 364 F3d 578, 591 (CA 5, 2004) (other citations omitted).

As part of his or her "community caretaking" function, a police officer may enter a dwelling without a warrant where it is reasonably believed that a person inside is in need of medical assistance; the entry must be limited to the reason for its justification, and the officer must be motivated primarily by a perceived need to render assistance and may do no more than is reasonably necessary to determine whether assistance is required and render it. *People v Davis (Harriet)*, 442 Mich 1, 20-26 (1993).

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, 266 Mich App 687, 704-705 (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance. *Tierney, supra* at 704-705.

Where "officers were confronted with ongoing violence occurring within [a] home" during their investigation of a neighbor's early morning complaint about a loud party, exigent circumstances justified the officers' warrantless entry. *Brigham City, Utah v Stuart*, 547 US 398, 405-407 (2006). In *Brigham City, supra* at 406, the police officers were responding to a "loud party" complaint when they heard people shouting inside the residence at the address to which they responded. The officers walked down the driveway to further investigate and saw two juveniles drinking beer in the backyard of the residence. *Id*. Through a screen door and some windows, the officers observed a physical altercation in progress in the kitchen. *Id*. The officers saw one of the adults spitting blood in the kitchen sink after a juvenile punched him in the face, and when the other adults attempted to restrain the juvenile using force enough to move the refrigerator against which the juvenile was pinned, one of the officers opened the screen door

and announced their presence. *Id*. at 401. The officers' presence went unnoticed until one of them walked into the kitchen and repeated the announcement. *Id*. The individuals in the kitchen eventually realized that police officers were present and stopped struggling with the juvenile. *Id*.

A law enforcement officer's warrantless entry into a home is permitted "when [the officer] ha[s] an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *Brigham City,* 547 US at 400. The defendants in *Brigham City* argued that evidence discovered as a result of the officers' warrantless entry should be suppressed because "the officers were more interested in making arrests than quelling violence." *Brigham City, supra* at 404. The United States Supreme Court disagreed and explained that whether an officer's subjective motivation for a warrantless entry is to provide emergency assistance to an injured person or to seize evidence and effectuate an arrest is irrelevant to a determination of reasonableness. *Id*. at 404-405. If an officer's action is justified under an objective view of the circumstances, the action is reasonable for Fourth Amendment purposes, regardless of the officer's state of mind. *Id*.

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, the police saw in the driveway a vehicle with blood on the hood and its front end smashed, blood on clothes inside the vehicle, damaged fenceposts in the yard, three broken house windows, a locked back door, and a blockaded front door, where the defendant, who was inside the home screaming and throwing things, ignored the police officers' questions about whether he needed medical help for the cut on his hand and refused to respond to the officers' knock on the door. *Michigan v Fisher (Jeremy)*, 558 US ___, ___ (2009). The United States Supreme Court analyzed the facts under *Brigham City,* 547 US 398:

> "A straightforward application of the emergency aid exception, as in *Brigham City,* dictates that the officer's entry was reasonable. Just as in *Brigham City,* the police officers here were responding to a report of a disturbance. Just as in *Brigham City,* when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City,* the officers could see violent behavior inside. Although [the police] did not see punches thrown,

> as did the officers in *Brigham City*, they did see [the defendant] screaming and throwing things. It would be objectively reasonable to believe that [the defendant's] projectiles might have a human target (perhaps a spouse or a child), or that [the defendant] would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment." *Fisher (Jeremy)*, 558 US at ___.

The Court held that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception[,]" and reiterated that "the test . . . is not what [the officer] believed, but whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger[.]" *Fisher (Jeremy)*, 558 US at ___, quoting *Brigham City*, 547 US at 406. The Court reversed the Michigan Court of Appeals, holding that "[i]t was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency." *Fisher (Jeremy)*, *supra* at ___. The Court held that "[i]t sufficed to invoke the emergency aid exception that it was reasonable to believe that [the defendant] had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that [the defendant] was about to hurt, or had already hurt, someone else." *Id*. at ___.

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, a police officer first heard a male voice shouting from inside the home, then encountered the defendant, who acted irate and who shouted profanities at the officer, even after being informed that his teenage daughter was suspected of being in danger. *Schreiber v Moe*, 596 F3d 323, 329-330 (CA 6, 2010) (in the context of a 42 USC §1983 action). According to the officer, he could not see the girl before entering the home—his inability to see her made it reasonable for him to investigate to verify that she was safe. *Schreiber*, *supra* at 330-331. Even if the officer could see the girl as the defendant claimed, she was crying and hurt and her "visibly distraught demeanor would have led a reasonable police officer to believe that the girl was in distress and was consistent with the 911 caller's conclusion that [the girl] was 'getting beat.'" *Id*. The United States Court of Appeals for the Sixth Circuit noted that "[p]reventing imminent or ongoing physical abuse within a home qualifi[ed]

as an exigent circumstance[,]" and concluded that "no reasonable jury would dispute that [the officer] had an 'objectively reasonable basis for believing' that [the girl] was at risk of imminent injury." *Schreiber*, *supra* at 330, citing *Michigan v Fisher (Jeremy)*, 558 US ___, ___ (2009). The Court conceded that "this case lacks some of the more outward manifestations of violence that often support a finding of exigency[,]" such as "signs of blood, . . . broken objects, . . . or gunfire." *Id*. at 331 (internal citations omitted). However, in this case, as in *Fisher (Jeremy)*, *supra*, "'[i]t sufficed to invoke the emergency aid exception that it was reasonable to believe that . . . [the defendant] was about to hurt, or had already hurt, [his daughter].'" *Schreiber*, *supra* at 331, quoting *Fisher (Jeremy)*, *supra* at ___.

Where a police officer was dispatched to a domestic violence incident possibly involving weapons, a warrantless entry and search of the premises was permissible under both the exigent circumstances and emergency aid exceptions. *People v Beuschlein*, 245 Mich App 744, 746, 757-758 (2001).

"[T]he community caretaking exception to the warrant requirement applies when a firefighter, responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside." *People v Slaughter*, 489 Mich 302, 316-317 (2011). In *Slaughter*, *supra* at 306-308, a firefighter responded to a 911 call from a townhouse resident reporting that water was flowing over her electrical box and behind a wall that adjoined the defendant's townhouse; when the firefighter entered the defendant's basement "to shut off [his] water and to assess whether any additional measures needed to be taken to prevent a fire," the firefighter observed, in plain view, grow lights and marijuana plants, which were later seized pursuant to a search warrant. The Michigan Supreme Court held that warrantless entry is permissible where "a firefighter's entry into a private residence [is] an exercise of community caretaking functions, and not an exercise of investigative functions," and where the firefighter, "acting in good faith, . . . 'possess[es] specific and articulable facts' leading [him or her] to the conclusion that [his or her] actions [are] necessary to abate an imminent threat of fire inside the private residence." *Id*. at 317, 320, quoting *Davis (Harriet)*, 442 Mich at 25. Thus, because "the responding firefighter[] believed that there existed the imminent threat of an electrical fire in [the] defendant's residence[,] . . . reasonably believed that the danger posed an imminent threat to property or life, and . . . acted reasonably in abating that threat[,]" the

lower courts erred in suppressing the marijuana that was discovered in plain view during the entry. *Slaughter*, *supra* at 328-329.

2. Search Incident to Arrest

Once there is a custodial arrest, a full search of the person requires no additional justification. *United States v Robinson*, 414 US 218, 235 (1973). The Fourth Amendment is not violated where the police make an arrest based on probable cause and conduct a search incident to the arrest, even if the arrest is prohibited by state law. *Virginia v Moore (David)*, 553 US 164, 176 (2008) (police arrested the defendant for an "unarrestable" offense under state law). "[O]fficers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." *Moore (David)*, *supra* at 176. This rule covers any "lawful arrest," i.e., "an arrest based on probable cause." *Id*. at 177. While some states have taken "lawful" to mean in "compliance with state law," the United States Supreme Court intends "lawful" to mean in "compliance with constitutional constraints." *Id*., citing *Robinson*, *supra*.

Additionally, the Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

3. Inventory Search

After a custodial arrest, the police may search any property belonging to the suspect that is impounded at the time of arrest; this is commonly referred to as an inventory search.

The decision to impound a car must be based on an established set of departmental procedures followed by all officers. *People v Toohey*, 438 Mich 265, 267, 291 (1991). An impoundment and subsequent inventory search is undertaken as part of the caretaking functions performed by the police. *Toohey*, *supra* at 284-285. Impoundment must not be used as a pretext for conducting a criminal investigation. *Id*. at 285.

In order for a vehicle inventory search to be valid, it must be shown that it was conducted in accordance with reasonable procedures established to safeguard impounded vehicles and

their contents. *People v Long (David Kerk)*, 419 Mich 636, 650 (1984). Where no such procedures are present or where a police officer acts in a manner contrary to established procedures, the inventory search is unlawful. *Long (David Kerk)*, *supra* at 648.

Police officers may only open closed containers pursuant to an inventory search if established departmental policies authorize such an action. See *Florida v Wells*, 495 US 1, 4-5 (1990) (absent a policy with respect to the opening of closed containers encountered during an inventory search, such a search is not sufficiently regulated to satisfy the Fourth Amendment).

4. Investigatory Stop—*Terry*[41] Stop

Police officers may make a valid investigatory stop (a *Terry* stop) if they have reasonable suspicion that crime is afoot. *People v Champion (Kenneth)*, 452 Mich 92, 98 (1996). Reasonable suspicion is more than a hunch, but less than the level of suspicion required for probable cause, *Champion (Kenneth)*, *supra* at 98, and must be based on commonsense judgments and inferences about human behavior. *Illinois v Wardlow*, 528 US 119, 125 (2000). During an investigatory stop, "[a] police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328 (2001). "*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Champion (Kenneth)*, *supra* at 99. The officer may seize any contraband which is immediately apparent if he or she has probable cause to believe the object is contraband. *Id*. at 100-101. "It is the totality of the circumstances in a given case that determine whether a patdown search is constitutional." *Custer*, *supra* at 328.

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins (Shawn)*, 472 Mich 26, 32-33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *Jenkins (Shawn)*, *supra* at 35. Evidence discovered as a result of these legal detentions is

[41] *Terry (John) v Ohio*, 392 US 1 (1968).

properly seized at the time the individual citizen is seized. *Id*. at 34-35.

A police officer does not need probable cause or an articulable suspicion to conduct a computer check of a vehicle's license plate number. *People v Jones (Calvin)*, 260 Mich App 424, 427-428 (2004). An investigatory stop is justified if a computer check reveals that the vehicle's registered owner is subject to arrest and no visible evidence contradicts the inference that the vehicle's driver is also the registered owner. *Jones (Calvin)*, *supra* at 427-428. As long as the investigatory stop was proper and the subsequent arrest was warranted, the search of the driver's person and vehicle does not violate the Fourth Amendment, and any evidence discovered during the warrantless search was lawfully obtained. *Id*. at 430.

A *Terry* stop need not be based upon probable cause; rather, an officer may "stop and frisk" a defendant based upon a reasonable suspicion supported by articulable facts that criminal activity might be afoot. *Terry (John)*, 392 US at 30. See *People v Dunbar*, 264 Mich App 240, 245-250 (2004), overruled on other grounds by *People v Jackson (Harvey)*, 483 Mich 271 (2009) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant). See also *People v Steele (James)*, 292 Mich App 308, 310-313 (2011), where a loss prevention officer trained to recognize the precursors for methamphetamine and who had provided reliable information on more than ten prior occasions, provided the police with information that the defendant purchased packages of Sudafed and a gallon of fuel (known precursors to the manufacture methamphetamine) and a description of the defendant's vehicle. This information, considered with the arresting officer's training and experience regarding methamphetamine manufacture, constituted "a solid basis upon which [the arresting officer] had a reasonable suspicion of criminal activity to justify the *Terry* [*v Ohio*, 392 US 1 (1968)] stop." *Steele (James)*, *supra* at 315-316.

See also *United States v Long (Richard)*, 464 F3d 569, 573-576 (CA 6, 2006) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from an anonymous caller, where the police knew the caller's address and the police pulled up in front of the caller's house while the 911 call was still ongoing), and *People v Horton (Lajamille)*, 283 Mich App 105, 113 (2009) (reasonable suspicion that a person has engaged or is engaging in criminal activity may properly be based on an in-person tip from a citizen who declines to identify him- or

herself, where the tipster provides the police with sufficiently detailed information).[42]

"When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Jenkins (Shawn)*, 472 Mich at 33. "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he [or she] was not free to leave." *Jenkins (Shawn)*, *supra* at 32.

In determining whether a *Terry* stop is reasonable, the court must examine both the character of the official intrusion, as well as its justification. *People v Chambers (Allan)*, 195 Mich App 118, 121 (1992). The question that must be asked "in assessing whether a detention is too long in duration to be justified as an investigatory stop is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped." *Chambers (Allan)*, *supra* at 123.

When officers make stops for traffic violations, the Fourth Amendment does not require the officers to expressly inform the individuals stopped that they are free to leave before requesting consent to search the individuals or their vehicles. *Ohio v Robinette*, 519 US 33, 39-40 (1996).

a. Traffic Stop

Generally, an officer's decision to stop an automobile is reasonable when there is probable cause to believe that the driver violated a traffic law. *Whren v United States*, 517 US 806, 810 (1996). The constitutional reasonableness of traffic stops does not depend on the actual motivations of the police officers involved. *Whren*, *supra* at 813.

The issue in *Whren*, 517 US at 808, was the legality of actions taken by plainclothes officers patrolling in an unmarked car. The officers noticed a vehicle of teenagers in a known drug area displaying peculiar behavior. *Whren*, *supra* at 808. The car suddenly turned without signaling "and sped off at an 'unreasonable' speed." *Id*. The officers pulled over the car and approached it, at

[42] In *Horton (Lajamille)*, 283 Mich App at 107, police properly detained the defendant where the police received in-person information from a citizen, who declined to identify himself, that a black male, approximately 30 years of age and who "seemed to be pretty nervous and upset," was driving a burgundy Chevrolet Caprice at a gas station one mile away, and was waving an "uzi type weapon" with a long clip.

which time they observed plastic bags of crack cocaine in the defendant's hands. *Id*. at 809. The officers had probable cause to believe that the traffic code was violated; accordingly, the traffic stop was reasonable under the Fourth Amendment, and evidence of the subsequently discovered drugs was admissible. *Id*. at 819.

Where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search a vehicle is valid. *People v Williams (John Lavell)*, 472 Mich 308, 310 (2005). Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Williams (John Lavell)*, *supra* at 318.

In *Williams (John Lavell)*, 472 Mich at 310, the defendant was stopped by a Michigan State Police trooper for speeding. After the defendant produced his driver's license, the trooper asked where he and his two passengers were going. *Williams (John Lavell)*, *supra* at 310. The defendant's answer raised the trooper's suspicion because it was implausible. *Id*. at 310-311. Answers the defendant and the two passengers gave to the trooper were inconsistent and served only to increase his suspicions. *Id*. at 311. At one point during the encounter, the defendant admitted to a previous arrest "for a marijuana-related offense." *Id*. Following the five- to eight-minute detention, the trooper asked for and received the defendant's consent to search the vehicle. *Id*. A canine unit arrived within three minutes, and the dog indicated that narcotics were present in the vehicle's backseat. *Id*. No drugs were found there, and the defendant consented to a search of the vehicle's trunk. *Id*. When the defendant later withdrew his consent, the trooper obtained a warrant, searched the trunk, and discovered marijuana and cocaine. *Id*. at 311-312. The *Williams* (*John Lavell)* Court conducted "a fact-intensive inquiry" pursuant to the standards set out in *Terry (John)*, 392 US 1. *Williams (John Lavell)*, *supra* at 314. According to the *Terry* standard,

> "the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference

> in the first place.'" *Williams (John Lavell)*, 472 Mich at 314, quoting *Terry (John)*, 392 US at 20.

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about his or her destination and travel plans. *Williams (John Lavell)*, 472 Mich at 316. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Williams (John Lavell)*, *supra* at 316.

See also *Arizona v Johnson (Lemon)*, 555 US 323, 327 (2009), holding that "[t]o justify a patdown of [a] driver or a passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." In *Johnson (Lemon)*, *supra* at 327, the defendant was a backseat passenger in a car stopped for a vehicular violation. While obtaining preliminary information from the defendant, an officer noticed that the defendant's clothing, as well as a police scanner in his pocket, suggested that he was affiliated with a gang. *Id*. at 328. Because she wished to obtain "intelligence about the gang [the defendant] might be in," the officer asked the defendant to get out of the vehicle so that she could question him away from the front-seat passenger. *Id*. at 328. Based on her suspicions that the defendant might be armed, the officer patted him down for safety reasons when he got out of the car. *Id.* The officer felt a gun during the patdown, and she handcuffed the defendant when he started to struggle. *Id*. The United States Supreme Court rejected the state appellate court's conclusion that "once [the officer] undertook to question [the defendant] on a matter unrelated to the traffic stop, *i.e.*, [his] gang affiliation, patdown authority ceased to exist, absent reasonable suspicion that [he] had engaged, or was about to engage, in criminal activity." *Id*. at 332-334. Rather, "[t]he temporary seizure of driver and passengers [during a lawful roadside stop] ordinarily continues, and remains reasonable, for the duration of the stop[,]" and "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop[] . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id.* at 333. "The police need not have, in addition [to the vehicular violation], cause to believe any occupant of the vehicle is

involved in criminal activity." *Id*. at 327. Accordingly, the officer "was not constitutionally required to give [the defendant] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her." *Id*. at 334.

Police officers may stop a vehicle if they have reasonable suspicion that the vehicle was involved in criminal activity, even if the officers do not possess reasonable suspicion that the driver or owner of the vehicle was engaged in that conduct. *United States v Marxen*, 410 F3d 326, 332 (CA 6, 2005). Because a traffic stop under these circumstances is lawful, any evidence seized as a result of the stop is lawfully obtained, even if the items seized are unrelated to the criminal activity that prompted the traffic stop. *Marxen*, *supra* at 327, 332.

In *Marxen*, 410 F3d at 327, the defendant's vehicle was identified as the car used by suspects in an armed robbery. Although the defendant did not match the description of either of the suspects and police had not observed the defendant interact with either of the suspects during their post-robbery surveillance of the defendant, the investigative traffic stop that occurred eleven days after the robbery did not violate the defendant's constitutional rights. *Marxen*, *supra* at 327. During the stop, which was based solely on the fact that the vehicle's description and license plate matched that of the car used in the robbery, police officers noticed a marijuana pipe and a bag of marijuana in plain view in the defendant's car. *Id*. Because the stop was lawful, the seizure of the unlawful items—seen by officers who were lawfully in a position to see them—was also proper. *Id*. at 332.

"[F]ewer foundational facts are necessary to justify an investigative stop of a moving vehicle based on a citizen tip of erratic driving." *People v Barbarich*, 291 Mich App 468, 479 (2011). "[W]hile the quantity of the tip's information must be sufficient to identify the vehicle and to support an inference of a traffic violation, less is required as to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details." *Barbarich*, *supra* at 479-480. In *Barbarich*, *supra* at 470-471, a police officer stopped the defendant's vehicle on the basis of an unnamed citizen informant mouthing the words "Almost hit me" while pointing at the defendant's vehicle. The Court of Appeals held that

"sufficient indicia of reliability supported the citizen's tip and [the officer] was justified in conducting the investigatory stop." *Id*. at 482. Specifically, "[t]he tip provided sufficient information to accurately identify the vehicle and to create an inference that a crime or civil infraction had occurred; and, the tip was also sufficiently reliable, based on the [citizen's] contemporaneous observations." *Id*. In sum, "[u]nder the totality of the circumstances, [the officer] had a reasonable articulable suspicion that justified an investigatory stop of [the] defendant's vehicle." *Id*.

b. Evidence Seized Without a Warrant During Investigatory Stops

▸ Plain Feel Exception

The plain feel exception to the warrant requirement allows the warrantless seizure of an object felt during a legitimate patdown search for weapons when the identity of the object is immediately apparent and the officer has probable cause to believe that the object is contraband. *Champion (Kenneth)*, 452 Mich at 100-101.

In *Champion (Kenneth)*, 452 Mich at 95, a police officer conducting a patdown search for weapons felt a pill bottle in the defendant's pants. Based on the officer's law enforcement experience with drugs, he knew that controlled substances were often carried in pill bottles. *Champion (Kenneth)*, *supra* at 95. Believing that the pill bottle contained controlled substances, the officer removed it, opened it, and found that it contained cocaine. *Id*. Because the patdown did not exceed the scope of *Terry (John)*, 392 US 1, and because there was probable cause to believe that the pill bottle felt during the patdown contained contraband, the plain feel exception to the warrant requirement authorized removal of the pill bottle from the defendant's pants. *Champion (Kenneth)*, *supra* at 114-115.

In *Custer*, 465 Mich at 331, a police officer conducting a patdown search felt an 2 x 3 inch object in the defendant's pocket. Based on the officer's law enforcement experience with drugs, he knew that acid was often carried on similarly-sized sheets of cardboard. *Custer*, *supra* at 331. Because the officer had probable cause to believe that the object felt during the patdown was contraband, the plain feel exception to the warrant requirement authorized removal of the object from the defendant's pants. *Id*. at

332. Even though the object ultimately retrieved was not contraband, the seizure was still lawful. *Id*.

In *Bond v United States*, 529 US 334, 335 (2000), the United States Supreme Court was protective of the privacy of bags and soft luggage that passengers carry with them on buses and trains, finding that police could not manipulate carry-on luggage placed in an overhead bin.

▸ Plain Smell Exception

Where a police officer detected the odor of marijuana emanating from a car he had stopped for a traffic violation, the odor alone provided justification to search the car without a warrant. *People v Kazmierczak*, 461 Mich 411, 424 (2000).

5. Consent

There is no need for a search warrant where the defendant consents to the search. What amounts to consent differs in relation to the person granting it.

▸ **Consent by defendant:**

When a defendant voluntarily consents to a warrantless search or seizure, there is no Fourth Amendment violation. *People v Chism*, 390 Mich 104, 123 (1973). To justify a warrantless search or seizure on the basis of consent, the prosecution must show by clear and positive evidence that the defendant consented to the search and seizure. *People v Kaigler*, 368 Mich 281, 294 (1962). According to the *Kaigler* Court:

"[C]onsent must be prove[n] by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given." *Kaigler*, 368 Mich at 294. "[T]here is no requirement that consent must be verbally given." *United States v Hinojosa*, 606 F3d 875, 882 (CA 6, 2010). "Consent to a search 'may be in the form of words, gesture, or conduct.'" *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004), quoting *United States v Griffin*, 530 F2d 739, 742 (CA 7, 1976).

There are "basic principles governing the scope of searches authorized by consent." *People v Dagwan*, 269 Mich App 338, 343 (2005). "First, the party granting consent to a search may limit its scope or may revoke consent after granting it." *Dagwan*, *supra* at 343. "Thus, because consent flows from its grantor, '[a] suspect may of course delimit as he [or she]

chooses the scope of the search to which he [or she] consents.'" *Id*., quoting *Florida v Jimeno*, 500 US 248, 252 (1991). "Second, the constitutional standard for determining the scope of a consent to search 'is that of "objective reasonableness"—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Dagwan*, *supra* at 343, quoting *Jimeno*, *supra* at 251. "The *Jimeno* Court also observed, '[t]he scope of a search is generally defined by its expressed object.'" *Dagwan*, *supra* at 343, quoting *Jimeno*, *supra* at 251.

Where the traffic stop and resulting detention were reasonable, no Fourth Amendment violation occurred and no inquiry was needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that [the] defendant was involved with narcotics." *Williams (John Lavell)*, 472 Mich at 318. Consequently, the defendant's consent to search his vehicle under the circumstances was valid and the evidence obtained was properly admitted against the defendant at trial. *Williams (John Lavell)*, *supra* at 318-319.

Whether consent was in fact voluntary in a particular case or was given in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 227 (1973).

Consent given by a suspect who is not in custody may be valid even if given after a request to speak to an attorney. *People v Marsack*, 231 Mich App 364, 376 (1998).

The Fourth Amendment does not require police to inform detainees that they are free to go before a consent to search may be deemed voluntary. *Robinette*, 519 US at 35.

Another exception to the Fourth Amendment warrant requirement is where an individual has agreed to submit to warrantless searches as a condition of probation. *United States v Knights*, 534 US 112, 119-120 (2001). Under those circumstances, the police only need reasonable suspicion of a possible criminal act to search the probationer's property. *Knights*, *supra* at 121. See also *Griffin (Joseph) v Wisconsin*, 483 US 868, 872-873 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity).

- **Consent by third person:**

"[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that

consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v Matlock*, 415 US 164, 171 (1974).

A person who has equal possession or control of the premises searched may also consent to a search. See *Illinois v Rodriguez*, 497 US 177, 181 (1990) (addressing "common authority"). "[P]olice officers' belief in a third party's ability to consent to a search must be reasonable under the circumstances; a good-faith belief is not the controlling criterion." *People v Goforth*, 222 Mich App 306, 312 (1997). Police need not "make a further inquiry regarding a third party's ability to validly consent to a search unless the circumstances are such as to cause a reasonable person to question the consenting party's power or control over the premises or property." *Goforth*, *supra* at 312.

Where the driver of a vehicle consents to its search following a valid traffic stop, a police officer's search of the passenger's backpack was found to be valid. *People v Labelle*, 478 Mich 891 (2007). Because the stop of the vehicle was legal, the passenger lacked standing to challenge the search of the vehicle. *Labelle*, *supra* at 892. Additionally, "the defendant did not assert a possessory or proprietary interest in the backpack before it was searched but, rather, left the backpack in a car she knew was about to be searched." *Id*.

A warrantless search of a shared dwelling, conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search, is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US 103, 122-123 (2006).

When a defendant is arrested and a cotenant consents to an officer's entry into the home the cotenant shares with the defendant, the defendant's invocation of his right to counsel and his right to remain silent did not constitute an objection to the officer's entry for purposes of suppressing incriminating evidence against the defendant observed by the officer while in the home. *People v Lapworth*, 273 Mich App 424, 425 (2006). According to the Court,

> "[E]ven if we were to regard an invocation of rights following *Miranda* warnings as a tacit objection to consent to search, a tacit objection is insufficient under *Randolph*[, 547 US 103].
>
> * * *

> "The officer's authority to enter the premises is not based on defendant's consent, but on his roommate's consent. And, under *Randolph*, that consent is sufficient authority unless defendant expressly objected, which he did not." *Lapworth*, 273 Mich App at 428.

Where the defendant was permitted to use a third-party's personal computer, which was located in a residence separate from the defendant's, the third-party's consent to search the computer was valid, even though the defendant's e-mail account was password protected. *Brown (Craig)*, 279 Mich App at 132-134.

- **Consent obtained by reference to search warrant:**

There is no consent if police say or suggest that they have a search warrant if they do not, in fact, have one.

> "In *Bumper v North Carolina* [, 391 US 543 (1968)], the United States Supreme Court made clear that where a person 'permits' a search in the face of an assertion by the police that they have a warrant, there is no consent that can support the validity of the search.
>
> * * *
>
> "[T]he defendant testified that [the police officer] displayed a search warrant form in his folder when he confronted the defendant. The defendant also testified that he believed the officers had a warrant and allowed them to enter for that reason. The circuit judge ultimately found that testimony believable, relying particularly on the specificity of the defendant's testimony by contrast to that of the officers. Such factual determinations by trial judges are to be sustained unless clearly erroneous." *People v Farrow*, 461 Mich 202, 207-208 (1999).

6. Special Needs, Inspections, Border Searches, and Regulatory Searches

Certain searches do not have to be accompanied by a warrant so long as the need to search outweighs the invasion that the search entails. A warrant is not required under the governmental "special needs" or regulatory exception to the warrant requirement as long as the search satisfies reasonable

legislative or administrative standards. *People v Chowdhury*, 285 Mich App 509, 517, 522 (2009) (ordinance permitting police to conduct warrantless preliminary breath tests (PBTs) on minors found unconstitutional; the special needs exception was inapplicable because the police were merely attempting to detect evidence of ordinary criminal wrongdoing). Likewise, inspections, border searches, and regulatory searches must be based upon reasonable standards. See *United States v Brignoni-Ponce*, 422 US 873, 884 (1975) ("[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country"). See also *Camara v Municipal Court*, 387 US 523, 528-539 (1967) (administrative searches by municipal health and safety inspectors constitute significant intrusions upon protected Fourth Amendment interests, and lack traditional safeguards when conducted without warrant procedure; "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant"), and *People v Beydoun*, 283 Mich App 314, 316, 323-324 (2009) (exemption from the warrant requirement applies to properly conducted administrative inspections of pervasively regulated industries, e.g., tobacco products).

7. Objects in Plain View

To prevent generalized searches, the law prohibits police officers from seizing items not listed in a search warrant unless an exception to the warrant requirement exists. One such exception is the plain view doctrine. In *Minnesota v Dickerson*, 508 US 366, 375 (1993), the United States Supreme Court defined that doctrine as follows:

> "[I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officer has a lawful right of access to the object, they may seize it without a warrant. If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if 'its incriminating character [is not] "immediately apparent,"'—the plain-view doctrine cannot justify its seizure." (internal citations omitted.)

See *Horton (Terry) v California*, 496 US 128, 137 (1990) (in addition to requirements that the item be in plain view and its character be immediately apparent, the officer must also be lawfully located in a place from which the object can be plainly seen, and he or she must have a lawful right of access (e.g., officer cannot be trespassing) to the object itself).

In *Arizona v Hicks (James)*, 480 US 321, 325-329 (1987), the United States Supreme Court addressed a situation in which the plain view doctrine did not justify an object's seizure. Specifically, the Court held invalid police officers' seizure of stolen stereo equipment while executing a search warrant for other evidence. *Hicks (James)*, *supra* at 325-329. Although the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment in order to read its serial numbers. *Id*. The Court reasoned that the subsequent seizure of the equipment could not be justified by the plain view doctrine because the incriminating character of the stereo equipment was not immediately apparent. *Id*. Rather, the officers had to engage in further investigation to determine if possession of the equipment was unlawful. *Id*. See also *People v Galloway*, 259 Mich App 634, 638-642 (2003) (marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the plants were in plain view from the officer's vantage point in the defendant's backyard, the officer's entry into the backyard was unlawful). Cf. *People v Fletcher*, 260 Mich App 531, 550-551 (2004) (documents not listed in a search warrant were properly seized because their incriminating nature was immediately apparent to the officer—in a homicide investigation, the documents provided evidence of the defendant's illicit affair with a woman who was not the defendant's wife).

The Michigan Supreme Court has similarly defined the plain view doctrine. In *People v Secrest*, 413 Mich 521, 523 (1982), police officers executing a search warrant for weapons in the defendant's apartment seized photographs of the defendant which were used against him at his trial. In ruling that the plain view doctrine did not authorize seizure of the photographs, the Court stated:

> "There must be something incriminating about the evidence the police inadvertently come upon; indeed, some courts have added the incriminating nature must be 'immediately apparent'. . . .
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> ". . . [W]e fear we would come too quickly to what Justice Stewart described [in his concurring

> opinion in *Stanley v Georgia*, 394 US 557, 569 (1969)] as 'the general searches and unrestrained seizures that had been a hated hallmark of colonial rule'. The warrant in this case directed the officers to search for a weapon and for ammunition. Either can be quite small. If the police can, while scouring a house look for these objects, seize as being in plain view items which only later serve to connect the defendant to a crime, then they are effectively operating under a general warrant." *Secrest*, 413 Mich at 528-529.

8. Protective Sweep

When an arrestee is taken into physical custody pursuant to a lawful arrest, it is reasonable for the police to search him or her for "weapons, instruments of escape, and evidence of crime." *People v Houstina*, 216 Mich App 70, 75 (1996). The police may also search the area within the arrestee's immediate reach. *Houstina*, *supra* at 75.

The area within the arrestee's immediate control is defined as "the area from which the arrestee might gain possession of a weapon or destructible evidence." *People v Jackson (Karl)*, 123 Mich App 423, 426 (1983), citing *Chimel v California*, 395 US 752, 763 (1969). However, "the scope of the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible." *Houstina*, 216 Mich App at 75.

9. "Open Fields"

A search of an open field need not be accompanied by a warrant.

"[A]n open field is neither a 'house' nor an 'effect,' and, therefore, 'the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.' . . . '[T]he term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech.'" *United States v Dunn*, 480 US 294, 303-304 (1987), quoting *Oliver (Ray) v United States*, 466 US 170, 177, 180 n 11 (1984).

Curtilage questions should be resolved by employing the *Dunn* factors: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of

the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 US at 301.

10. Knock and Talk

Inculpatory evidence obtained after police officers refused a defendant's request that they leave the defendant's home is inadmissible as fruit of the poisonous tree. *People v Bolduc*, 263 Mich App 430, 443-445 (2004). In *Bolduc*, *supra* at 433, the defendant opened his door to two law enforcement officers and allowed them to enter his home. The defendant denied possessing marijuana, refused to consent to a search of his home, and asked the officers to leave. *Id*. at 434. Instead of leaving, however, one of the officers began questioning the defendant about a bulge in the defendant's pocket. *Id*. The defendant explained that the bulge was $6,500 from a sale he made earlier that day at the defendant's used car lot. *Id*. The defendant offered to confirm the source of the money by taking the officers to the car lot to verify the sale. *Id*. The defendant was unable to prove that the sum of money in his pocket was the result of a sales transaction. *Id*. The defendant eventually admitted to possessing marijuana and took the officers back to his house where the defendant turned over nine bags of marijuana to the officers. *Id*.

Under these circumstances, the Court of Appeals ruled that the police officers exceeded the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and, in doing so, created a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *Bolduc*, 263 Mich App at 441-443. Applying the standard test to the facts in *Bolduc,* the Court concluded that under the totality of circumstances—the knock and talk encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave—a reasonable person would not have felt free to ignore the police officers' presence and go about his business. *Bolduc*, *supra* at 443. According to the Court:

> "By failing to leave defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.
>
> * * *

> "Unlike in a street encounter, a person such as defendant does not have the option of testing whether he is actually confined by the police by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home." *Bolduc*, 263 Mich App at 441-443.

Although the inculpatory evidence was obtained after the coercive knock and talk incident inside the defendant's home, the coercion tainted any evidence obtained as a result of the officers' initial visit to the defendant's home. *Bolduc*, 263 Mich App at 444. The incriminating evidence obtained during the defendant's later "cooperation" with the officers "ensued from the police officers' improper conduct in failing to leave when requested [and was] properly suppressed as the fruit of the illegal seizure . . . ." *Bolduc*, *supra* at 444. The Court reiterated the constitutional considerations present in such an encounter:

"In sum, while the police are free to employ the knock and talk procedure, [*People v*] *Frohriep*, [247 Mich App 692 (2001)], they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a legal basis for the police to remain without the person's consent." *Bolduc*, 263 Mich App at 444-445.

Where police officers knocked on a defendant's door and asked him repeatedly to step outside but did not threaten to compel his exit, did not touch him until after he stepped out of the house, and did not draw their weapons or otherwise make a show of force, the officers did not constructively enter the defendant's home in violation of his Fourth Amendment right to privacy. *People v Gillam*, 479 Mich 253, 255-256, 266 (2007). Consequently, when the police arrested the defendant and entered his home, at his request, to retrieve his coat and shoes, evidence discovered in plain view was admissible against the defendant at trial. *Gillam*, *supra* at 257-259, 266.

In reaching its conclusion, the Michigan Supreme Court reviewed cases from the Third, Sixth, Ninth, and Tenth federal circuit courts of appeals,[43] all of which are courts that recognize the doctrine of constructive entry (where a suspect leaves his or her home not because of law enforcement's

unlawful physical entry into the home but as a result of coercive police conduct). *Gillam*, 479 Mich at 261. In a Sixth Circuit case in which the defendant established a case of constructive entry, the circumstances involved "siege tactics" like "encircling of the suspect's house with nine officers and several patrol cars, the strategic blocking of the suspect's car with one of the patrol cars, and the use of floodlights and a bullhorn in the dark of night to summon the suspect from the home . . . ." *Gillam*, *supra* at 262, citing *United States v Morgan*, 743 F2d 1158, 1161, 1164 (CA 6, 1984). In contrast to *Morgan*, the *Gillam* Court noted that "the actions of the officers in the instant case, according to defendant himself, merely involved knocking on his front door and asking him to step outside." *Gillam*, *supra* at 262.

Also of note, according to the *Gillam* Court, was the defendant's initial refusal to leave his home because he was tethered and prohibited from leaving his home. *Gillam*, 479 Mich at 256. With regard to the tether, the Court explained that although the defendant's tether complicated a review of the situation, "[the tether] alone d[id] not lead to a presumption that defendant's will was overborne by a show of police force." *Gillam*, *supra* at 266. Instead, the Court reasoned that "armed with a court order [to remain in the apartment], defendant should have felt reasonably confident in refusing police requests that he leave the apartment." *Id*.

After its review of the federal case law, the Michigan Supreme Court declined to recognize the doctrine of constructive entry and stated that "even if [it] recognize[d] the [] doctrine, [the] defendant in this case would fail to establish that police constructively entered his home in violation of his Fourth Amendment right to privacy." *Gillam*, 479 Mich at 266. According to the Court, the defendant's arrest was legal and the trial court wrongly suppressed the evidence discovered in the defendant's home. *Gillam*, *supra* at 266.

Where police officers were unlawfully in a position in the defendant's backyard because of a misuse of the "knock and talk" tactic, the marijuana plants growing in a shed behind the defendant's house were inadmissible because the vantage point from which the officers saw the plants was unlawfully obtained. *Galloway*, 259 Mich App at 639-642.

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[43] *Sharrar v Felsing*, 128 F3d 810, 819 (CA 3, 1997); *United States v Morgan*, 743 F2d 1158, 1166 (CA 6, 1984); *United States v Al-Azzawy*, 784 F2d 890, 893 (CA 9, 1985); *United States v Maez*, 872 F2d 1444, 1450 (CA 10, 1989). The United States Supreme Court has not yet addressed the issue. *Gillam*, 479 Mich at 261.

3.22 Search and Seizure Issues—Was There Probable Cause?

In making a probable cause determination, the issuing magistrate must examine the totality of the circumstances faced by the officer at the time the search was made. *Illinois v Gates (Lance)*, 462 US 213, 238-239 (1983). The magistrate must make a practical, commonsense decision whether, given all the circumstances set out in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Gates (Lance)*, *supra* at 238-239. The reviewing court's duty is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id*.

3.23 Search and Seizure Issues—Is Exclusion the Remedy if a Violation Is Found?

A Fourth Amendment violation does not necessarily require the exclusion of evidence obtained as a result of the violation. *People v Manning*, 243 Mich App 615, 637 (2000). There are exceptions to the exclusionary rule and situations where the exclusionary rule does not apply. *People v Hellstrom*, 264 Mich App 187, 193-194 n 3 (2004).

A. Inevitable Discovery Doctrine

The inevitable discovery exception permits the admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. *People v Stevens (Eugene)*, 460 Mich 626, 637 (1999). Whether the inevitable discovery doctrine applies requires an analysis of three basic questions:

- Are the legal means of discovery truly independent of the unlawful conduct that first led to the evidence's discovery?
- Are both the use of the legal means and the discovery of the evidence at issue by that means truly inevitable?
- Does application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken Fourth Amendment protection? *Stevens (Eugene)*, 460 Mich at 638, citing *United States v Silvestri*, 787 F2d 736, 744 (CA 1, 1986).

In *Stevens (Eugene)*, 460 Mich at 642-643, 647, the Supreme Court held that the inevitable discovery exception to the exclusionary rule was applicable where "the police were acting under a valid search warrant and within the scope of that search warrant," and "[e]ven though the method of entry into the dwelling violated the knock-and-announce principles." The Court also noted that "[t]here are both state and federal sanctions for such violations that serve as deterrents for police misconduct that are less severe than the exclusion of the evidence," and that "exclusion of the evidence w[ould] put the prosecution in a worse position than if the police misconduct had not occurred." *Stevens (Eugene)*, *supra* at 647.

See also *People v Vasquez (After Remand)*, 461 Mich 235, 241-242 (1999) (evidence was admissible pursuant to the inevitable discovery doctrine because it would have been discovered during the execution of a valid search warrant without regard to whether police violated the knock and announce statute).

The inevitable discovery doctrine cannot be used as an exception to the warrant requirement merely because probable cause existed to obtain a search warrant even though one was not obtained before the search took place. *People v Hyde*, 285 Mich App 428, 442, 445 (2009). In *Hyde*, *supra* at 433, the defendant gave a blood sample following a traffic stop, and the blood test revealed that his blood alcohol content exceeded the legal limit. The defendant moved to suppress his blood sample and the blood test results on the basis that his consent was coerced because the police incorrectly informed him that he was required to provide his blood under the informed consent statute, MCL 257.625c (anyone operating a vehicle is considered to have given consent to test his or her blood, breath, or urine to determine the presence of alcohol; however, the defendant fell under an exception and was considered not to have given consent to a blood test because he had diabetes). *Hyde*, *supra* at 435, 440-441. The trial court denied the defendant's motion to suppress, holding that his bodily alcohol content would have been inevitably discovered by the police had they obtained a warrant, or by the defendant had he consented to a breath or urine test. *Id*. at 435, 442. The Court of Appeals rejected the trial court's rationale that the evidence would have been inevitably discovered through a search warrant, holding that "[t]o allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant. Such an approach diminishes the Fourth Amendment and is an incentive for improper or careless police practices." *Id*. at 445-446.

B. Independent Source Doctrine

"The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v Williams (Robert)*, 467 US 431, 443 (1984).

"The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Nix*, *supra* at 443 (internal citations omitted).

Evidence seized from a dwelling pursuant to a valid search warrant issued after an officer's unlawful entry into that dwelling is admissible when probable cause for the warrant's issuance is based on information independent of the illegal entry. *People v Smith (Steven)*, 191 Mich App 644, 646 (1991). According to the United States Supreme Court:

"[A]n illegal entry by police officers upon private premises d[oes] not require suppression of evidence subsequently discovered at those premises pursuant to a search warrant that had been obtained on the basis of information wholly unconnected with the initial entry." *Segura v United States*, 468 US 796, 805 (1984).

C. Good Faith Doctrine

"When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' [i.e., 'good faith'] on the subsequently invalidated search warrant." *Herring v United States*, 555 US 135, 142 (2009), quoting *United States v Leon*, 468 US 897, 922 n 23 (1984). The "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, *supra* at 145, quoting *Leon*, *supra* at 922 n 23.

Michigan has adopted the good faith exception to the exclusionary rule. *People v Goldston*, 470 Mich 523, 526 (2004). "The primary benefit [and purpose] of the exclusionary rule is that it deters official misconduct by removing incentives to engage in unreasonable

searches and seizures." *Goldston*, *supra* at 529, citing *Leon*, *supra* at 906.

In *Goldston*, 470 Mich at 526, the police observed the defendant dressed as a fireman collecting money on a street corner, allegedly to donate to firefighters in New York following the September 11, 2001, terrorist attacks. The police confiscated the donations from the defendant and obtained a search warrant for his house that authorized, among other things, the seizure of any police and fire equipment. *Goldston*, *supra* at 526-527. The search yielded additional firefighter paraphernalia, a firearm, and drugs. *Id*. at 527. The trial court granted the defendant's motion to suppress the evidence on the basis that the affidavit did not establish probable cause for the issuance of the warrant because the search warrant affidavit did not connect the place to be searched with the defendant, and did not state the date that the police observed the defendant soliciting money. *Id*. The Supreme Court applied the good faith exception to the exclusionary rule and concluded that although the warrant was later determined to be deficient, excluding the evidence obtained in good faith reliance on the warrant would not further the purpose of the exclusionary rule. *Id*. at 542-543.

In *Herring*, 555 US 135, the United States Supreme Court reviewed several cases in which it held that the exclusionary rule did not apply under the circumstances present in those cases:

- "[T]he exclusionary rule did not apply when a warrant was invalid because a judge forgot to make 'clerical corrections' to it." *Herring*, 555 US at 142, quoting *Massachusetts v Sheppard (Osborne)*, 468 US 981, 991 (1984).

- The exclusionary rule did not apply "to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional." *Herring*, 555 US at 142, citing *Illinois v Krull*, 480 US 340, 349-350 (1987).

- The exclusionary rule did not apply "to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding." *Herring*, 555 US at 142, citing *Arizona v Evans*, 514 US 1 (1995).

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 US at 144. In *Herring*, *supra* at 135, the police arrested the defendant on a warrant listed in the database of a neighboring county. A search incident to arrest yielded drugs and a gun. *Id*. It was subsequently discovered that the warrant had been recalled but that the recall information was never entered into the database. *Id*. The defendant moved to suppress the evidence on

the basis that his initial arrest was illegal. *Id*. The United States Supreme Court held that the exclusionary rule was not applicable to bar the admission of the evidence, because the police error arose "from nonrecurring and attenuated negligence . . . far removed from the core concerns that led [the Court] to adopt the [exclusionary] rule in the first place." *Id*. at 144.

"[A]n officer's good faith reliance on case law that is later overturned may form a proper basis to avoid the operation of the exclusionary rule." *People v Short*, 289 Mich App 538, 540 (2010) (trial court correctly denied the defendant's motion to suppress evidence of weapons found in his car following a search incident to arrest, where even though the search was unconstitutional under the retroactive application of a new United States Supreme Court decision,[44] the police officers conducting the search acted reasonably and in good faith based on a long-standing line of case law under which the search was constitutional[45]).

"[T]he good-faith exception to an improperly issued search warrant [may] apply [even when] the police officer who supplied the underlying affidavit for the search warrant also executed the warrant." *People v Adams (Shawn)*, 485 Mich 1039 (2010). In *Adams (Shawn)*, *supra* at 1039, there was "no evidence that the officer provided an affidavit so lacking in indicia of probable cause as to render his subsequent official belief in its existence entirely unreasonable." The Supreme Court held that because "[t]he evidence show[ed] that the officer executed the warrant with a good-faith belief that it was properly issued[,]" the Court of Appeals erred in relying on *United States v Leon*, 468 US 897 (1984), to rule that the good-faith exception was inapplicable. *Adams (Shawn)*, *supra* at 1039.

"The mere fact of an illegal arrest does not per se require the suppression of evidence." *People v Corr*, 287 Mich App 499, 508 (2010). "'It is only when an "unlawful detention has been employed as a tool to procure *any* type of evidence from a detainee" that the evidence is suppressed under the exclusionary rule.'" *Corr*, *supra* at 508-509, quoting *People v Kelly*, 231 Mich App 627, 634 (1998), quoting *People v Mallory*, 421 Mich 229, 240-241, 243 n 8 (1984). In *Corr*, *supra* at 509, "the officers detained [the] defendant to maintain control of the scene and protect their safety as well as [the] defendant's safety while they finished performing their duties at the scene." "[T]here [wa]s no indication . . . that the officers exploited the detention to obtain evidence, acted in bad faith, or that the detention was employed as a tool to procure evidence from [the]

[44] *Arizona v Gant*, 556 US 332 (2009).

[45] See *New York v Belton*, 453 US 454 (1981), and its progeny.

defendant." *Id*. Additionally, "the evidence at issue (the officers' testimony) was obtained when [the] defendant, subsequent to the detention, illegally assaulted, battered, resisted, or obstructed the officers' performance of their duties." *Id*. The Court specifically declined to adopt a rule that "permits a suspect to avoid prosecution for crimes committed when illegally detained[.]" *Id*.

"[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis v United States*, 564 US ___, ___ (2011). In *Davis, supra* at ___, officers conducted a search that was legal under then-current case law, and before appeal, the United States Supreme Court distinguished that precedent, making the *Davis* search unlawful. The *Davis* Court stated that the exclusionary rule is not meant to deter a police officer from acting in good faith or from following existing law; thus, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id*. at ___.[46] See also *People v Mungo (On Second Remand)*, ___ Mich App ___, ___ (2012) (applying *Davis, supra* at ___, and holding that because police acted in good-faith reliance on then-current United States Supreme Court precedent in conducting a search of the defendant's car incident to a passenger's arrest, the exclusionary rule did not apply to evidence discovered in that search, even though the search was rendered unconstitutional under a subsequently-issued United States Supreme Court decision).

D. Attenuation Doctrine

Barring any egregious conduct on the part of the officers making the arrest, "discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest." *People v Reese (Richard)*, 281 Mich App 290, 303, 305 (2008). The proper inquiry is "whether the evidence came to light through exploitation of the illegal conduct or by means sufficiently distinguishable to be purged of the taint from the illegal conduct." *Reese (Richard)*, *supra* at 299. Three factors to consider in determining "'whether the causal chain has been sufficiently attenuated to dissipate the taint of illegal conduct [are]: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of the intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.'" *Id*., quoting *United States v Green (David)*, 111 F3d 515, 521 (CA 7, 1997). However, "whether the discovery of a preexisting warrant dissipates or attenuates the illegality of the initial stop or arrest will usually depend on two main points: '(1) what evidence did the police obtain from the initial illegal stop *before* they

[46] See Section 3.20(B)(5) for additional discussion of *Davis*, 564 US ___.

discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights.'" *Reese (Richard)*, *supra* at 303-304, quoting *McBath v Alaska*, 108 P3d 241, 248 (Alas, 2005).

"Purposeful and flagrant misconduct exists where: '(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his [or her] conduct was likely unconstitutional' but engaged in it anyway, or where '(2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up."'" *Reese (Richard)*, 281 Mich App at 304, quoting *United States v Simpson*, 439 F3d 490, 496 (CA 8, 2006), quoting *Brown (Richard) v Illinois*, 422 US 590, 605 (1975). "But where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *Reese (Richard)*, *supra* at 304. Accordingly, "evidence that is discovered in a subsequent search incident to the lawful arrest need not be suppressed." *Id*.

In *Reese (Richard)*, 281 Mich App at 293, the defendant was illegally arrested for loitering. The police subsequently discovered that the defendant had an outstanding misdemeanor warrant and conducted an inventory search of his car, which yielded drugs. *Reese (Richard)*, *supra* at 293. "Because the officers' initial misconduct—the arrest for loitering—was not particularly egregious or motivated by bad faith and only yielded [the defendant's] identity, the subsequent discovery of the preexisting arrest warrant was not tainted by the illegality of that arrest. As such, the discovery of the preexisting warrant constituted an intervening circumstance that broke the causal connection between the illegal arrest and the discovery of the [drug] evidence. Because the search was independently justified as a search incident to the lawful arrest on the warrant, [the defendant] was not entitled to have the [drug] evidence suppressed." *Reese*, *supra* at 305.

E. Statutory Violations

The plain language used in a statute or court rule determines whether the exclusion of evidence is the intended remedy for a violation of that statute or court rule. *People v Hawkins*, 468 Mich 488, 507 (2003). See also *People v Anstey*, 476 Mich 436, 448 (2006), where the Michigan Supreme Court ruled that suppression of the evidence was not the appropriate remedy for a statutory violation (MCL

257.625a(6)(d)) because "there [wa]s no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated." According to the Court, when suppression of the evidence is not authorized for a statutory violation, "the court may instruct the jury that the defendant's statutory right was violated and [] the jury may decide what significance to attach to th[at] fact."

The exclusionary rule does not apply to violations of Michigan's knock and announce statute. *Hudson (Booker) v Michigan*, 547 US 586, 599-600 (2006). MCL 780.656, Michigan's knock and announce statute, provides:

> "The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant."

Because violation of the knock and announce statute is unrelated to the seizure of a person's property pursuant to a valid search warrant, the exclusionary rule is not the proper remedy for the statutory violation. *Hudson (Booker)*, 547 US at 594. When a statute does not authorize exclusion of the evidence obtained as a result of a statutory violation, a jury instruction regarding the statutory violation may be an appropriate remedy. *Anstey*, 476 Mich at 448.

Generally, unless there is "a causal relationship between the violation and the seizing of the evidence," suppression of the evidence is not required. *Vasquez*, 461 Mich at 241.

3.24 Search and Seizure Issues—Standard of Review

A trial court's findings of fact regarding a motion to suppress are reviewed for clear error, and questions of law relevant to the issue of suppression are reviewed de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694 (2001).

The application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326 (2001).

In warrantless search and seizure cases, appellate courts should apply a de novo standard of judicial review concerning reasonable suspicion to stop and probable cause to search. *Ornelas v United States*, 517 US 690, 699 (1996).

3.25 Double Jeopardy Issues

A. Generally

"Both the United States and Michigan constitutions prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565 (2004). The Double Jeopardy Clause of the United States Constitution, Am V, provides: 'No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .' The Clause applies to the states through the Fourteenth Amendment. *North Carolina v Pearce*, 396 US 711, 717 (1969). The Michigan Constitution provides: 'No person shall be subject for the same offense to be twice put in jeopardy.' Const 1963, art 1, § 15. This provision is 'essentially identical' to its federal counterpart, *Nutt*, *supra* at 575, and was intended to be 'construed consistently with the corresponding federal provision.' *Id*. at 594.

"Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. [*Nutt*, 469 Mich] at 574; *Pearce*, [396 US 711]." *People v Ford*, 262 Mich App 443, 447 (2004).

"The purposes of double jeopardy protections against successive prosecutions for the same offense are to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Ford*, 262 Mich App at 447. Collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy," as it "surely protects the man who has been acquitted from having to 'run the ga[u]ntlet' a second time." *Ashe v Swenson*, 397 US 436, 445-446 (1970), quoting *Green (Everett) v United States*, 355 US 184, 190 (1957).

"[T]he purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended." *Ford*, 262 Mich App at 447-448. Where multiple punishments are involved, the Double Jeopardy Clause acts as a restraint on the prosecution and the courts, not the Legislature. *Brown (Nathaniel) v Ohio*, 432 US 161, 165 (1977). The *Blockburger*[47] test should be employed to determine whether double jeopardy considerations bar multiple punishments. *People v Smith (Bobby)*, 478 Mich 292, 296 (2007).

[47] *Blockburger v United States*, 284 US 299 (1932).

"[I]f a defendant can make a prima facie showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the government can demonstrate by a preponderance of the evidence why double jeopardy principles do not bar prosecution." *People v Wilson (Amir)*, 454 Mich 421, 428 (1997).

B. Multiple Prosecutions for the Same Offense

MCL 763.5 provides that "[n]o person shall be held to answer on a second charge or indictment for any offense for which he [or she] has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him [or her] in bar of any subsequent prosecution for the same offense."

Same Elements Test. When multiple charges are brought against a defendant for conduct related to a single criminal transaction, the "same-elements" test is used to determine whether the prohibition against double jeopardy is violated. *Nutt*, 469 Mich at 567-568.[48] "Application of the same-elements test, commonly known as the '*Blockburger* test,' is the well-established method of defining the Fifth Amendment term 'same offence.'" *Nutt*, *supra* at 576; *Blockburger*, 284 US at 304. The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt*, *supra* at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same elements test, as set out in *Blockburger*, provides:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Nutt*, 469 Mich at 577-578, quoting *Blockburger*, 284 US at 304.

Personal Protection Orders (PPOs) and Double Jeopardy. In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to whatever other criminal penalties may apply for a separate criminal offense.[49] MCL 600.2950(23); MCL 600.2950a(20);

[48] In *Nutt*, 469 Mich at 567-568, the Michigan Supreme Court overruled *People v White (George)*, 390 Mich 245 (1973), which employed the "same transaction" test (prohibiting successive prosecutions of a defendant for entirely different crimes arising from a single criminal "transaction") to resolve double jeopardy issues.

[49] See the Michigan Judicial Institute's *Domestic Violence Benchbook*,Chapter 8, for more information.

People v Coones, 216 Mich App 721, 727-728 (1996). The Double Jeopardy Clause applies to non-summary criminal contempt prosecutions just as it does to other criminal prosecutions. *United States v Dixon (Alvin)*, 509 US 688, 696 (1993).

Successive State and Federal Prosecutions. The Double Jeopardy Clause does not bar successive state and federal prosecutions of a defendant for offenses arising from the same criminal episode. *People v Davis (Gevon)*, 472 Mich 156, 162 (2005), citing *Bartkus v Illinois*, 359 US 121 (1959). Because federal and state prosecutorial authority are derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns. *Davis (Gevon)*, *supra* at 163-164.

The "Separate Sovereign" Rule. The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving successive state prosecutions. *Davis (Gevon)*, 472 Mich at 158. Double jeopardy does not prohibit successive state prosecutions where a defendant's conduct violates the law in more than one state and more than one state seeks to prosecute the defendant for a crime resulting from that conduct. *Davis (Gevon)*, *supra* at 168-169. In *Davis (Gevon)*, the Double Jeopardy Clause did not bar the State of Michigan from prosecuting a defendant who had already been convicted and sentenced in Kentucky for offenses under Kentucky law that arose from the same conduct on which Michigan based its charges against the defendant. *Id*. at 158-159, 168-169. Successive state prosecutions do not violate a defendant's double jeopardy protections if the entities involved are separate sovereigns. *Id*. at 168. A state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority. *Id*. at 166-167. See also *United States v Studabaker*, 578 F3d 423, 430 (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).

Retrial Following Entry of Directed Verdict of Acquittal. When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix*, 453 Mich 619, 626-627 (1996).

However, "'[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.'" *People v Evans (Evans II)*, 491 Mich 1, 20 (2012), quoting *People v Mehall*, 454 Mich 1, 5 (1997). 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.'" *Evans II*, *supra* at 11, quoting *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977). Thus, "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." *Evans II*, *supra* at 3-4, 11, 22, 25 (Double Jeopardy Clauses of state and federal constitutions did not bar retrial where the trial court erroneously added an extraneous element to the charged offense and granted a directed verdict on the ground that the prosecution had failed to present proof of the additional element).[50]

C. Multiple Punishments for the Same Offense

The *Blockburger* test for determining whether the protection against double jeopardy prohibits multiple prosecutions is the appropriate test for determining whether double jeopardy considerations bar multiple punishments. *Smith (Bobby)*, 478 Mich at 315. In *Smith (Bobby)*, *supra* at 316, the Michigan Supreme Court expressly stated that the definition of "same offense" for purposes of the multiple punishments strand of the prohibition against double jeopardy is the same as the definition of "same offense" announced by the Court in *Nutt*, 469 Mich 565, for purposes of the multiple prosecutions strand.

There is no double jeopardy violation where a defendant is convicted and sentenced for both armed robbery, MCL 750.529, and felonious assault, MCL 750.82(1). *People v Chambers (Billy)*, 277 Mich App 1, 8-9 (2007). Applying the same elements test adopted by the Court in *Smith (Bobby)*, 478 Mich 292, the *Chambers* (*Billy)* Court concluded that armed robbery and felonious assault are not the same offense for purposes of the multiple punishments strand of double jeopardy because each offense requires an element for its commission not required by the other. *Chambers (Billy)*, *supra* at 9. See also *People v Strawther*, 480 Mich 900 (2007) (no double jeopardy violation where the defendant was convicted of both assault with intent to commit great bodily harm, MCL 750.84, and felonious assault, MCL 750.82).

"[C]onvicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the 'multiple punishments' strand of the Double Jeopardy Clause *if*

[50] See Section 5.12(C) for additional discussion of the double jeopardy implications of a directed verdict.

each offense has an element that the other does not." (Emphasis added). *People v Ream*, 481 Mich 223, 240-241 (2008), overruling *People v Wilder*, 411 Mich 328, 342 (1981). The Court reiterated its holding in *Smith (Bobby)*, 478 Mich at 316, that the *Blockburger* test should be employed to determine whether the protection against double jeopardy prohibits multiple punishments; multiple punishments are authorized if each statute requires proof of an additional fact not required by the other. *Ream*, *supra* at 228. In *Ream*, *supra* at 225-226, the Supreme Court held that there was no double jeopardy violation where the defendant was convicted and sentenced for both first-degree felony murder and the predicate felony of first-degree criminal sexual conduct (CSC-1). One element required to prove first-degree felony murder, but not required to prove CSC-1, is the killing of a human being. *Id*. at 241. One element of CSC-1, but not an element of first-degree felony murder, is sexual penetration. *Id*. Because each of the offenses contained an element that the other did not, they were not the same offense and the defendant could be punished for both. *Id*. at 241-242.

Convicting and sentencing a defendant for both carjacking, MCL 750.529a(1), and assault with intent to rob while armed, MCL 750.89, does not violate the multiple punishments strand of the Double Jeopardy Clause, because each offense contains an element that the other does not. *People v McGee (Anthony)*, 280 Mich App 680, 684-685 (2008). One element required to prove carjacking, but not required to prove assault with intent to rob while armed, is the larceny of a motor vehicle. *McGee (Anthony)*, *supra* at 684-685. One element required to prove assault with intent to rob while armed, but not required to prove carjacking, is the use of a weapon. *Id*.

Convicting and sentencing a defendant for four separate counts of CSC where there were only two acts of penetration did not violate the multiple punishments strand of the Double Jeopardy Clause. *People v Garland*, 286 Mich App 1, 5-6 (2009). In *Garland*, *supra* at 5, "the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, [the] defendant was charged, tried, and convicted of two criminal offenses: CSC I on the theory that a sexual penetration had occurred during a home invasion [], and CSC III on the theory that the victim was physically helpless[]." One element required to prove CSC I, but not required to prove CSC III, is that the sexual penetration occurred "under circumstances involving the commission of any other felony." MCL 750.520b(1)(c). One element required to prove CSC III, but not required to prove CSC I, is that the sexual penetration was accompanied by the actor knowing or having "reason to know that the victim [was] . . . physically helpless." MCL 750.520d(1)(c). "[U]nder the *Blockburger* test, because each offense contains an element that the other does not, CSC I and CSC III are separate

offenses for which [the] defendant was properly convicted and sentenced . . . ." *Garland*, *supra* at 6.

Convicting and sentencing a defendant for both being a prisoner in possession of a controlled substance, MCL 801.263(2), and delivery of marijuana, MCL 333.7401(2)(d)(*iii*), does not violate the multiple punishments strand of the Double Jeopardy Clause because each offense contains an element that the other does not. *People v Williams (Robert)*, 294 Mich App 461, 468-470 (2011) ("[a]n individual need not be a prisoner to be convicted of delivery [of marijuana][] . . . [and] a person need not deliver a controlled substance to be a prisoner in possession [of a controlled substance][]").

Convicting and sentencing a defendant for two separate counts of first-degree home invasion violated the multiple punishments strand of the Double Jeopardy Clause where there was only one home invasion supported by two theories. *People v Baker*, 288 Mich App 378, 386 (2010). In *Baker*, *supra* at 380, the defendant broke into the victim's apartment where he sexually assaulted her and tried to steal from her. The Court of Appeals noted that "*intending* to commit a felony, larceny, or assault, and *actually* committing a felony, larceny, or assault simply constitute two different methods of establishing the same element of first-degree home invasion." *Id*. at 385. The Court held that the *Blockburger* test was not satisfied because the two first-degree home invasion convictions were not premised on the establishment of different sets of elements. *Id*. Accordingly, the defendant should have been convicted and sentenced for one count of first-degree home invasion supported by two theories. *Id*. at 386.

There is no double jeopardy violation where a defendant receives multiple punishments for the same offense when the legislative intent explicitly provides for the multiple punishments. *People v Mitchell (Shane)*, 456 Mich 693, 695-696 (1998). For example, the Michigan Legislature intended to allow multiple punishments for a defendant charged pursuant to the felony-firearm statute and charged with a felony not expressly excepted from the felony-firearm statute. *Mitchell (Shane)*, *supra* at 694-695, 698 (protection against double jeopardy not violated where defendant was convicted of both felony firearm and the predicate felony of receiving or concealing a stolen firearm or ammunition). See also *People v Sturgis*, 427 Mich 392, 409-410 (1986) (felony firearm and carrying a concealed weapon (CCW) are distinct offenses that may be separately punished in a single trial arising out of a single criminal episode when the CCW offense is not a predicate of the felony-firearm offense); *People v Conley (Aaron)*, 270 Mich App 301, 311-312 (2006) (convictions of first-degree home invasion and felonious assault do not violate constitutional protection against

double jeopardy where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law); and *People v Price*, 214 Mich App 538, 542 (1996) ("even if the crimes are the same, this Court's inquiry is at an end, as it pertains to a double jeopardy challenge based on multiple punishment, if it is evident that the Legislature intended to authorize cumulative punishments"). Cf. *People v Meshell*, 265 Mich App 616, 630-631 (2005) (Legislature did not intend multiple punishments for convictions of both operating/maintaining a methamphetamine laboratory and operating/maintaining a methamphetamine laboratory within 500 feet of a residence, where, applying the *Blockburger* same elements test, each offense does not contain an element not contained in the other).

Where a defendant's convictions of second-degree criminal sexual conduct were vacated (he was charged with first-degree criminal sexual conduct, and the jury convicted him of the cognate lesser offense of second-degree criminal sexual conduct), *People v Nyx (Maurice)*, 479 Mich 112, 134, 136 (2007), double jeopardy principles do not bar the prosecution from charging the defendant with and retrying him for second-degree criminal sexual conduct, where the defendant successfully appealed his conviction and the reversal was not based on insufficient evidence. *People v Nyx*, 480 Mich 1204 (2007) (Corrigan, J. concurring). The defendant could not be retried for the first-degree CSC charge because the jury's CSC-2 verdict was an implicit acquittal of CSC-1.

A defendant who receives one conviction of first-degree murder supported by two theories—first-degree premeditated murder and first-degree felony murder—and who is also convicted of the felony underlying the felony-murder charge, and whose conviction of the underlying felony is later vacated on double jeopardy grounds, may have a judgment of conviction of the underlying felony entered against him or her where the defendant's murder conviction is reversed on grounds that only affect the murder element. *People v Williams (Joezell II)*, 475 Mich 101, 103-105 (2006).

In *Williams (Joezell II)*, 475 Mich at 103, the underlying felony at issue was larceny. The prosecutor was concerned that if the judgment vacated the larceny conviction, in the rare event that the defendant's conviction of murder was overturned for a reason unrelated to the larceny conviction, the defendant could avoid punishment for the larceny, even though he was originally found guilty of that crime. *Id*. Relying on *Rutledge v United States*, 517 US 292 (1996), the Court determined that if the defendant's murder conviction was "reversed on grounds only affecting the murder element, entry of a judgment

of conviction of larceny may be directed by the appellate court." *Williams (Joezell II)*, *supra* at 104-105.

When a defendant is convicted "of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim[,]" the resulting double jeopardy violation is remedied by "modify[ing] the conviction to specify that it is for a single count of first-degree murder supported by two theories." *People v Orlewicz*, 293 Mich App 96, 112 (2011), citing *People v Williams (Joezell I)*, 265 Mich App 68, 72 (2005), aff'd 475 Mich 101 (2006).

D. Standard of Review

A double jeopardy challenge presents a question of constitutional law that is reviewed de novo. *Conley (Aaron)*, 270 Mich App at 310.

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Chapter 4: Pleas

4.1 Plea of Guilty or Nolo Contendere 4-1
4.2 Plea of Guilty but Mentally Ill 4-7
4.3 Plea of Not Guilty by Reason of Insanity 4-8
4.4 Withdrawal of a Guilty Plea 4-9
4.5 Sentence Bargaining 4-19
4.6 Plea—Collateral Attack of Earlier Plea or Conviction Used for Purposes of Sentence Enhancement 4-28

4.1 Plea of Guilty or Nolo Contendere

A. Generally

It is the duty of the judge to be satisfied that a felony plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The court may not accept a guilty or nolo contendere (no contest) plea unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A). Before accepting a guilty or nolo contendere plea, the court must place the defendant under oath and personally carry out MCR 6302(B)–MCR 6.302(E). MCR 6.302(A).

B. Requirements for Guilty or Nolo Contendere Pleas[1]

1. An Understanding Plea

For an understanding plea, the court must advise the defendant of the name of the offense, the maximum possible prison sentence (including any mandatory minimum sentence) for the offense, and the rights that will be given up (both at

[1] See the Appendix for a checklist and script for conducting a felony plea proceeding.

trial and on appeal) if the defendant's plea is accepted. MCR 6.302(B).

"The requirements of MCR 6.302(B)(3) and MCR 6.302(B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office." MCR 6.302(B)(3). "If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights." *Id*. The form must be approved by the State Court Administrative Office. See SCAO form CC 291, *Advice of Rights (Circuit Court Plea)*.[2]

When a defendant pleads guilty to an offense and may be sentenced according to the sentencing guidelines for habitual offenders, a trial court must inform the defendant of the maximum *enhanced* sentence possible in order for the defendant to tender an understanding plea as required by MCR 6.302. *People v Boatman*, 273 Mich App 405, 412 (2006). In *Boatman*, *supra* at 412, the sentencing court's failure to specify whether the maximum sentence to which it was referring was based on the habitual offender or the first-time offender guidelines "constituted a procedural flaw that resulted in the failure to properly inform defendant of the consequences of his plea, rendering it unintelligent."

For a nolo contendere plea, it is good practice to ensure that the defendant understands that he or she will be sentenced in the same manner as if he or she had tendered a guilty plea. MCL 767.37.

2. A Voluntary Plea

For a voluntary plea, the court must confirm the terms of any plea agreement and determine whether the defendant was promised anything beyond the plea agreement, whether the defendant was threatened, and whether the plea is the defendant's own choice. MCR 6.302(C).

A plea agreement must be made in open court or in writing. MCR 2.507(G); *People v Mooradian*, 221 Mich App 316, 318-320 (1997).

[2] Available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc291.pdf.

3. An Accurate Plea

For an accurate guilty plea, "the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1). A guilty plea should not be accepted by a trial court until facts sufficient to establish the defendant's guilt have been placed on the record. *People v Haack*, 396 Mich 367, 375 (1976).

For an accurate nolo contendere plea, the court may not question the defendant about participation in the crime, but must state why a plea of nolo contendere is appropriate, and hold a hearing (unless there has already been one) that establishes support for finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. MCR 6.302(D)(2). It is appropriate for a trial court to rely on a preliminary examination transcript to furnish the factual basis for a nolo contendere plea. *People v Chilton*, 394 Mich 34, 38-39 (1975).

4. Additional Inquiries

After questioning the defendant, the court is required to ask the attorneys whether there are any promises, threats, or inducements other than those already disclosed on the record and whether the court has complied with MCR 6.302(B), MCR 6.302(C), and MCR 6.302(D). MCR 6.302(E).

Committee Tip: After advising a defendant of his or her rights, it is good practice to also advise the defendant that there is no absolute right to withdraw a plea, but that he or she may file a motion to withdraw his or her plea before sentencing. MCR 6.310(B).

C. Nolo Contendere Plea Details

A nolo contendere plea may be appropriate "where the defendant would not be able to supply a sufficient factual basis for a guilty plea because he or she was intoxicated on the night of the incident, where there is the possibility of future civil litigation resulting from the offense, or where a defendant cannot remember the events which led to his or her being charged with a crime." 1A Gillespie Michigan Criminal Law & Procedure, § 16:15.

A nolo contendere plea may only be entered with the consent of the court. MCR 6.301(B).

If a no contest plea to a specific intent crime is based on intoxication, the prosecution must offer evidence to refute an intoxication defense. *People v Polk*, 123 Mich App 737, 740 (1983). "However, a prosecutor is not required to produce evidence negating a defendant's claimed intoxication defense in a case where sufficient evidence has been presented to the trial court to establish that the defendant acted with the required specific intent, thereby providing a sufficient basis for acceptance of a proffered nolo contendere plea." 1A Gillespie Mich Criminal Law & Procedure, § 16:15, citing *People v Stevens (Donald)*, 138 Mich App 438, 441 (1984).

If the defendant's competency is in question, the trial court must render a finding of competence at the time the plea is offered. *People v Matheson*, 70 Mich App 172, 179 (1976). Where there is significant evidence of incompetence, the trial court should make a record of its deliberation, rather than merely allowing its acceptance of the plea to serve as an implicit finding of competence. *Matheson*, *supra* at 179.

D. Use of Felony Pleas

MRE 410 governs the admissibility of pleas, plea discussions, and related statements:

> "Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> > "(1) A plea of guilty which was later withdrawn;
> >
> > "(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
> >
> > "(3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
> >
> > "(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> "However, such a statement is admissible (*i*) in any proceeding wherein another statement made in the

> course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (*ii*) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel."

MRE 803(22) concerns the hearsay exception for a judgment of previous conviction. Specifically, MRE 803(22) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

"Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

E. Remedy for a Defective Plea

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecution to establish the missing elements. *People v Mitchell (Donald)*, 431 Mich 744, 749-750 (1988). If the prosecution is able to do so and there is no contrary evidence, the defendant's conviction should stand. *Mitchell (Donald)*, *supra* at 750. However, if the prosecution is unable to establish that the defendant committed the offense, the trial court must set aside the defendant's conviction. *Id*. If contrary evidence is produced, the matter should be treated as a motion to withdraw the guilty plea, and the trial court must exercise its discretion to decide the matter. *Id*. If the motion is granted, the trial court must set aside the conviction. *Id*.

Strict compliance with MCR 6.302 is not required; rather, the Michigan Supreme Court has adopted a doctrine of substantial compliance, i.e., whether a particular departure from the rule justifies or requires reversal or remand for additional proceedings depends on the nature of the noncompliance. *People v Plumaj*, 284 Mich App 645, 649 (2009). Automatic reversal is only required if the trial court fails to obtain an enumeration and waiver on the record of (1) the privilege against self-incrimination; (2) the right to a jury trial; and (3) the right to confrontation. *Plumaj*, *supra* at 649, citing *Boykin v Alabama*, 395 US 238 (1969). A reviewing court may consider the entire record in determining whether the *Boykin*

requirements were satisfied and whether the guilty plea was knowingly and voluntarily made. *Plumaj*, *supra* at 649.

In *Plumaj*, 284 Mich App at 649, the defendant moved to set aside his pleas on the basis that he was not placed under oath before he tendered them. The Court of Appeals reversed the trial court's decision to allow the defendant to withdraw his pleas, noting that "[w]hile MCR 6.302(A) requires that the court place the defendant under oath before accepting a plea of guilty or nolo contendere, the failure in and of itself is not self-determinative. Because the oath obligation is not one of the protected rights requiring reversal, the trial court must make the initial determination as to whether or not the pleas were accurate, understanding or knowingly made, and voluntary. While an oath may assist the trial court in making its determination, an oath in and of itself does not establish any of the necessary requisites to a valid plea." *Plumaj*, *supra* at 649.

F. Standard of Review

A trial court's decision to accept or reject a guilty plea is reviewed for an abuse of discretion. *People v Grove*, 455 Mich 439, 444 (1997).

The adequacy of the factual basis for a guilty plea is reviewed by examining "whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431 (1996). A response of "guilty" in answer to how a defendant wished to plead was held "not a sufficient factual basis elicited from defendant to support a finding that defendant was guilty of the offense." *People v Holoweski*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 278029).[3] "The trial court must elicit factual support sufficient to permit a trier of fact to conclude that defendant is guilty, not the bare conclusion itself." *Holoweski*, *supra*.

In deciding whether the requirements of MCR 6.302 were fulfilled in accepting a plea, the test is whether there was substantial, as opposed to strict, compliance. *People v Saffold*, 465 Mich 268, 270-271 (2001) (trial court's failure to inform the defendant of his presumption of innocence during the guilty plea hearing did not require reversal of the defendant's conviction where, earlier in the day, the defendant was present while the trial court instructed the jury that had convened for the defendant's trial that the defendant was presumed innocent until proven guilty beyond a reasonable doubt). In determining whether there was compliance with the court rule, review is not limited to the exchange between the

[3] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

defendant and the trial court at the time the plea was entered. *United States v Vonn*, 535 US 55, 59 (2002); *Saffold*, *supra* at 281. Rather, the entire record may be considered, beginning at the defendant's first appearance in the matter leading to his or her eventual plea. *Vonn*, *supra* at 59; *Saffold*, *supra* at 281.

Generally, guilty and nolo contendere pleas waive all nonjurisdictional[4] defects in the proceedings. *People v New*, 427 Mich 482, 488 (1986) (defendant's claim that trial court erred in failing to suppress statements he gave to the police was waived by nolo contendere plea and codefendant's claim that trial court erred in denying his motion to suppress evidence of drugs was waived by guilty plea; both defenses related to evidentiary matters and challenged state's ability to prove factual guilt but did not challenge state's authority to prosecute defendants). However, a guilty plea does not waive the defendant's right to subsequently raise a claim that would have precluded the state from ever prosecuting the defendant for the crime regardless of his or her factual guilt. *New*, *supra* at 488. While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application only. MCR 6.301(C)(2).

"[I]ndigent defendants who plead guilty or nolo contendere in a Michigan court have a federal constitutional right to the appointment of appellate counsel with regard to first-tier review in th[e] Court [of Appeals]." *People v James (William)*, 272 Mich App 182, 188-189 (2006), citing *Halbert v Michigan*, 545 US 605 (2005). "*Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 387 (2008).

4.2 Plea of Guilty but Mentally Ill

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. "In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or [MCR 6.302](D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered." MCR 6.303. The reports must be made a part of the record. *Id*.

[4] Jurisdictional defects have been found where a defendant raises issues such as "improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, imprisonment when the trial court had no authority to sentence defendant to the institution in question, and the conviction of a defendant for no crime whatsoever." *People v Carpentier*, 446 Mich 19, 47-48 (1994) (Riley, J., concurring). Nonjurisdictional defects include violations of the Interstate Agreement on Detainers (IAD), *People v Wanty*, 189 Mich App 291, 293 (1991); noncompliance with the 180-day rule, *People v Eaton (Clifford)*, 184 Mich App 649, 657 (1990); and claims of unlawful search and seizure, *People v West (Halton)*, 159 Mich App 424, 426 (1987).

Additionally, the following statutory conditions must be met under MCL 768.36(2) before a guilty but mentally ill plea may be accepted:

> (1) the defendant has asserted a defense of insanity;
>
> (2) the defendant has waived his or her right to trial by jury or judge;
>
> (3) the prosecuting attorney has approved the plea of guilty but mentally ill;
>
> (4) with the defendant's consent, the court has examined the report or reports on criminal responsibility prepared as a result of examinations required by the defendant's assertion of the defense;
>
> (5) a hearing on the issue of defendant's mental illness has been conducted; and
>
> (6) the court is satisfied that the defendant proved by a preponderance of the evidence that he or she was mentally ill at the time of the offense.

These requirements are also incorporated in MCR 6.301(C)(1).

A trial court has discretion whether to accept a defendant's guilty but mentally ill plea. *People v Blue*, 428 Mich 684, 694 (1987).

4.3 Plea of Not Guilty by Reason of Insanity

Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302, except that MCR 6.304(C) (rather than MCR 6.302(D)) governs the manner of determining the accuracy of the plea. MCR 6.304(A).

"Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that (1) the defendant committed the acts charged, and (2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense." MCR 6.304(C).

Legal insanity means that the "person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

"After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands that the plea will result in the defendant's commitment for

diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time." MCR 6.304(B).

After accepting the defendant's plea, the trial court must immediately commit the defendant to the custody of the center for forensic psychiatry for a period not to exceed 60 days. MCL 330.2050(1).

The court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime. MCR 6.304(D); MCL 330.2050(1).

The defendant may secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. MCL 768.20a(3). If the defendant is indigent and makes a showing of good cause, the trial court may order the county to pay for an independent psychiatric evaluation. *Id*.

4.4 Withdrawal of a Guilty Plea

A. Withdrawal of Plea Before Acceptance

A defendant has a right to withdraw any plea until the court accepts the plea on the record. MCR 6.310(A).

B. Withdrawal of Plea Before Sentencing

There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court. *People v Montrose*, 201 Mich App 378, 380 (1993).

MCR 6.310(B) sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence. Specifically, MCR 6.310(B) states:

> "After acceptance but before sentence,
>
> > "(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the

> defendant to withdraw the plea if it would be required by [MCR 6.310](C).
>
> "(2) the defendant is entitled to withdraw the plea if
>
> > "(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
> >
> > "(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

The Court of Appeals for the Sixth Circuit has developed the following multi-factor balancing test to guide district courts in deciding whether to grant a motion to withdraw a guilty plea:[5]

> "(1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his [or her] innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted." *United States v Haygood*, 549 F3d 1049, 1052 (CA 6, 2008).

"The relevance of each factor will vary according to the 'circumstances surrounding the original entrance of the plea as well as the motion to withdraw.'" *Haygood*, 549 F3d at 1052, quoting *United States v Triplett*, 828 F2d 1195, 1197 (CA 6, 1987). A defendant should not generally be allowed to withdraw his or her plea if he or

[5] Rule 11 of the Federal Rules of Criminal Procedure concerns entry of a defendant's a guilty plea.

she made a strategic choice to plead guilty, and later determines that it was a poor decision. *Haygood*, *supra* at 1052-1053.

In *Haygood*, the Court of Appeals for the Sixth Circuit determined that the district court properly denied the defendant's motion to withdraw his guilty plea because he did not move to withdraw his plea until four and a half months after it was entered, and he used the motion to withdraw his plea as an inappropriate way to challenge the validity of the search warrant that led to his arrest. *Haygood*, 549 F3d at 1053.

"When reviewing whether the factual basis for a plea is adequate, th[e] [c]ourt considers whether the fact finder could find the defendant guilty based on the facts elicited from him [or her] at the plea proceeding." *People v Fonville*, 291 Mich App 363, 377 (2011). "'A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says.'" *Fonville*, *supra* at 377, quoting *People v Thew*, 201 Mich App 78, 85 (1993), quoting *People v Jones*, 190 Mich App 509, 511-512 (1991) (internal citations omitted) (trial court did not abuse its discretion in denying the defendant's motion to withdraw his plea where his statements "were in line with the elements of the charged crime[,]" an inculpatory inference could be drawn from the his admissions, and although he "claimed that he was innocent of the crime as charged because he did not have an 'evil intent,' he never argued that he was actually innocent of the alleged conduct").

In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *People v Harris (Lamar)*, 224 Mich App 130, 131 (1997). Examples of fair and just reasons for withdrawal include when the plea resulted from fraud, duress, or coercion, *People v Gomer*, 206 Mich App 55, 58 (1994), when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, *People v Jackson (Andrew)*, 417 Mich 243, 246 (1983), or when the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement. *Harris (Lamar)*, *supra* at 132. If the facts of the case indicate that the plea was voluntary, the plea will be upheld regardless whether the defendant received consideration in return. *Id*. at 132-133. "[R]equests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *People v Haynes*

(Kermit), 221 Mich App 551, 559 (1997). However, MCR 6.310(B)(2)(a) and MCR 6.310(B)(2)(b) provide that a defendant is entitled to withdraw the plea if the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation, or the trial court states that it will sentence the defendant to a specified term or within a specified range, and then finds that it is unable to do so.

A trial court may not sua sponte vacate an accepted plea without the defendant's consent, even if a defendant indicates that he or she is innocent. *People v Strong*, 213 Mich App 107, 112 (1995) (after trial court sua sponte vacated the defendant's plea without the defendant's consent, he was found guilty following a jury trial; Court of Appeals reversed the defendant's convictions and remanded to permit the defendant to plead guilty in exchange for the terms of the parties' previous plea agreement).

A sentencing judge who decides not to abide by the terms of a sentence agreement (*Cobbs*[6] agreement) may not tell a criminal defendant what sentence might be imposed before the defendant decides whether to withdraw a guilty plea. MCR 6.310(B)(2)(b); *People v Williams (Avana)*, 464 Mich 174, 180 (2001).

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). When recanted testimony provides a substantial part of the factual basis underlying a defendant's nolo contendere plea, the defendant must prove by a preponderance of credible evidence that the original testimony was untruthful, in order to constitute a fair and just reason for allowing the defendant to withdraw his or her plea. *Patmore*, *supra* at 152. If the defendant meets the burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. *Id*. If the defendant fails to meet the burden, or if other evidence is sufficient to support the plea, then the defendant has failed to present a fair and just reason to warrant withdrawal of his or her plea. *Id*.

If the defendant establishes a fair and just reason for withdrawal of the plea, the burden then shifts to the prosecution to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *People v Jackson (Dwayne)*, 203 Mich App 607, 611-612 (1994). To constitute substantial prejudice, the prosecution must demonstrate that its ability to prosecute is impeded by the

[6] *People v Cobbs*, 443 Mich 276 (1993).

delay. *People v Spencer*, 192 Mich App 146, 151-152 (1991) (substantial prejudice not established where trial was set to begin at the time the pleas were entered, and some witnesses were from out of state). In deciding whether a defendant may withdraw a plea, the trial court should bear in mind what is in the interests of justice. *Spencer*, *supra* at 151-152 ("the fact that [the] defendant's pleas may have been induced by inaccurate legal advice combined with his refusal or inability to personally recount a sufficient basis to substantiate the[] charges made it incumbent upon the trial court to allow [the] defendant to withdraw his pleas").

C. Withdrawal of Plea After Sentencing

"The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in [MCR] 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals." MCR 6.310(C).

"[In general], criminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea." *People v Haynes (Joseph)*, 256 Mich App 341, 349 (2003). However, defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla v Kentucky*, 559 US ___, ___ (2010).[7]

When a defendant pleads guilty to an offense and may be sentenced according to the sentencing guidelines for habitual offenders, a trial court must inform the defendant of the maximum *enhanced* sentence possible in order for the defendant to tender an understanding plea as required by MCR 6.302. *People v Boatman*, 273 Mich App 405, 413 (2006). In *Boatman*, *supra* at 412, the defendant was entitled to withdraw his plea when the court sentenced him under the habitual

[7] "[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, "the new rule of criminal procedure announced in *Padilla*[, 559 US at ___,] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413-419 (2012) (the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, *supra*, which was decided several years after he completed his sentence).

offender guidelines to a greater sentence than the maximum sentence for a first conviction of the offense as stated during the defendant's plea hearing. *Id*. at 413.

"[W]hen a sentence is modified to make it consistent with state law and to give the defendant the benefit of his [or her] original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea." *Pickens v Howes*, 549 F3d 377, 381-382 (CA 6, 2008).

D. Motion to Withdraw Based on Ineffective Assistance of Counsel

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US ___, ____ (2010)[8]; see also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]"). Accordingly, a claim of ineffective assistance of counsel may be reviewable following a guilty plea. *People v New*, 427 Mich 482, 491 (1986) ("a defendant, after pleading guilty, may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant"). However, "[w]here the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived." *People v Vonins (After Remand)*, 203 Mich App 173, 176 (1993). For example, in *People v Stammer*, 179 Mich App 432, 440 (1989), the defendant, "by complaining of ineffective assistance, [sought] to get through the back door appellate relief that could not be obtained by directly invoking review on issues of evidentiary suppression and the insanity defense."

To establish ineffective assistance of counsel in the context of a guilty plea, the inquiry is whether the defendant tendered the plea voluntarily and understandingly. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120 (1991). See also MCR 6.302(A) ("[t]he court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate"). Absent unusual circumstances, where counsel has adequately apprised a

[8] "[T]he new rule of criminal procedure announced in *Padilla*[, 559 US at ___,] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

defendant of the nature of the charges and the consequences of a plea, the defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995); see also *People v Armisted*, 295 Mich App 32, 49 (2011) (the defendant's affidavit, stating that trial counsel misinformed him about the minimum sentence that would likely be imposed if he were convicted of the charged offense, "was insufficient to contradict or overcome his previous sworn statements at the plea proceeding . . . that he understood the plea and sentencing agreement[]").

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*[, 466 US at 687]." *Frye*, 566 US at ___, citing *Hill v Lockhart*, 474 US 52, 57 (1985). First, "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, *supra* at 56 (citation omitted). "The second, or 'prejudice,' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59.[9]

Defense counsel's decision to concede the defendant's responsibility for a lesser offense may be a tactical strategy where evidence clearly indicates the defendant is guilty of a crime; in such circumstances, counsel's concession of guilt is not necessarily ineffective assistance. *People v Savoie*, 419 Mich 118, 134-135 (1984).

Counsel may be found ineffective and a defendant's plea found involuntary or unknowing if counsel failed to explain to the defendant the nature of the criminal charges against him or her, or if counsel failed to discuss with the defendant the possible defenses he or she might have against the charges to which the defendant was pleading guilty. *People v Jackson (Dwayne)*, 203 Mich App 607, 614 (1994). A defendant's attorney is required to explain to the defendant the range and consequences of the choices available to the defendant with enough detail to allow the defendant to make an intelligent and informed choice. *Jackson (Dwayne)*, *supra* at 614. Absent unusual circumstances, where counsel has adequately apprised the defendant of the nature of the charges and the

[9] See Section 4.5(C) for discussion of claims of ineffective assistance of counsel resulting in the lapse or rejection of plea offers.

consequences of a plea, a defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway,* 212 Mich App 442, 446 (1995). Counsel is not required to make a recommendation, and the failure to provide such advice does not necessarily constitute the ineffective assistance of counsel. *Corteway, supra* at 446.

Defense counsel was found to be ineffective for failing to inform the defendant that he could be found guilty of first-degree murder under an aiding and abetting theory, where the defendant rejected the prosecution's plea offer and was ultimately convicted of first-degree murder. *People v McCauley,* 287 Mich App 158, 164 (2010). "[T]he record support[ed] the trial court's finding that defense counsel's failure to explain the concept of aiding and abetting to [the] defendant, and failure to inform him that he could still be convicted of first-degree murder even if he did not fire the fatal shot, fell below an objective standard of reasonableness." *McCauley, supra* at 164. "The record also support[ed] the trial court's finding that [the] defendant was prejudiced by trial counsel's deficient performance." *Id*.

Defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla*, 559 US at ___. In *Padilla, supra* at ___, the United States Supreme Court stated that "constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation[,]" and held that whether the defendant was entitled to relief was dependent on whether he could demonstrate that counsel's ineffectiveness amounted to prejudice.[10] See also *People v Fonville*, 291 Mich App 363, 392 (2011), where the Court of Appeals applied the *Padilla* rationale to support its holding that "defense counsel must advise a defendant that registration as a sexual offender is a consequence of his [or her] guilty plea. The failure to inform a pleading defendant that his [or her] plea will necessarily require registration of a sex offender affects whether the plea was knowingly made." In *Fonville*, *supra* at 395, "defense counsel's performance was constitutionally defective where he failed to inform [the defendant] of the sex offender registration

[10]"[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, "the new rule of criminal procedure announced in *Padilla*[, 559 US at ___,] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413-419 (2012) (the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, *supra*, which was decided several years after he completed his sentence).

requirement[,]" and that failure prejudiced the defendant such that reversal of his conviction and sentence was required.

Issues that relate solely to the state's capacity to prove factual guilt are waived by an unconditional guilty or nolo contendere (no contest) plea. *New*, 427 Mich at 493-494. Where the alleged deficient actions of defense counsel do not relate to issues implicating the state's authority to prosecute the defendant and were waived by the defendant's valid guilty plea, the claims of ineffective assistance of counsel relating to those actions are also waived. *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993).

E. Effect of Withdrawal or Vacation of Plea

"If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered." MCR 6.312. See also *People v Johnson (Ricardo)*, 197 Mich App 362, 364 (1992) ("[w]hen defendant withdrew his guilty plea, he reopened this matter to any of the charges which had been brought or could have been brought against him at the time his plea of guilty was entered").

F. Inadmissibility of Withdrawn Plea

Ordinarily, evidence of a withdrawn plea and statements made during the plea proceedings are not admissible in any civil or criminal proceedings. MRE 410. However, a criminal defendant may waive MRE 410 protections, so long as he or she is appropriately advised and so long as the statements admitted into evidence are voluntarily, knowingly, and understandingly made. *People v Stevens (James)*, 461 Mich 655, 656-657, 661-663, 668-670 (2000) (the defendant acknowledged his guilt during plea discussions arising out of proceedings pursuant to an investigative subpoena; the plea was ultimately not entered and the Supreme Court ruled that the statements were "not rendered inadmissible by MRE 410, and, if otherwise admissible, c[ould] be introduced in the prosecutor's case in chief").

G. Appealing a Guilty Plea[11]

"A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the

[11] See Section 4.4(D) and Section 4.5(C) for discussion of postconviction relief based on ineffective assistance of counsel in the plea bargain context.

rules in [MCR 6.310], or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial, court, raising as a basis for withdrawal the claim sought to be raised on appeal." MCR 6.310(D). See also *People v Gaines*, 198 Mich App 130, 131 (1993) ("defendant's challenge concerning the validity of his [] plea is not properly before [the Court] because he did not move to withdraw the plea in the trial court").

"[I]ndigent defendants who plead guilty or nolo contendere in a Michigan court have a federal constitutional right to the appointment of appellate counsel with regard to first-tier review in th[e] Court [of Appeals]." *People v James (William)*, 272 Mich App 182, 188-189 (2006), citing *Halbert v Michigan*, 545 US 605 (2005). "*Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 387 (2008). "For those indigent defendants whose pleas were taken after *Halbert* [*v Michigan*, 545 US 605 (2005),] was issued, but before the repeal of MCL 770.3a, there can be no finding of waiver [of the right to counsel]. Because indigent defendants whose pleas were taken after June 23, 2005, but before January 9, 2007, could not have clearly understood that they had the right to appointed counsel, they could not have executed a knowing and intelligent waiver of this right." *People v Billings*, 283 Mich App 538, 544-545 (2009). The Court also held that requiring a defendant to waive his or her right to appointed appellate counsel as a plea condition was unconstitutional. *Billings*, *supra* at 545.

"In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that: (a) the defendant is entitled to file an application for leave to appeal, (b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and (c) the request for a lawyer must be made within 42 days after sentencing." MCR 6.425(F)(2). A legally erroneous instruction (e.g., that by pleading no contest, the defendant waived his right to court-appointed counsel except under certain circumstances) under MCR 6.425(F)(2), and *Halbert v Michigan*, 545 US 605 (2005), may be harmless if the advice-of-rights form the defendant receives at sentencing informs him or her of the right to appointed counsel under all circumstances, regardless of whether the conviction is plea- or trial-based. *People v Frazier*, 485 Mich 1044 (2010), citing MCR 6.425(F)(3). The Court noted, however, that "trial judges should take care to advise defendants in plea proceedings of their continuing right to court-appointed counsel if they cannot afford counsel." *Frazier*, *supra* at 1044.

See also MCR 6.425(G)(1)(c) ("[i]n a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing"). "In a case involving a conviction following a guilty plea, the denial of appointed appellate counsel on the basis of the defendant's failure to comply with the 42-day deadline for requesting counsel in MCR 6.425(G)(1)(c) does not violate *Halbert v Michigan*, 545 US 605 (2005)." *People v McCoy*, 483 Mich 898 (2009).

H. Standard of Review

A trial court's decision whether to grant a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Parker (Charles William III)*, 275 Mich App 213, 217 (2007).

4.5 Sentence Bargaining

A. Sentence Agreements and Recommendations

A defendant does not have a right to engage in plea negotiations with the prosecution. *People v Payne*, 285 Mich App 181, 191 (2009). Neither the United States Supreme Court nor the Michigan Supreme Court "'has recognized that the parties have a right to present a plea.'" *Payne*, *supra* at 191, quoting *People v Grove*, 455 Mich 439, 469 n 36 (1997).

A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a specific sentence disposition. The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), and *People v Cobbs*, 443 Mich 276 (1993). In *Killebrew*, *supra* at 205, the Supreme Court held that a trial court may not initiate or participate in discussions regarding a plea agreement. In *Cobbs*, *supra* at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appeared to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court's preliminary evaluation did not bind the court's ultimate sentencing discretion, because additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. *Cobbs*, *supra* at 283.

Sentence recommendation under *Killebrew*. *Killebrew* limits a trial court's involvement to the approval or disapproval of a nonbinding

prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew, supra* at 209, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that the recommendation was not accepted, state the sentence that the court finds is the appropriate disposition, and give the defendant the opportunity to affirm or withdraw the guilty plea. *Id*. at 209-210. See *People v Shuler*, 188 Mich App 548, 551 (1991) (the sentencing court expressly informed the defendant that it would exceed the sentence recommended by the prosecutor, named the specific sentence it intended to impose, and permitted the defendant to withdraw or affirm his guilty plea).

***Cobbs* plea.** *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the charged offense, on the basis of information available to the court at the time. *Cobbs*, 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Cobbs*, *supra* at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id*.

Committee Tip:

Make the attorneys do the extra work to provide the court with information regarding the reasons why a Cobbs hearing is appropriate, and, if a hearing is held, why a particular plea is appropriate. Even if the parties cannot agree on the terms, the court may still proceed with a Cobbs plea; it is not dependent on the assent of the parties. If the defendant elects to withdraw his or her plea, the trial court may consider a new Cobbs agreement, or proceed to trial.

In *People v Williams (Avana)*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* (*Avana)* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge."

Williams (Avana), *supra* at 177. However, the *Williams* (*Avana)* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams (Avana)*, *supra* at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

"In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand, is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.

"By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

"Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams (Avana)*, 464 Mich at 179-180.

B. Violations of a Sentence Agreement or Recommendation

1. By Prosecutor

As a general rule, fundamental fairness requires that promises made during plea bargaining be respected, where (1) the government agent was authorized to enter into the agreement;

and (2) the defendant relied on the promise to his or her detriment. *People v Ryan (Thomas)*, 451 Mich 30, 41 (1996).

Where a defendant is aggrieved by the breach of an unauthorized non-plea agreement with the police (that the defendant not be prosecuted) he or she is not entitled to specific performance of that agreement. *People v Gallego (Luis)*, 430 Mich 443, 445, 452 (1988). Instead, suppression or exclusion of the written agreement is an appropriate remedy. *Gallego*, *supra* at 446, 456-457.

Where a sentencing agreement negotiated between the defendant and the prosecution is subsequently breached by the prosecution, a reviewing court has discretion to choose between vacating the plea or ordering specific performance, with considerable weight given to the defendant's choice of remedy. *People v Nixten*, 183 Mich App 95, 97, 99 (1990) (where the defendant did not assert his innocence and only complained that the prosecution did not fulfill its part of the bargain, the Court of Appeals found that specific performance was the appropriate remedy and remanded for resentencing before a different judge).

2. By Defendant

"On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." MCR 6.310(E).

A defendant's breach of a plea agreement constitutes grounds for setting aside the agreement. *People v Abrams*, 204 Mich App 667, 672-673 (1994) (where the defendant breached his plea agreement by engaging in criminal activity, the prosecution was allowed to pursue its case against the defendant).

An evidentiary hearing is required for the court to determine if a substantial breach of a plea agreement has occurred. *United States v Frazier (Eric)*, 213 F3d 409, 419 (CA 7, 2000). The burden is on the prosecution to show by a preponderance of the evidence that a defendant breached the plea agreement. *Frazier (Eric)*, *supra* at 419. A defendant who breaches a plea agreement forfeits any right to its enforcement. *United States v Wells*, 211 F3d 988, 995 (CA 6, 2000).

It is appropriate to grant a prosecutor's motion to void a plea bargain where the defendant has not lived up to his or her part of the bargain. *Abrams*, 204 Mich App at 672-673. See also *People v Acosta*, 143 Mich App 95, 99 (1985) (it was not error for the trial court to grant the prosecution's motion to void a plea

agreement where the defendant absconded, failed to appear to enter his guilty plea, and was arrested eight months later).

Or, a trial court may simply decline to allow a defendant to withdraw his or her plea. See *People v Garvin (Larry)*, 159 Mich App 38, 44 (1987) (the defendant's failure to live up to his part of a plea bargain did not void his guilty plea, but rather, waived his right to withdraw the plea). See also *People v Kean*, 204 Mich App 533, 535-536 (1994) (where, pursuant to a plea agreement, the defendant entered a qualifying drug and alcohol treatment program before sentencing, but left the program after one week, failed to appear at sentencing, and was arrested more than two and a half years later, the trial court's denial of the defendant's motion to withdraw his plea was upheld).

It is appropriate to grant a prosecutor's motion to set aside a guilty plea made pursuant to a plea bargain where defense counsel concealed material information during the bargaining process. *People v Cummings*, 84 Mich App 509, 513-514 (1978).

3. By the Court

If the court receives information that in its judgment dictates a lower sentence than that included in a sentence agreement, it must notify the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea. *People v Seibert*, 450 Mich 500, 511 (1995). If the court chooses not to follow the specific sentence disposition or recommendation agreed upon, the defendant must be allowed the opportunity to withdraw from the plea agreement. MCR 6.302(C)(3); *Killebrew*, 416 Mich at 208-209.

A defendant is entitled to withdraw his or her plea when the court is unable to comply with the prosecutor's sentence recommendation or agreement, or the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose. MCR 6.310(B)(2)(a)–MCR 6.310(B)(2)(b).

4. Standard of Review

The trial court's finding that a plea agreement was breached is reviewed for clear error, and even when the court finds a breach, the trial court has discretion to affirm the plea. MCR 2.613(C); MCR 6.310(C), and 1989 Staff Comment; *People v Hannold*, 217 Mich App 382, 388-389 (1996).

C. Ineffective Assistance of Counsel Causing Lapse or Rejection of Plea Offer[12]

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US ___, ____ (2010),[13] citing *Hill v Lockhart*, 474 US 52, 57 (1985). See also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").

1. Establishing Ineffective Assistance Under *Strickland*

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v Washington*, 466 US 668, 687 (1984)]." *Frye*, 566 US at ___, citing *Hill*, 474 US at 57.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___.

In *Frye*, 566 US at ___, the respondent was charged with driving without a license, a felony that carried a maximum term of four years' imprisonment. The prosecutor offered to defense counsel a choice of two plea bargains, including an offer to reduce the charge to a misdemeanor that carried a maximum term of imprisonment of one year and to recommend a 90-day sentence if the respondent pleaded guilty. *Frye, supra* at ___. Counsel failed to communicate the offers to the respondent, who entered an open plea of guilty to the original felony charge and was sentenced to three years in prison. *Id*. at ___. After determining that counsel's performance was deficient under the first part of the *Strickland*[14] test, *Frye*,

[12] See Section 4.4(D) for discussion of plea withdrawal based on ineffective assistance of counsel.

[13] "[T]he new rule of criminal procedure announced in *Padilla*[, 559 US at ___,] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

[14] 466 US at 687.

supra at ___, the Court turned to *Strickland*'s prejudice requirement:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice . . . , it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 US at ___.

Noting that, in light of the respondent's intervening arrest on an additional charge of driving without a license shortly before the plea hearing was held, there was reason to doubt that the prosecution would have adhered to the misdemeanor plea offer or that the trial court would have accepted it unless they were required to do so under state law, the *Frye* Court remanded the case to the state appeals court to consider whether the "plea offer, if accepted by [the respondent], would have been adhered to by the prosecution and accepted by the trial court." *Frye*, 566 US at ___.

Similarly, where defense counsel's ineffective assistance results in a defendant's *rejection* of a favorable plea offer, followed by his or her conviction at an ensuing trial and the imposition of a sentence harsher than that offered, "[the] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v Cooper*, 566 US ___, ___ (2012).

In *Lafler*, 566 US at ___, it was conceded that defense counsel rendered ineffective assistance by advising the respondent that the prosecution would not be able to obtain a conviction at trial

and convincing him, on that basis, to reject the prosecution's offer to dismiss two charges and to recommend a sentence of 51 to 85 months' imprisonment if the respondent pleaded guilty to two remaining charges. Following trial, the respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment. *Lafler, supra* at ___. The *Lafler* Court rejected the petitioner's contention that "there can be no finding of *Strickland*[15] prejudice arising from plea bargaining if the defendant is later convicted at a fair trial[,]" holding that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it[, and i]f that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler, supra* at ___, ___. Because the respondent established "that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea [offer,]" and because he received a sentence after trial that was "3½ times greater than he would have received under the plea[,]" the *Strickland* test was satisfied. *Lafler, supra* at ___.

The defendant "established that counsel's failure to inform him of the actual consequences of accepting or rejecting [a] plea offer prejudiced him[]" where defense counsel's erroneous advice and failure to inform him of the 25–year mandatory minimum sentence for a conviction of the charged offense resulted in his rejection of a favorable plea offer, a jury conviction of the charged offense, and the imposition of the mandatory sentence. *People v Douglas (Jeffery)*, ___ Mich App ___, ___ (2012), citing *Lafler*, 566 US at ___. In *Douglas (Jeffery), supra* at ___, defense counsel advised the defendant that he would likely be sentenced to a minimum term of five to eight years in prison if convicted as charged of first-degree criminal sexual conduct (CSC-I) (victim under 13), and that "if he accepted the [prosecution's plea] offer [(granting him the option of pleading guilty to fourth-degree criminal sexual conduct)], the worst sentence that he could receive was ten months in jail with the requirement that he register as a sex offender." Based on this erroneous advice, the defendant rejected the plea offer and was convicted of CSC-I and sentenced to the mandatory 25-year prison term. *Id*. at ___. Because the defendant "show[ed] that the offer was valid, that he would have accepted the offer, and that his conviction and

[15] 466 US at 687.

sentence would have been much less severe than the convictions and sentences imposed after trial[,] . . . [he] satisfied both prongs of the *Strickland*[16] test[.]" *Id*. at ___.

2. Remedy

When "a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence," the remedy, like other Sixth Amendment remedies, "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Lafler*, 566 US at ___, quoting *United States v Morrison*, 449 US 361, 364 (1981). Noting that "[t]he specific injury" suffered in such a case may not always be redressed simply by imposition of a lesser sentence, the *Lafler* Court explained that in some cases—for example, if the offer was for a guilty plea to a less serious count or if a mandatory sentence applied to the charged offense—"the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Lafler, supra* at ___. If the trial court does so, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id*. at ___.

"In implementing a remedy . . . , the trial court must weigh various factors[,]" including "a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions[]" and "any information concerning the crime that was discovered after the plea offer was made." *Lafler*, 566 US at ___. In *Lafler, supra* at ___, where defense counsel's ineffective assistance resulted in the respondent's rejection of a plea offer to dismiss two charges and to recommend a much lower sentence than the sentence imposed following trial, "[t]he correct remedy . . . [was] to order the State to reoffer the plea agreement." If the respondent accepted the offer, the Michigan trial court would then have discretion, under MCR 6.302(C)(3), to determine "whether to vacate the convictions and resentence [the] respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the] respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Lafler, supra* at ___.

Where defense counsel's erroneous advice resulted in the defendant's rejection of a favorable plea offer, a jury conviction of the charged offense, and the imposition of a mandatory

[16] 466 US at 687.

sentence, and where counsel additionally rendered ineffective assistance at trial, the appropriate remedy was to "vacate [the] defendant's convictions and sentences and remand to the trial court for the prosecution to reinstate its plea offer" and, if the defendant rejected the offer, for a new trial. *Douglas (Jeffery)*, ___ Mich App at ___.

4.6 Plea—Collateral Attack of Earlier Plea or Conviction Used for Purposes of Sentence Enhancement

Prior convictions, where the record indicates that there was no counsel or formal waiver of counsel (when a right to counsel existed), may not be used to enhance punishment in a subsequent proceeding. *People v Garvie*, 148 Mich App 444, 453 (1986); *People v Schneider*, 132 Mich App 214, 216 (1984).

MCR 6.610(F)(2) incorporates the standard espoused by *Garvie* and *Schneider*:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to any attorney, a subsequent charge or sentence may not be enhanced because of this [prior] conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this [prior] conviction."

"[A]s a matter of federal law, a criminal defendant possesses the constitutional right to collaterally challenge a prior conviction that is used to enhance a sentence when that defendant alleges that the prior conviction was procured in violation of the Sixth Amendment right to counsel." *People v Carpentier*, 446 Mich 19, 28 (1994), citing *Custis v United States*, 511 US 485 (1994). However, the United States Supreme Court "expressly limited the availability of collateral challenges to these particular Sixth Amendment violations and refused to extend the opportunity for relief to other alleged constitutional infirmities." *Carpentier*, *supra* at 29, citing *Custis*, *supra* at 487. The United States Supreme Court "further emphasized that such a limitation was compelled by the ease of administration that accompanied such exceptional claims, and by the federal court's interest in promoting the finality of judgments for other non-*Gideon* [*v Wainwright*, 372 US 335 (1963)] challenges." *Carpentier*, *supra* at 29, citing *Custis*, *supra* at 497.

A violation of the right to counsel with respect to prior plea-based convictions is also subject to collateral attack under Michigan law. *People v Ingram*, 439 Mich 288, 296-297 (1992). While the state has "a compelling interest in championing the finality of criminal judgments . . . Michigan

has recognized the unique import of a defendant's constitutional right to counsel." *Carpentier*, 446 Mich at 29. "[A]n alleged *Gideon*[, 372 US 335] violation constitutes a jurisdictional defect that may be collaterally challenged by a convicted criminal defendant." *Carpentier*, *supra* at 29-30. However, this type of collateral attack is time-limited: "[a] collateral attack on a prior conviction underlying a present charge may not be made after a defendant's plea of guilty to the present charge is accepted." *People v Roseberry*, 465 Mich 713, 723 (2002).

A prior plea-based misdemeanor conviction, obtained without benefit of counsel but for which no incarceration was imposed, may be used in a subsequent criminal prosecution for purposes of sentence augmentation. *People v Reichenbach*, 459 Mich 109, 120 (1998). See also *Nichols v United States*, 511 US 738, 747 (1994) (the use of counselless misdemeanor convictions, where no prison term was imposed, to enhance the prison term for a subsequent offense was consistent with the Sixth and Fourteenth Amendments, because reliance on those types of convictions is consistent with the traditional understanding of the sentencing process, which is less exacting than the process of establishing guilt).

Chapter 5: Trial & Posttrial Proceedings

5.1 Trial or Jury Waiver 5-1
5.2 Bench Trial 5-5
5.3 Jury Selection 5-8
5.4 Voir Dire 5-10
5.5 Oaths or Affirmations 5-23
5.6 Subpoenas 5-27
5.7 Conducting the Trial 5-28
5.8 Questions or Comments by Judge 5-38
5.9 Issues Affecting the Jury During Trial 5-38
5.10 Defendant's Conduct and Appearance at Trial 5-42
5.11 Confrontation 5-50
5.12 Directed Verdict 5-69
5.13 Jury Instructions 5-72
5.14 Jury Matters During Deliberations 5-83
5.15 Verdict 5-94
5.16 Mistrial 5-99
5.17 New Trial 5-103
5.18 Ineffective Assistance of Counsel 5-112

5.1 Trial or Jury Waiver

A. Right to a Jury Trial

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury. MCL 763.2; US Const, Am VI; Const 1963, art 1, § 14; Const 1963, art 1, § 20. The right to a public trial is not absolute, however, and "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v Georgia*, 467 US 39, 45 (1984). "[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." *Waller*, *supra* at 48. "A trial court, in its discretion and under extraordinary circumstances, may order the exclusion of the public from a criminal trial for a limited purpose and duration where the specific circumstances may be seen to endanger the due process right to a fair trial." 1B Gillespie Michigan Criminal Law & Procedure, § 20:143. See, e.g., *People v Kline*, 197 Mich App 165, 169 (1992) ("[t]he age of an alleged victim, the nature of an alleged offense, and the potential for harm to the victim are appropriate factors to consider in weighing an accused's right to a public trial against the government's interest in protecting a victim from undue harm").

"Issues of fact shall be tried by a jury drawn, returned, examined on voir dire, and empaneled in the manner provided by law for the trial of issues of fact in civil cases." MCL 768.8.

B. Waiver of a Jury Trial

"The accused may waive any trial by jury . . . ." MCL 768.8. A defendant's waiver of the right to a jury trial requires the consent of the prosecutor and the court's approval. MCL 763.3; MCR 6.401; MCR 6.402. Before accepting a defendant's waiver, the defendant must have been arraigned on the information (or have waived arraignment), properly advised of the right to a jury trial, and offered the opportunity to consult with an attorney. MCR 6.402(A); MCR 6.402(B). In a court where arraignments have been eliminated under MCR 6.113(E)[1], the court may not accept a defendant's waiver of trial by jury until the defendant has been provided with a copy of the information and offered an opportunity to consult with an attorney. MCR 6.402(A). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.[2]

[1] A circuit court may eliminate arraignments for defendants represented by counsel, subject to the requirements in MCR 6.113(E).

[2] Available at http://courts.michigan.gov/scao/resources/other/lao/LAO26-model.doc.

Committee Tip:

Before proceeding to trial (or before taking a plea), it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

MCR 6.402(B) requires the court to make a verbatim record of the waiver proceeding. Before accepting a waiver of the right to a jury trial, the court must:

- Advise the defendant of his or her constitutional right to a jury trial.
- Determine whether the defendant has had an opportunity to consult with an attorney.
- Address the defendant personally to determine whether the defendant understands his or her right to a jury trial and is voluntarily giving up that right and opting to be tried by the court.

Compliance with the procedures set out in MCR 6.402(B) creates a presumption that the waiver was knowing, voluntary, and intelligent. *People v Mosly*, 259 Mich App 90, 96 (2003).

MCL 763.3(1) states that, except in cases of minor offenses,[3] a defendant's waiver of a jury trial and his or her election to be tried by the court *must be in writing*, signed by the defendant, filed in the case, and made part of the record. Here is an example of a written waiver:

"I, [name of defendant], defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury." MCL 763.3(1).

MCR 6.402, the court rule governing a defendant's waiver of a jury trial, *does not require the defendant to sign a written waiver form*. "The waiver procedure set forth in [MCR 6.402](B) differs from [MCL 763.3] . . . because it eliminates the written waiver requirement and

[3] A "minor offense" is defined in the Code of Criminal Procedure as "a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(k).

replaces it with an oral waiver procedure consistent with the waiver procedure applicable at plea proceedings." 1989 Staff Comment to MCR 6.402.

Because "[t]he statutory procedure is superseded by the court rule procedure[,]" a defendant does not have to sign a written waiver form to effect a valid waiver of his or her right to a jury trial. 1989 Staff Comment to MCR 6.402. See MCR 6.001(E) ("[t]he rules in this chapter supersede . . . any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter").

However, in the absence of a written waiver form, the court is required to make a verbatim record of the waiver proceeding showing that the defendant knew of the right, the defendant's waiver of the right was voluntary, and the defendant was offered an opportunity to consult with counsel. MCR 6.402(A); MCR 6.402(B). Where defense counsel signed a written waiver form on the defendant's behalf, the defendant objected to the fact that he had waived his right to a jury trial, and no record evidence existed that the defendant was fully informed about his right to a jury trial and voluntarily waived that right, the Court concluded that the defendant did not validly waive his right to a jury trial. *People v Cook*, 285 Mich App 420, 422-424 (2009).

The court has discretion to permit a defendant to withdraw the defendant's waiver of a jury trial, but the request to withdraw must not be made for the purpose of delay or judge shopping. *People v Wagner*, 114 Mich App 541, 558-559 (1982).

It is inappropriate for a trial court to give a defendant a "waiver break" in exchange for waiving his or her right to a jury trial, because a decision to drop, or plea bargain, any charges lies with one or both of the parties, not with the court. *People v Ellis (Tyrone)*, 468 Mich 25, 27-28 (2003). Where the defendant waived his right to a jury trial based on his defense counsel's sound advice that if he waived a jury trial, he would receive a sentence concession, the defendant's waiver was considered to be "informed," as opposed to "'coerced.'" *People v Godbold*, 230 Mich App 508, 513-514 (1998).

C. Standard of Review

The trial court's determination that a defendant validly waived his or her right to a jury trial is reviewed for clear error. *People v Taylor (Willie)*, 245 Mich App 293, 305 n 2 (2001). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Hesch*, 278 Mich App 188, 192 (2008).

A trial court's failure to comply with the procedural mandates of MCR 6.402(B) does not require automatic reversal "if the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Mosly*, 259 Mich App at 96. However, a constitutionally invalid jury waiver is a structural error requiring automatic reversal. *People v Cook*, 285 Mich App 420, 427 (2009).

The trial court's decision on a defendant's motion to withdraw a jury waiver is reviewed for an abuse of discretion. *Wagner*, 114 Mich App at 558-559. An abuse of discretion occurs where the decision results in an outcome falling outside of the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 617 (2006).

5.2 Bench Trial

A. Is Disqualification An Issue?

When a defendant opts for a bench trial, the trial judge should make a record of the court's prior involvement with the case and consider reassignment if the court is too familiar with the file. See MCR 2.003. Consider obtaining express approval of the parties to proceed if the court has had prior involvement with the case. Examples of various situations involving disqualification include:

- Where the trial court acknowledged personal animus toward the defendant, it should have disqualified itself. *People v Lobsinger*, 64 Mich App 284, 290-291 (1975).

- Where, during the codefendant's bench trial, the trial judge expressed his belief that the defendant committed the offense, the judge should have disqualified himself from subsequently hearing the defendant's case. *People v Gibson (On Remand)*, 90 Mich App 792, 796-798 (1979).

- Where the trial court had knowledge that a prosecution witness passed a polygraph test, it should have been disqualified from ruling on the defendant's motion for a new trial. *People v Hale*, 72 Mich App 484, 486 (1976).

A trial court may consider disqualification when it has heard the factual basis for an aborted guilty plea. *People v Cocuzza*, 413 Mich 78, 79-80 (1982).

A trial court is not automatically disqualified from hearing a defendant's second bench trial after a reversal on appeal. *People v Upshaw*, 172 Mich App 386, 388-389 (1988).

Reversal is not required where the trial court accepted the defendant's guilty plea and sentenced him or her in a previous case. *People v McLeod*, 107 Mich App 710, 714-715 (1981).

B. Pretrial Motions in a Bench Trial

Unless required to do so by a different court rule, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, but doing so is helpful for appellate review. MCR 2.517(A)(4); *People v Shields*, 200 Mich App 554, 558 (1993).

C. Evidentiary Issues in a Bench Trial

Generally, during a bench trial the court should consider only the evidence set out in the record and should not rely on its own specialized knowledge in reaching a verdict. *People v Simon*, 189 Mich App 565, 567-568 (1991). It is error requiring reversal for the trial judge during a bench trial to refer to the preliminary examination transcript, except as provided by MCL 768.26 (authorizes the prosecution's use of a preliminary examination transcript when a witness is unavailable at trial). *People v Ramsey*, 385 Mich 221, 225 (1971). It is also error requiring reversal for the trial judge to view the crime scene without giving counsel and the parties an opportunity to be present. *People v Eglar*, 19 Mich App 563, 565 (1969).

D. Motion for Acquittal

"[A]fter the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact." MCR 6.419(C).

The motion "is in the nature of a jury trial motion for a directed verdict and in both jury and nonjury trials is governed by the rule that the prosecutor has the burden of producing in his [or her] case in chief some evidence as to each element of the crime charged to warrant putting the defendant to his defense." *People v DeClerk*, 400 Mich 10, 17 (1977).

E. Decision

At the conclusion of the case, the trial court must "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 6.403. Additionally, "[t]he court must state its findings and conclusions on the record or in a written opinion made a part of the record." *Id*. The requirement that a trial judge articulate the reasons for a decision in its factual findings applies to criminal cases as well as civil cases. *People v Jackson (Robert)*, 390 Mich 621, 627 (1973). A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (Gary) (On Rehearing)*, 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith (Kerry)*, 211 Mich App 233, 235 (1995).

A trial judge sitting as the trier of fact may not enter an inconsistent verdict. *People v Walker (Alonzo)*, 461 Mich 908 (1999) (trial court's dismissal of a felony-firearm charge while convicting the defendant of malicious destruction of property, which destruction was the product of a firearm discharge, was held to be patently inconsistent). Jury verdicts "need not necessarily be consistent." *People v Vaughn (Marcus)*, 409 Mich 463, 465-466 (1980).

When rendering a decision after a bench trial, it is recommended that the judge cover the following:[4]

- Applicable statutes, if any;
- Applicable jury instructions (including elements of the offense and any lesser offenses);
- Burden of proof;
- Any presumptions that may apply;
- Findings of fact sufficient to show an appellate court that the trial judge was aware of the issues and correctly applied the appropriate law;
- Conclusions of law; and
- Entry of the appropriate judgment.

[4] A checklist is contained in the Appendix.

F. Standard of Review

A trial court's findings of fact are reviewed for clear error by the appellate court. MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, the evidence presented is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn (Kevin)*, 186 Mich App 376, 379 (1990).[5] The trier of fact may make reasonable inferences from evidence in the record but may not make inferences completely unsupported by any direct or circumstantial evidence. *Vaughn (Kevin)*, *supra* at 379-380.

5.3 Jury Selection

A defendant is entitled to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan (Gary) v Louisiana*, 391 US 145, 154 (1968). The process by which potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. Generally, the process should be random and result in potential juries that reflect a cross-section of the community. MCR 2.511(A).[6]

The selection process is described in MCR 2.511(A). MCR 2.511(A)(4) authorizes "any other fair and impartial method directed by the court or agreed to by the parties." An example is where the parties agree to have 14 potential jurors seated in the jury box, and seven potential jurors seated in the front row near the jury box. The attorneys are then permitted to question all 21 potential jurors, so that the attorneys are aware of the possible replacements if any of the original jurors are excused.

Defendant is entitled to a jury which contains a representative cross-section of the community. *Taylor (Billy) v Louisiana*, 419 US 522, 528 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant must show that (1) a distinctive group (2) was underrepresented in his or her venire or jury pool, and that (3) the underrepresentation resulted from the systematic exclusion of the group

[5] "[T]he standard for reviewing the sufficiency of the evidence in criminal jury trials is also applicable to criminal bench trials." *People v Traughber*, 432 Mich 208, 225 (1989).

[6] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

from the jury selection process.[7] *People v Smith (Diapolis)*, 463 Mich 199, 203 (2000), aff'd sub nom *Berghuis v Smith (Diapolis)*, 559 US ___ (2010).

The first prong requires a showing of the exclusion of a constitutionally cognizable group. *People v Hubbard (After Remand)*, 217 Mich App 459, 473 (1996).

The second prong requires a showing that the number of members of the cognizable group is not fair and reasonable in relation to the number of group members in the relevant community. *Hubbard*, 217 Mich App at 473-474. The United States Supreme Court has not specified a preferred method of measuring underrepresentation. *Smith (Diapolis)*, 463 Mich at 203. The lower federal courts have applied three different methods known as (1) the absolute disparity test, (2) the comparative disparity test, and (3) the standard deviation test. *Id*. The Court in *Smith* (*Diapolis)* indicated that all three approaches should be considered and that no individual method should be used to the exclusion of the others. *Id*. at 204. See *People v Bryant (Ramon)*, 289 Mich App 260, 268-271 (2010), for a detailed analysis of all three methods of determining whether representation of a distinctive group in the jury venire is fair and reasonable.

The third prong requires a showing that the underrepresentation of the cognizable group is systematic, meaning that it results from some circumstances inherent in the particular selection process. A showing of one or two incidences of disproportionate panels is not sufficient to show a systematic exclusion of group members. *Hubbard*, 217 Mich App at 481.

A. Number of Jurors

The number of jurors is set by Michigan's Constitution (Const 1963, art 1, § 20), by statute (MCL 768.18), and by court rule (MCR 6.410(A)). MCL 768.18 authorizes a trial judge in a felony case to impanel a jury of not more than 14 members. By agreement on the record, a jury of less than 12 can be utilized. MCR 6.410(A); *People v Champion (Michael)*, 442 Mich 874 (1993) (reversal not required where the defendant stipulated to a jury of 11 members).

Following the procedure outlined in MCR 6.410(A), the parties, with the court's consent, can agree to have the case decided by a specified number of jurors less than 12 at any time before a verdict is returned. If the parties indicate their willingness to stipulate to a jury of less than 12 members, the court must advise the defendant of his or her right to have the case decided by a jury of 12. MCR 6.410(A). The court must make a verbatim record that the defendant

[7] See Section 5.4(C).

understands the right and if the defendant makes a valid waiver of the right to be tried by a jury of 12, the court may accept the parties' stipulation and proceed. *Id*. The court may refuse to accept the parties' stipulation even when the defendant validly waived the right. *Id*. If the court refuses to accept the parties' stipulation to a jury of less than 12 members, it must state its reasons for doing so on the record. *Id*.

B. Identity of Jurors

The attorneys must be given a reasonable opportunity to examine the jurors' questionnaires before being called on to challenge for cause. MCR 2.510(C)(2).[8]

The press has a qualified right of postverdict access to juror names and addresses, subject to the court's consideration of jurors' concerns about safety and privacy. *In re Juror Names*, 233 Mich App 604, 630 (1999). Access can be denied if the court determines that the jurors' safety concerns are legitimate and reasonable. *In re Juror Names*, *supra* at 630 n 9.

5.4 Voir Dire

Voir dire is the process by which litigants may question prospective jurors so that challenges may be intelligently exercised. *People v Harrell*, 398 Mich 384, 388 (1976). The court has broad discretion to limit or preclude voir dire by the attorneys. *Harrell*, *supra* at 388. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer (Thomas)*, 215 Mich App 183, 186 (1996). MCR 6.412(C) states:

> "(1) *Scope and Purpose*. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.
>
> "(2) *Conduct of the Examination*. The court may conduct the examination of prospective jurors[9] or permit the lawyers to

[8] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

> do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors."

"When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror." MCR 2.511(C)[10]; see also MCL 600.1337.

A trial court's discretion over the voir dire process is not unlimited. For example, a trial court may not restrict the scope of voir dire to the degree that the parties are unable to develop a factual basis for the intelligent exercise of their peremptory challenges. *People v Tyburski (Leonard)*, 196 Mich App 576, 581 (1992), aff'd 445 Mich 606 (1994). In *Tyburski (Leonard)*, *supra* at 609, the defendant was denied a fair trial because the trial court "fail[ed] to conduct a sufficiently probing voir dire in order to uncover potential juror bias."

A trial court may refuse to ask prospective jurors specific questions submitted by counsel as long as the voir dire conducted by the court is sufficient to seat an impartial jury. *Sawyer (Thomas)*, *supra* at 191.

MCR 2.511(F) prohibits discrimination in the jury selection process:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> "(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn and the juror is allowed to remain on the jury, the defendant *may be* entitled to relief on appeal if the defendant can establish that the juror's presence on the jury resulted in actual prejudice. *People v Miller (Michael)*, 482 Mich 540, 561 (2008); *People*

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[9] A checklist of questions the court may wish to ask prospective jurors is included in the Appendix.

[10] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

v Daoust, 228 Mich App 1, 9 (1998). "[T]he proper inquiry is whether the defendant was denied his [or her] right to an impartial jury. If he [or she] was not, there is no need for a new trial." *Miller (Michael)*, *supra* at 561. ("To the extent that in *Daoust* the Court of Appeals broadly state[d] in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and is overruled." *Id*.)

In *Miller (Michael)*, 482 Mich at 561, the Michigan Supreme Court held that "[t]he trial court did not clearly err in finding that [the] defendant failed to establish that he was actually prejudiced by the presence of a convicted felon on his jury, and, thus, the trial court did not abuse its discretion when it denied [the] defendant's motion for a new trial." See MCL 600.1354(1) ("[f]ailure to comply with the provisions of [the Revised Judicature Act] shall not . . . affect the validity of a jury verdict unless the party . . . demonstrates actual prejudice . . . "). The *Miller (Michael)* Court emphasized that although a defendant has a constitutional right to an impartial jury, he or she does not have a constitutional right to a jury free of convicted felons. *Miller (Michael)*, *supra* at 547. The right to a jury free of convicted felons is a statutory right granted by MCL 600.1307a(1)(e). *Miller (Michael)*, *supra* at 544-545, 547-578. Violation of this statutory right requires a new trial only if the violation actually prejudiced the defendant's right to an impartial jury. *Id*. at 548.

Access to juror personal history questionnaires is governed by MCR 2.510(C)(2) and the court's local administrative order. Juror qualifications questionnaires are confidential. MCL 600.1315.

A. Challenges for Cause

Juror qualification is governed by both statute and court rule. MCL 600.1307a; MCR 2.511(D)(1).[11]

Jurors are presumed to be qualified, competent, and impartial. *People v Walker (Jefforey)*, 162 Mich App 60, 63 (1987). The burden of proving the existence of a disqualification is on the party alleging it. *People v Collins (Charles)*, 166 Mich 4, 9 (1911).

To qualify as a juror, an individual must "[n]ot have been convicted of a felony." MCL 600.1307a(1)(e).

A prospective juror is subject to challenge for cause on any ground set out in MCR 2.511(D), or for any other reason recognized by law. MCR 6.412(D).

[11] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

"It is grounds for a challenge for cause that the person: (1) is not qualified to be a juror; (2) is biased for or against a party or attorney; (3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be; (4) has opinions or conscientious scruples that would improperly influence the person's verdict; (5) has been subpoenaed as a witness in the action; (6) has already sat on a trial of the same issue; (7) has served as a grand or petit juror in a criminal case based on the same transaction; (8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys; (9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney; (10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution; (11) has a financial interest other than that of a taxpayer in the outcome of the action; (12) is interested in a question like the issue to be tried." MCR 2.511(D).

"If a party shows that a prospective juror comes within one of the categories enumerated in [MCR 2.511(D)], then the trial court is without discretion to retain that juror, who must be excused for cause." *Walker (Jefforey)*, 162 Mich App at 64. "Otherwise, the decision to excuse for cause is within the discretion of the trial court." *Walker (Jefforey)*, *supra* at 64.

A defendant is not entitled to relief where, even if the trial court erred in denying the defendant's challenge to a prospective juror for cause, the defendant failed to exhaust his or her peremptory challenges. *People v Legrone*, 205 Mich App 77, 81-82 (1994).

"A juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause." *People v Roupe*, 150 Mich App 469, 474 (1986); MCL 768.10. See also *People v Jendrzejewski*, 455 Mich 495, 515 (1997) (the defendant was not deprived of a fair trial where two jurors that were actually seated had formed an earlier opinion).

"A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *People v Lee*, 212 Mich App 228, 248-249 (1995).

B. Peremptory Challenges

A juror who is peremptorily challenged is excused without cause. MCR 2.511(E)(1).[12] In a criminal case where the offense is not punishable by life imprisonment, a defendant tried alone is entitled to five peremptory challenges. MCR 6.412(E)(1); MCL 768.12(1). Similarly, if two or more defendants are being jointly tried for an offense not punishable by life imprisonment, each defendant is entitled to five peremptory challenges. MCR 6.412(E)(1). The prosecutor is entitled to five peremptory challenges when a defendant is tried alone, and when two or more defendants are tried together, the prosecutor is entitled to the total number of challenges to which all the defendants are entitled. MCR 6.412(E)(1); MCL 768.12(1). On motion and a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges; it is unnecessary for the additional challenges granted by the court to be equal for each party. MCR 6.412(E)(2); MCL 768.12(2).

If the offense charged is punishable by life imprisonment, a defendant being tried alone is entitled to 12 peremptory challenges. MCR 6.412(E)(1); MCL 768.13(1). In cases where two or more defendants are being tried jointly for offenses punishable by life imprisonment, the number of peremptory challenges varies with the number of defendants being tried. See MCR 6.412(E)(1) and MCL 768.13(1)(a)—MCL 768.13(1)(d). A defendant may be granted an increased number of peremptory challenges for good cause, and where more than one defendant is being tried, the number of additional challenges granted by the court may result in an unequal number of challenges allowed each defendant. MCR 6.412(E)(2); MCL 768.13(3). The prosecutor is permitted 12 peremptory challenges in cases involving a single defendant and an offense punishable by life imprisonment. If multiple defendants are being tried jointly for an offense punishable by life imprisonment, the prosecutor is entitled to the total number of challenges allowed all defendants being tried. MCR 6.412(E)(1); MCL 768.13(2).

Peremptory challenges must be exercised as follows:

> "(a) First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete.

[12] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

> "(b) A 'pass' is not counted as a challenge but is a waiver of further challenge to the panel as constituted at that time.
>
> "(c) If a party has exhausted all peremptory challenges and another party has remaining challenges, that party may continue to exercise their remaining peremptory challenges until such challenges are exhausted." MCR 2.511(E)(3).

There is no constitutional right to exercise peremptory challenges. *Daoust*, 228 Mich App at 7. "The right to exercise peremptory challenges in state court is determined by state law[,]" and "the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." *Rivera v Illinois*, 556 US 148, 152, 158 (2009) (Illinois state court's erroneous denial of the defendant's peremptory challenge did not require automatic reversal of the defendant's first-degree murder conviction where all of the ultimately seated jurors were qualified and unbiased). The Court further stated, "[i]f a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Rivera*, *supra* at 157. A defendant is not denied an impartial jury simply because he or she cannot make the most effective use of his or her peremptory challenges (e.g., where a defendant uses up his or her peremptory challenges to excuse particular jurors to the exclusion of dismissing other potentially prejudiced jurors). *Daoust*, *supra* at 7.

A party may exercise a peremptory challenge, even of a juror that was previously "passed," at any time until the jury is sworn in. *People v Goode*, 78 Mich App 781, 785-786 (1977).

C. Discrimination During Voir Dire

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination during voir dire. *Batson v Kentucky*, 476 US 79 (1986). The Sixth Amendment also requires that a jury venire be drawn from a fair cross-section of the community. *Berghuis v Smith (Diapolis)*, 559 US ___, ___ (2010). MCR 2.511(F)(1)[13] states that no person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex. MCR 2.511(F)(2) states that discrimination during voir dire on the basis of those factors for the purpose of achieving what the court believes to be a

[13] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

balanced, proportionate, or representative jury in terms of those characteristics is not an excuse or justification for a violation of the rule.

In *Batson*, 476 US at 96-98, the United States Supreme Court set out a three-step process for determining the constitutional propriety of a peremptory challenge. The Michigan Supreme Court explained the process in *People v Knight*, 473 Mich 324, 336 (2005), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011)[14]:

> "First, the opponent of the peremptory challenge must make a prima facie showing of discrimination.[15] To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he [or she] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant considerations raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *Knight*, 473 Mich at 336 (internal citations omitted).
>
> "Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike.[16] *Batson's* second step does not demand an explanation that is persuasive, or even plausible. Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the

[14] In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson,* 476 US 79, was not violated in the jury selection at the joint trial of the two defendants, Jerome Knight and Gregory Rice. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight*, *supra* at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, *supra*, and they remain good law. See *Rice*, *supra* at 253-254 (reiterating the *Batson* process detailed in *Knight*, *supra* at 335-338).

[15] In the first *Batson* step, the opponent of the challenge is not required to actually prove discrimination. *Knight*, 473 Mich at 336. As long as the sum of the proffered facts gives rise to an inference of discriminatory purpose, the first *Batson* step is satisfied. *Knight*, *supra* at 336-337.

[16] The state must "demonstrate that 'a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.'" *Smith (D) v Berghuis*, 543 F3d 326, 344 (CA 6, 2008), quoting *Duren v Missouri*, 439 US 357, 367-368 (1979).

> reason offered will be deemed race neutral." *Knight*, 473 Mich at 337 (internal citations and quotations omitted).
>
> "Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext[17] and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." *Knight*, 473 Mich at 337-338 (internal citations omitted).

Under *Batson's* third prong, the prosecution's pretextual explanation gives rise to an inference of discriminatory intent. *Snyder v Louisiana*, 552 US 472, 484-485 (2008). At that stage, the trial court plays a pivotal role in evaluating the prosecutor's credibility; it must consider "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder*, *supra* at 477. A *Batson* claim will survive if a peremptory strike that was substantially motivated by discriminatory intent could not be sustained based on the prosecution showing anything less than that the motivating factor was not determinative. *Snyder*, *supra* at 485.

In *Snyder*, the trial court allowed the prosecutor to strike a black juror for the race-neutral reasons that the juror looked nervous, and that, because of a student-teaching obligation, the juror might return a lesser guilty verdict (which would obviate the need for a penalty phase) in order to fulfill his jury duty more quickly. *Snyder*, 552 US at 478. The United States Supreme Court held that the trial court clearly erred in overruling the defendant's *Batson* objection to the prosecutor's strike of that juror, specifically noting that "in light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that [the juror] was nervous, the prosecution's description of both of its proffered explanations as 'main concern[s],' and the adverse inference noted above [that the prosecutor declined to use a peremptory strike on a white juror with more pressing work and family obligations]—the record does not show that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone." *Snyder*, *supra* at 485.

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[17] "Pretext" is defined as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." *Webster's Ninth New Collegiate Dictionary* (1988).

"[A] judge, in ruling on an objection to a peremptory challenge under *Batson v Kentucky*, 476 US 79 (1986), [is not required to] reject a demeanor-based explanation for the challenge [even if] the judge [did not] personally observe[] and [does not] recall[] the aspect of the prospective juror's demeanor on which the explanation is based." *Thaler v Haynes*, 559 US ___, ___ (2010). In *Thaler*, *supra* at ___, two different judges presided over different stages of the jury selection process—when the attorneys individually questioned prospective jurors, and when the attorneys exercised peremptory challenges. When the prosecutor struck an African-American juror, the defendant's attorney raised a *Batson* objection. *Id*. at ___. "[The judge presiding over peremptory challenges] determined that [the defendant] made out a prima facie case under *Batson*, and the prosecutor then offered a race-neutral explanation that was based on [the juror's] demeanor during individual questioning [which the judge did not observe]." *Thaler*, *supra* at ___. "After considering the prosecutor's explanation and the arguments of defense counsel, [the judge presiding over peremptory challenges] stated that the prosecutor's reason for the strike was 'race-neutral' and denied the *Batson* objection without further explanation." *Thaler*, *supra* at ___. The United States Court of Appeals for the Fifth Circuit relied on *Batson* and *Snyder v Louisiana*, 552 US 472 (2008), to support its conclusion that the defendant was entitled to a new trial, reasoning that "a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor." *Thaler*, *supra* at ___. The United States Supreme Court disagreed, noting that even absent a judge's personal recollection of a juror's demeanor, he or she may accept a prosecutor's demeanor-based explanation in the face of a *Batson* challenge. *Thaler*, *supra* at ___.

"[T]rial courts must meticulously follow *Batson's* three-step test," and the Michigan Supreme Court "strongly urge[s] [trial] courts to clearly articulate their findings and conclusions on the record." *Knight*, 473 Mich at 339. The best practice is to excuse the jury to conduct the *Batson* hearing. Also, in order to preserve the option of reseating a juror who was improperly struck, a court should not release the challenged juror until the challenge is addressed. *Knight*, *supra* at 347.

For the first *Batson* step, "[t]he trial court must first find the facts and then decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." *Knight*, 473 Mich at 342. "The first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review" on appeal. *Knight*, *supra* at 342.

For the second *Batson* step, the trial court must only be "concerned with whether the proffered reason violates the Equal Protection Clause as a matter of law." *Knight*, 473 Mich at 344. On appeal, the second *Batson* step is subject to de novo review. *Knight*, *supra* at 343-344.

For the third *Batson* step, the trial court must determine whether the opponent of the peremptory challenge satisfied the ultimate burden of proving purposeful discrimination. *Knight*, 473 Mich at 344-345. On appeal, the third *Batson* step is subject to review for clear error. *Knight*, *supra* at 344-345.

In order to ensure the equal protection rights of individual jurors, a trial court may sua sponte raise a *Batson* issue after observing a prima facie case of purposeful discrimination[18] through the use of peremptory challenges. *People v Bell (Marlon)*, 473 Mich 275, 285-287 (2005).

It is important to note the distinction between a *Batson* error and a denial of a peremptory challenge: a *Batson* error occurs when a juror is actually dismissed on the basis of race or gender, whereas a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. *Bell (Marlon)*, 473 Mich at 293. A *Batson* error is of constitutional dimension, and is subject to automatic reversal, whereas an improper denial of a peremptory challenge is not of constitutional dimension, and is reviewed for a miscarriage of justice if it is preserved, or for plain error affecting substantial rights if it is unpreserved. *Bell (Marlon)*, *supra* at 293-295. *People v Miller (Dwjuan)*, 411 Mich 321 (1981), and *People v Schmitz*, 231 Mich App 521 (1998), are no longer binding to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal. *Bell (Marlon)*, *supra* at 293.

D. Alternate Jurors and Removal or Substitution of a Juror at Trial

The court may direct that more than 12, but not more than 14, jurors be impaneled. MCR 6.411. If more jurors than needed to decide the case remain on the panel when deliberations are set to begin, the names of all the jurors must be placed in a container and names drawn to reduce the number of jurors to the number required to decide the case. MCL 768.18; MCR 6.411.

[18] For example, a prima facie case of discrimination based on race is established where "(1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race." *People v Bell (Marlon)*, 473 Mich 275, 282-283 (2005).

Alternate jurors may be retained during the jury panel's deliberations. If the court decides to retain the alternate jurors, it must advise the alternate jurors not to discuss the case with any person until the jury completes its deliberations and is discharged. MCR 6.411.

The court has the discretion to remove a juror during trial for possible bias. *People v Mason*, 96 Mich App 47, 49-50 (1980).

A trial court has discretion to replace a deliberating juror with an alternate juror. *People v Mahone*, 294 Mich App 208, 215-218 (2011) (trial court did not abuse its discretion in removing a juror during deliberations, and the defendant was not denied a fair trial by the juror's replacement with an alternate juror rather than the granting of a mistrial; the record showed that the removed juror was unable to continue deliberations due to physical and emotional stress, that the alternate juror complied with instructions not to discuss the case or review any media about the case, and that the jury was properly instructed to begin deliberations anew as required by MCR 6.411); *People v Tate*, 244 Mich App 553, 559-560 (2001) (trial court excused a juror who developed a medical condition after deliberations had begun and replaced that juror with a dismissed alternate juror who had not acquired any extraneous information about the case). See also MCL 768.18 ("[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12"). "[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, *supra* at 562. Accordingly, "[r]emoval of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Id*. Once a juror is replaced, the judge must instruct the reconstituted jury to begin deliberations anew. *Id*. at 567; MCR 6.411.

E. Substitution of Judges

"It is far preferable that a single judge preside over all aspects of a trial." *People v McCline*, 442 Mich 127, 134 (1993). However, if a judge is substituted after voir dire, but before opening statements and the introduction of proofs, automatic reversal is not required; rather, prejudice must be shown to justify reversal. *McCline*, *supra* at 134.

F. Sequestration of Jury

Sequestration of a jury is within the trial court's discretion. *People v Williams (Louis)*, 78 Mich App 737, 740 (1977); MCL 768.16; CJI2d 2.15.

Where "[d]uring voir dire, each juror told the trial court that he or she would avoid being exposed to media coverage if selected as a juror," and "[d]uring [the 22 day] trial, the trial court instructed the jury not to talk about, read or listen to the media coverage regarding the crime or the trial," and "[t]he jurors were also instructed not to speak with anyone about the case while it was pending," the trial court did not abuse its discretion in not sequestering the jury. *People v Haggart*, 142 Mich App 330, 336-337 (1985).

G. Anonymous Jury

It is permissible to use juror numbers instead of names at trial. *People v Williams (John)*, 241 Mich App 519, 525 (2000). However, trial courts are strongly urged "to advise the jury venire that any use of numbers in lieu of jurors' names is simply for logistical purposes and they should not in any way consider it a negative toward the defendant." *People v Hanks*, 276 Mich App 91, 94 (2007). This is because the use of anonymous juries is potentially prejudicial, and should only be employed when jurors' safety or freedom from undue harassment is an issue. *Williams (John)*, *supra* at 525. "The anonymity of the jury should be preserved in cases: (1) with very dangerous persons who were participants in large scale organized crime, and who participated in mob-style killings and had previously attempted to interfere with the judicial process; (2) where defendants have had a history of attempted jury tampering and serious criminal records; or (3) where there have been allegations of dangerous and unscrupulous conduct by the defendant, coupled with extensive pretrial publicity." *United States v Talley,* 164 F3d 989, 1001 (CA 6, 1999).

In the case of an anonymous jury, appropriate safeguards should be followed to ensure a fair trial. *Williams (John)*, 241 Mich App at 525. "In deciding to empanel an anonymous jury, the court must ensure that the defendant retains his or her right to an unbiased jury by conducting 'a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself,' and by providing the jury a neutral and non-prejudicial reason for requiring that it be anonymous, so that jurors will refrain from inferring that anonymity was necessary due to the character of the defendant." *Talley,* 164 F3d at 1001-1002, quoting *United States v Paccione*, 949 F2d 1183, 1192 (CA 2, 1991).

To successfully challenge an anonymous jury, the record must reflect that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised. *Williams (John)*, 241 Mich App at 523. For example, in *Hanks*, 276 Mich App at 94, the trial court's use of numbers rather than names when referring to jurors did not prevent the defendant from a meaningful examination of the jury and did not affect the defendant's presumption of innocence. Although the jurors' names were withheld, the jurors were anonymous only in the literal sense because "the juror questionnaires containing biographical information were provided to the parties, and . . . both parties conducted extensive voir dire." *Hanks*, *supra* at 94.

H. Standard of Review

Alleged violations of the proper jury selection process are reviewed de novo. *People v Fletcher*, 260 Mich App 531, 554 (2004).

Whether minorities have been systematically excluded from a jury venire and other alleged violations of the jury selection process are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472 (1996). In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *Knight*, 473 Mich at 345, habeas corpus gtd *Rice*, 660 F3d at 257-260,[19] the Michigan Supreme Court clarified the standards of review for each stage as follows:

> "If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson's* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether

[19] In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson,* 476 US 79, was not violated in the jury selection at the joint trial of the two defendants, Jerome Knight and Gregory Rice. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight*, *supra* at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, *supra*, and they remain good law. See *Rice*, *supra* at 253-254 (reiterating the *Batson* process detailed in *Knight*, *supra* at 335-338).

> the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error."

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *People v Washington (Allan)*, 468 Mich 667, 674 (2003).

A judge's decision on whether to conduct a midtrial voir dire is reviewed for an abuse of discretion. *People v Adams (McConnell)*, 245 Mich App 226, 240 (2001).

A trial court's ruling on a challenge for cause based on bias is reviewed for an abuse of discretion. *People v Williams (John)*, 241 Mich App 519, 521 (2000).

Comments of potential jurors during voir dire may warrant a new trial where they are "'such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment.'" *People v Sowders*, 164 Mich App 36, 47 (1987), quoting *People v Nick*, 360 Mich 219, 230 (1960). A new trial was not warranted in *Sowders*, *supra* at 47-48, where a prospective juror commented during voir dire that she knew a local police officer who was to be a witness in the case, but that, even though the officer had arrested her brother, she did not harbor any bad feelings toward the officer, and generally had positive feelings about the police department.

A trial court's decision to grant an anonymous jury is reviewed for an abuse of discretion. *Talley*, 164 F3d at 1001.

A trial court's decision whether to remove a juror is reviewed for an abuse of discretion. *Tate*, 244 Mich App at 559.

5.5 Oaths or Affirmations

A. Juror Oath Before Voir Dire

CJI2d 1.4 provides:

> "(1) I will now ask you to stand and swear to answer truthfully, fully, and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer all the questions truthfully, fully, and honestly.
>
> "(2) Here is your oath: 'Do you solemnly swear (or affirm) that you will truthfully and completely answer

> all questions about your qualifications to serve as jurors in this case?'"

B. Juror Oath Following Selection

"The following oath shall be administered to the jurors for the trial of all criminal cases: 'You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God.'" MCL 768.14.

"Any juror shall be allowed to make affirmation, substituting the words 'This you do under the pains and penalties of perjury' instead of the words 'so help you God.'" MCL 768.15.

"The word 'oath' shall be construed to include the word 'affirmation' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" MCL 8.3k.

MCR 2.511(H) states:

> "The jury must be sworn by the clerk substantially as follows:
>
> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

CJI2d 2.1 states:

> "(1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.
>
> "(2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.
>
> "(3) Here is your oath: 'Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further

> deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.'"

The jury oath is not a mere formality required only by tradition. *People v Clemons (Keith)*, 177 Mich App 523, 528 (1989). "The required oath is necessary to protect the defendant's fundamental right of a trial by an impartial jury." *Clemons (Keith)*, *supra* at 529-530. "[J]eopardy attaches when the jury is impaneled and sworn." *People v Pribble*, 72 Mich App 219, 223 (1976).

C. Oath for Bailiff Before Deliberation

"You do solemnly swear [or affirm] that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God." MCL 768.16.

D. Oath for Witness

"Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." MRE 603.

MCL 600.1432 governs the mode of administering oaths and makes reference to "[t]he usual mode of administering oaths . . . by the person who swears holding up the right hand . . . ." If a witness is opposed to swearing under oath, MCL 600.1434 permits an affirmation of truthful testimony. *Donkers v Kovach*, 277 Mich App 366, 374 (2007). However, neither MCL 600.1434 nor MRE 603 *requires* a witness to raise his or her right hand when swearing or affirming to testify truthfully. *Donkers*, *supra* at 373-374.

E. Oath for Interpreter

An interpreter must be administered an oath or affirmation "to make a true translation." MRE 604. MCL 393.506(1) requires a qualified interpreter for a deaf or deaf-blind person to make an oath or affirmation to make a true interpretation in an understandable manner in the English language to the best of the interpreter's

ability. The following may be used for both foreign language and sign language interpreters:

> "Do you solemnly swear or affirm that you will make a true and understandable interpretation of the witness and that you will accurately interpret the statements made by the witness to the best of your ability?"

"As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said . . . . The interpreter should not aid or prompt the primary witness in any way, or render a summary of what the witness stated." *People v Cunningham*, 215 Mich App 652, 654-655 (1996) (citations omitted).

F. Child Witness

MRE 601 provides that "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." In the case of a child witness, a court may simply ask the child if he or she will promise to tell the truth.

G. Suggested Caution to Witness

The following instruction should be given when witnesses have been excluded under MRE 615:

> "I instruct you not to discuss this case or your possible testimony with any other witness until you learn the case has been concluded."

5.6 Subpoenas

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses, and MCR 2.506 regulates that process. There are a number of specialized statutes providing for subpoenas in particular situations. See, e.g., *Ewin v Burnham*, 272 Mich App 253, 256 (2006) (MCL 600.1852(2), in part, authorizes Michigan courts to order a person residing or who is found in Michigan "to give his testimony or statement or to produce

documents or other things for use in a proceeding in a tribunal outside this state"). In addition to requiring the attendance of a party or witness, the court is authorized to subpoena a representative of an insurance carrier for a party, "with information and authority adequate for responsible and effective participation in settlement discussions," to be present or immediately available at trial. MCR 2.506(A)(4). Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).[20]

One of the rights of an accused in a criminal prosecution is "to have compulsory process for obtaining witnesses in his or her favor." Const 1963, art 1, § 20. See also MCL 767.32 and MCL 775.15. The right to offer testimony of witnesses and compel their attendance is the right to present a defense. *Washington (Jackie) v Texas*, 388 US 14, 19 (1967). A criminal defendant's right to compulsory process, though fundamental, is not absolute. *People v McFall*, 224 Mich App 403, 408 (1997). It requires a showing that the witness's testimony would be both material and favorable to the defense. *McFall*, *supra* at 408. Matters of compulsory process, as well as trial continuances to obtain a witness, are decided at the discretion of the trial court. *Id*. at 411; *In re Jackson (Rebecca)*, 199 Mich App 22, 28 (1993).

B. Subpoena Duces Tecum (Subpoena for Production of Evidence)

A party or witness may be required to bring specified notes, records, documents, photographs, or other portable tangible things. MCR 2.506(A)(1). Subpoenas issued pursuant to MCR 2.506(A)(1) "have no relation to subpoenas issued in conjunction with discovery proceedings. The end of the discovery period does not preclude the issuance of trial subpoenas, including subpoenas duces tecum, even if the records to be produced were not the subject of discovery." *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316 (1991).

A subpoena for hospital medical records is controlled by MCR 2.506(I).

C. Motion to Quash Subpoena

MCR 2.506(H) states that a person served with a subpoena may appear and challenge the subpoena. For good cause, the witness may be excused, with or without a hearing. MCR 2.506(H)(3).

[20] See the Michigan Judicial Institute's *Contempt of Court Benchbook,* Chapter 5, for more information.

Otherwise, the person must appear unless excused by the court or the party who had the subpoena issued. MCR 2.506(H)(4).

5.7 Conducting the Trial

"The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 2.513(B).[21]

A. Stipulations

The prosecution retains the burden of proving beyond a reasonable doubt each element of the crime charged, even if the defendant offers to stipulate to any elements of the crime charged. *People v Mills*, 450 Mich 61, 69 (1995). Evidence may be properly admitted on an undisputed point—one to which the defendant has stipulated—if the evidence is necessary to "illustrate[] the nature and extent of the [victim's] injuries." *Mills*, *supra* at 70-71. For example, in *Mills*, *supra* at 66, 70 n 5, 79-80, even though the defendants offered to stipulate to the contents of photographs depicting the severity of the burns inflicted on the victim, the trial court properly admitted the photographs because they were necessary to show the defendants' intent to kill and to corroborate the testimony of the prosecution's expert witness and the victim. But see *People v Crawford (Douglas)*, 458 Mich 376, 381 n 3, 395-400 (1998), where the trial court committed error requiring reversal in declining the defendant's offer to stipulate to his prior convictions, where admission of the convictions constituted improper use of MRE 404(b) evidence.

B. Opening Statement

Opening statements serve to introduce the case to the jury.[22] "Unless the parties and the court agree otherwise, the . . . prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the . . . prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements." MCR 2.513(C) (applicable only to jury trials). See also MCR

[21] See Section 5.9 for information on jury matters during trial. See the Michigan Judicial Institute's *Evidence Benchbook,* Chapter 1, for discussion of limitations on evidence.

[22] "Opening statements are commonly waived in bench trials." *People v McNally,* unpublished opinion per curiam of the Court of Appeals, February 10, 2005 (Docket No. 252849). (An unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).)

2.507(A), which is applicable to both jury and nonjury trials (unless waived with the consent of the court and opposing counsel, a party introducing evidence "must make a full and fair statement of that party's case and the facts the party intends to prove"); *People v Stimage*, 202 Mich App 28, 31 (1993). The court may impose reasonable time limits on opening statements and closing arguments. MCR 2.507(F); MCR 2.513(C). "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32 (1976). An opening statement is the appropriate time to state the facts to be proven at trial. *People v Nard*, 78 Mich App 365, 374-375 (1977).

In the absence of bad faith, it is not error when the prosecutor fails to prove the assertions made during opening statements. *People v Wolverton*, 227 Mich App 72, 75 (1997). Counsel may argue their theories of the law during opening statement. *People v Myers*, 30 Mich App 409, 429 (1971). "While this court has always conceded to a trial court a liberal discretion in the control and direction of statements and arguments of counsel to the jury, it has as strongly upheld the right of counsel to state their theory of the law as applicable to the facts which they expect to prove." *People v Lum Lee*, 258 Mich 618, 621 (1932).

1. Prejudicial or Inflammatory Remarks

It is improper for a prosecutor to appeal to a jury's sympathy during opening statement. *People v Watson*, 245 Mich App 572, 591 (2001). However, reversal is not required where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *Watson*, *supra* at 591. The ultimate determination of whether the prosecutor engaged in improper conduct depends on whether the prosecutor's conduct, taken in context, deprived the defendant of a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645 (2003).

2. Dismissal or Mistrial

A trial court may dismiss the action against a defendant after the prosecutor's opening statement where it finds that even if the prosecution proved all the facts intended, there would be no basis to convict. *People v Recorder's Ct Judge*, 78 Mich App 576, 578-579 (1977). However, this practice is discouraged and should only be used after careful judicial consideration. *Recorder's Court Judge*, *supra* at 579.

Where the prosecutor makes comments—in good faith or bad faith—during opening statement which are not substantiated

at trial by the evidence, reversal is not required unless the defendant was unfairly prejudiced. *Wolverton*, 227 Mich App at 76-78. In *Wolverton*, *supra* at 78, the trial court erred in denying the defendant's motion for a mistrial where the prosecutor in good faith disclosed the results of the defendant's blood alcohol test during opening statement, and that evidence was ultimately not admitted at trial due to lack of a proper foundation.

C. Interim Commentary

"Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial." MCR 2.513(D) (applicable only in jury trials).

D. Witness Examination

1. Direct Examination

Unless otherwise ordered by the court, the prosecution must introduce its testimony first. MCR 2.507(B). As long as the prosecutor acts in good faith, he or she should be allowed wide latitude in presenting the case, so that the jurors can grasp the theory and the defendant's connection with the alleged offense. *People v Dye*, 356 Mich 271, 277 (1959). In *Dye*, *supra* at 277, the trial court did not abuse its discretion in "allowing the prosecutor by direct and cross-examination to bring out and refer to certain allegedly irrelevant and collateral matters pertaining to the defendant's varied marital life, his ownership of property, his professional experience and training, and numerous other things[,]" when "in so doing the prosecutor was in good faith attempting to show a motive for the crime and to attack the credibility and show the possible bias of the defendant and certain of his witnesses."

Leading questions are only permissible on direct examination as necessary to develop a witness's testimony. MRE 611(c)(1). See, e.g., *Watson*, 245 Mich App at 587, where reversal was not required where the prosecutor asked leading questions of the thirteen-year-old victim only to the extent necessary to develop her testimony.

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

The trial court has broad discretion to examine witnesses. *People v Gendron*, 144 Mich App 509, 517 (1985). For example, in *Gendron*, *supra* at 517-518, no abuse of discretion occurred

where the trial court extensively questioned two alibi witnesses to clarify relevant testimony because those witnesses had difficulty understanding the prosecutor's questions and communicating their answers.

2. Cross-Examination

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. MRE 611(b). However, the trial court may limit cross-examination regarding matters not testified to on direct examination. *Id*. Stated another way, "[t]his evidentiary rule plainly confers on the trial judge the discretion to limit the scope of cross-examination to matters testified to on direct examination." *People v Kimber,* unpublished opinion per curiam of the Court of Appeals, issued May 2, 2000 (Docket No. 206358), slip op p 3.[23]

The trial court has broad discretion in controlling cross-examination, but due regard must be given to the defendant's constitutional rights. *People v Holliday*, 144 Mich App 560, 566 (1985).

Leading questions are permissible during cross-examination. MRE 611(c)(2).

"[H]ostile cross-examination of a defendant in a criminal prosecution is a function of the prosecuting attorney and [] a judge before whom a jury case is being tried should avoid any invasion of the prosecutor's role." *People v Cole*, 349 Mich 175, 196 (1957).

3. Redirect Examination

On redirect examination, a witness may explain answers he or she made on cross-examination. *People v Harris (Benson)*, 127 Mich App 538, 545 (1983).

4. Recross-Examination

On recross-examination, the prosecution may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard (Kenneth)*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).

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[23] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

E. Closing Argument

"After the close of all the evidence, the parties may make closing arguments. The . . . prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the . . . prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments." MCR 2.513(L) (applicable only to jury trials). See also MCR 2.507(F) (applicable to jury and nonjury trials).

Committee Tip:

Many courts give jury instructions before closing argument, because it assists the jury in better understanding the closing arguments of the parties. See MCR 2.513(N)(1) (the trial court, in its discretion and on notice to the parties, may instruct the jury before closing arguments).

In a case where the defendant asserted the affirmative defense of insanity, the trial court's decision to deny the defendant's request to make a surrebuttal argument did not constitute an abuse of discretion because former MCR 6.414(G)[24] "references only the prosecution's ability to make a rebuttal argument[,]" and "the prosecution's burden to prove the elements of the crime beyond a reasonable doubt was still greater than [the] defendant's burden to prove insanity by a preponderance of the evidence." *People v Lacalamita*, 286 Mich App 467, 473 (2009).

1. Permissible Content of Closing Argument

During closing argument, a prosecutor may argue the evidence admitted at trial and reasonable inferences arising from that evidence. *People v Kelly (Albert)*, 231 Mich App 627, 641 (1998). The prosecutor may not submit issues which are beyond the scope of guilt or innocence, or make predictions on the consequences of the jury's verdict. *People v Biondo*, 76 Mich App 155, 158-160 (1977) (it was error requiring reversal for the prosecutor to argue that the jurors had an opportunity to

[24] Effective September 1, 2011, ADM 2005-19 deleted MCR 6.414 and added MCR 2.513(L), which contains language similar to former MCR 6.414(G).

impact the local drug problem by convicting the defendant). The prosecutor can evaluate the personality, truthfulness, and integrity of witnesses. *People v Couch*, 49 Mich App 69, 72-73 (1973). The prosecutor may not appeal to the sympathy of the jurors, to their sense of civic duty, *People v Abraham (Nathaniel)*, 256 Mich App 265, 273 (2003), or to their religious beliefs. *People v Mischley*, 164 Mich App 478, 483 (1987). A "prosecutor may not question defense counsel's veracity." *People v Wise*, 134 Mich App 82, 101-102 (1984).

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment. A prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *People v Fyda*, 288 Mich App 446, 463-464 (2010).

The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, because that type of argument effectively states that defense counsel does not believe his or her own client, which undermines the defendant's presumption of innocence. *People v Unger*, 278 Mich App 210, 236 (2008). In its initial closing argument, not in response to defense counsel comments, "[t]he prosecution . . . clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to 'confuse the issue[s]' and 'fool the jury' by way of 'tortured questioning,' 'deliberately loaded questions,' and 'a deliberate attempt to mislead,' (2) that defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors,' and (3) that defense counsel had attempted 'to deter [the jury] from seeing what the real issues are in this case.'" *Unger*, *supra* at 238. Because the trial court instructed the jury that the attorneys' arguments were not evidence, and "because a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had, [there was] no error requiring reversal." *Id*.

"If the defendant makes an argument, the . . . prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument." MCR 2.513(L); see also MCR 2.507(E).

2. Remarks Involving Witness Testimony

The prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard (Connell)*, 226 Mich App 528, 548 (1997). The prosecutor is free to argue the evidence and all reasonable inferences from it as it relates to the prosecutor's theory of the case. *People v Schumacher*, 276 Mich App 165, 178-179 (2007). However, "[a] prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness[.]" *People v McGhee (Larry A)*, 268 Mich App 600, 630 (2005). "Improper vouching occurs when a prosecutor either (1) bluntly states a personal belief in a witness's credibility, 'thereby placing the prestige of the [prosecutor's office] behind that witness,' or (2) 'implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury.'" *United States v Henry (Roderick)*, 545 F3d 367, 378-379 (CA 6, 2008), quoting *United States v Francis*, 170 F3d 546, 550-551 (CA 6, 1999). As long as a prosecutor's comments about a defendant's testimony are supported by reasonable inferences from the record evidence and are not wholly based on the prosecutor's personal opinion, a prosecutor may properly attack a defendant's credibility just as the prosecutor would any other witness's credibility. *Henry (Roderick)*, *supra* at 382.

Where the prosecutor's argument "was based on evidence in the record, and was not framed in such a way that would suggest the prosecutor knew of any outside evidence[,]" the prosecutor's repeated references to defense witnesses as "liars" was not constitutionally improper. *Cristini v McKee*, 526 F3d 888, 902 (CA 6, 2008).

Where the complaining witness testified, without prompting, that she was a religious person, and the prosecutor then couched his closing argument in terms of a credibility contest between a person with a "deep rooted belief in God" and a person who was a "liar," the defendant's conviction required reversal. *People v Leshaj*, 249 Mich App 417, 422 (2002).

A prosecutor may "argue from the evidence presented that an expert witness had a financial motive to testify at trial." *Unger*, 278 Mich App at 236, 239 (prosecutor was free to argue that defense counsel "bought" a defense expert's testimony by paying the expert a substantial sum of money). But where a case turns primarily on conflicting expert testimony, a prosecutor should take special steps to avoid misconduct designed to impugn the integrity of defense expert witnesses. *Unger*, *supra* at 240. In *Unger*, *supra* at 240, the Court found that

the prosecutor unnecessarily and impermissibly impugned the integrity of a defense expert witness by arguing that the expert was hired "'to come in with [his] credentials and fool this jury,'" that the expert was hired to provide "'[r]easonable doubt at reasonable prices,'" and that the expert "'did what he was paid to do.'"

3. Remarks Involving Defendant's Failure to Testify

It is impermissible for the prosecutor to comment on a defendant's failure to take the stand. *Griffin (Eddie) v California*, 380 US 609, 615 (1965). The prosecutor also may not direct questions to the defendant during closing arguments which would require a defendant who did not testify to explain the evidence against him or her. *People v Green (Louis)*, 131 Mich App 232, 234-239 (1983). Such a practice would shift the burden of proof to the defendant and violate the Fifth Amendment protection against self-incrimination. *Green (Louis)*, *supra* at 236-237. However, when a defendant takes the stand, the prosecutor may comment on the validity of the argument without shifting the burden of proof to the defendant. *People v Fields (Carl)*, 450 Mich 94, 109-113, 116 (1995). Questioning a defendant about his or her failure to confront his accomplice does not violate the defendant's right to silence. *People v Hackett (William)*, 460 Mich 202, 204-205 (1999).

A prosecutor may point out that specific inculpatory evidence is undisputed without violating the prohibition against commenting on a defendant's failure to testify—especially when a person other than the defendant could have provided testimony to dispute the evidence. *People v Perry (Michael)*, 218 Mich App 520, 538 (1996).

4. Remarks Involving Failure to Produce Corroborating Witnesses

"[C]ourts [] permit[] the prosecutor to offer a rhetorical argument regarding a defendant's failure to produce witnesses which could corroborate his story. The underlying rationale is that the constitutional protection against defendant's failure to take the stand does not apply to witnesses. For this reason, the prosecutor has been permitted to comment upon (1) defendant's failure to call an accomplice or indicted co-defendant and (2) the failure of such witnesses to testify. This rule is subject to an exception . . . that the prosecutor may not comment on such witnesses' failure to testify when they are called by the defendant and invoke their constitutional right to

remain silent." *People v Gant (Percy)*, 48 Mich App 5, 8-9 (1973) (internal citations omitted).

In *Gant (Percy)*, 48 Mich App at 9, the defendant "disavowed any involvement in the charged crime and offered an explanation which, if true, could be easily verified by the [defendant's] two unidentified companions." The Court of Appeals held that "[t]he prosecutor's comment upon defendant's failure to produce these witnesses constituted a permissible attempt to challenge the quality of the proffered defense consistent with the cited authorities," and that "[e]ven if the missing witnesses are considered accomplices or the actual perpetrators of the crime, defendant's failure to seek their testimony to the point where such is denied by their invocation of the Fifth Amendment creates adverse circumstantial evidence subject to comment by the prosecutor." *Gant (Percy)*, *supra* at 9.

F. Summation of Evidence by Court

"After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury." MCR 2.513(M) (applicable only to jury trials).

G. Standard of Review

Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451 (2005).

Prosecutorial misconduct may constitute constitutional or nonconstitutional error. *People v Blackmon*, 280 Mich App 253, 269-271 (2008). Whether an error is constitutional or nonconstitutional is a question of law subject to de novo review. *Blackmon*, *supra* at 259. "[T]o be constitutional error, [in the absence of an allegation that the misconduct violated a specific constitutional right,] the misconduct must have *so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law*." *Id*. at 269, citing *Donnelly v DeChristoforo*, 416 US 637, 643 (1974).

If prosecutorial misconduct is preserved and is constitutional in nature, the proper standard of review on direct appeal is the

"harmless beyond a reasonable doubt" standard. *Blackmon*, 280 Mich App at 271.

If prosecutorial misconduct is preserved and is nonconstitutional in nature, the proper standard of review on direct appeal is whether "it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *Blackmon*, 280 Mich App at 270, quoting *People v Lukity*, 460 Mich 484, 495-496 (1999).

Review of unpreserved claims is precluded unless a curative instruction could not have eliminated the prejudicial effect, or the failure to consider the issue would result in a miscarriage of justice. *People v Avant*, 235 Mich App 499, 512 (1999). For example, unfair prejudice produced by prosecutorial comments may be cured by the court's instruction to the jury that counsel's arguments are not evidence. *People v Green (Rodney)*, 228 Mich App 684, 693 (1998). Unpreserved claims of prosecutorial misconduct may only be reviewed for plain error, and reversal is only warranted when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Odom*, 276 Mich App 407, 413 (2007).

A trial court's decision to permit the prosecution to include certain comments in its opening statement is reviewed for an abuse of discretion. *People v Jansson*, 116 Mich App 674, 690 (1982).

Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the entire record and evaluate a prosecutor's remarks in context. *People v Dobek*, 274 Mich App 58, 64 (2007). Prosecutorial arguments are also considered in light of the defense arguments. *People v Lawton*, 196 Mich App 341, 353 (1992).

5.8 Questions or Comments by Judge

A trial court is vested with broad discretion over the administration of trial proceedings. *People v Taylor (Kelvin)*, 252 Mich App 519, 522 (2002). See also MCL 768.29; MRE 611(a).

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 340 (1995).

When a case is tried before a jury, the judge must take care that his or her questions and comments do not indicate partiality. *People v Jackson*

(Joseph), 98 Mich App 735, 740 (1980). A new trial will be ordered where such comments quite possibly could have influenced the jury to the detriment of the defendant's case. *People v Pointer (Robert)*, 133 Mich App 313, 316-317 (1984).

"While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480 (1996).

Judicial questioning that creates a suspicion as to the witness's credibility is discouraged. *People v Sterling*, 154 Mich App 223, 228 (1986). It is improper for a trial judge to belittle, scold, or demean a defendant's attorney to the extent that the jury might regard the attorney with contempt. *People v Ross (Kenneth)*, 181 Mich App 89, 91 (1989).

Examples of objectionable conduct by the trial court include volunteering information not in evidence, "campaigning from the bench," and interrupting or making derogatory remarks toward counsel. *People v Conyers*, 194 Mich App 395, 405-406 (1992).

5.9 Issues Affecting the Jury During Trial

A. Reference Document

"The court may authorize or require counsel in . . . criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations." MCR 2.513(E).

B. Jury Note Taking

MCR 2.513(H) states:

> "The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court

> must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded."[25]

C. Jury Questions

The court may allow the jury to ask questions of any witness. MCR 2.513(I). If the court allows jury questions, it must ensure that the questions are asked by the court itself. *Id.* In addition, it must ensure "that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions." *Id.* The court must inform the jury "of the procedures to be followed for submitting questions to witnesses." *Id.* See also *People v Heard*, 388 Mich 182, 188 (1972) ("The questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he [or she] wishes, and it was error for a judge to rule that under no circumstances might a juror ask any questions.").

See CJI2d 2.9, which states:

> "(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.
>
> "(2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the question down, and pass it to the bailiff, who will give it to me.
>
> "(3) There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or not ask it at all.
>
> "(4) On the other hand, if you cannot hear what a lawyer or witness says, please raise your hand immediately and ask to have the question or answer repeated."

[25] In civil cases only, jurors "are permitted to discuss the evidence among themselves in the jury room during trial recesses." MCR 2.513(K). There is no corresponding rule for criminal cases.

D. Jury View

MCL 768.28 states that the court may order a view by the jury "whenever such court shall deem such view necessary."

MCR 2.513(J) provides:

> "On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view, provided, however, that in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security. During the view, no person, other than the officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion."

Because the purpose of a jury view is to help the jury understand evidence *already introduced* at trial, a jury view should not be conducted until *after* the relevant evidence has been admitted at trial.[26] *People v Unger*, 278 Mich App 210, 303 (2008).

Committee Tip:

Take a tape recorder along to the jury view to record any questions that jurors may have. Then, make a record of the jury view after returning to court.

Whether to permit a jury view of the place where the crime occurred is left to the discretion of the court. *People v Mallory*, 421 Mich 229, 245 (1984). A crime scene may be viewed despite changed conditions, where the jury has been apprised of the changes. *People v King (Levurn)*, 210 Mich App 425, 432 (1995).

An accused defendant in custody has the fundamental right to be present at a jury view of the crime scene.[27] *King (Levurn)*, 210 Mich App at 432-433.[28] A defendant may waive his or her right to be

[26] This issue was considered in the context of the defendant's claim that his counsel was ineffective.

[27] In a bench trial, it is error for a judge to conduct a view "without having given the defendant and counsel for both parties an opportunity to be present with him [or her]." *People v Eglar*, 19 Mich App 563, 565 (1969).

present at a jury view by affirmative consent, by failure to appear at the view when he or she is free to do so, and by disorderly or disruptive conduct at trial precluding continuation of the trial in his or her presence. *King (Levurn)*, *supra* at 433.

E. Prohibited Jury Actions

The court is required to instruct the jurors regarding certain prohibited actions during the term of jury service. MCR 2.511(H)(2). Specifically, the jurors must not:

> "(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
>
> "(b) read or listen to any news reports about the case;
>
> "(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;
>
> "(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
>
>> "(i) information about a party, witness, attorney, or court officer;
>>
>> "(ii) news accounts of the case;
>>
>> "(iii) information collected through juror research on any topics raised or testimony offered by any witness;
>>
>> "(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case."

[28] However, see MCR 2.513(J) ("in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security[]").

5.10 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

1. Generally

Due Process entitles an accused to the presumption of innocence. *In re Winship*, 397 US 358, 364 (1970). The Sixth Amendment guarantee of the right to a fair trial means that a criminal defendant is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Taylor (Michael) v Kentucky*, 436 US 478, 485 (1978). "[A] criminal defendant generally has the right to appear before the court with the appearance, dignity, and self-respect of a free and innocent [person] . . . ." *People v Payne*, 285 Mich App 181, 187 (2009) (internal citations and quotations omitted).

2. Clothing

The defendant's right to a fair and impartial trial generally requires that the defendant not appear before the jury in jail clothes. *People v Daniels (Jerry)*, 163 Mich App 703, 710 (1987). The presumption of innocence would be prejudiced if the defendant was forced to appear before a jury in jail garb. *Daniels (Jerry)*, *supra* at 710. The defendant's timely request to appear in civilian clothes must be granted. *People v Harris (Thomas)*, 201 Mich App 147, 151 (1993). This general rule does not apply to bench trials where an absence of prejudice is presumed. *Daniels (Jerry)*, *supra* at 710.

A defendant's right to appear in civilian clothes is not absolute and may be denied if the request is untimely. *People v Turner (Clarence Duane)*, 144 Mich App 107, 109 (1985). The request should be made before the jury has been impaneled so that the jury has not had occasion to see the defendant in prison attire. *Turner (Clarence Duane)*, *supra* at 109. It is error requiring reversal and an abuse of the court's discretionary power when the court fails to explain the reasoning behind its decision to deny the defendant's motion. *Id*. at 110-112.

3. Handcuffs/Shackles

Freedom from shackling is an important component of a fair trial, *People v Dixon (Lamont)*, 217 Mich App 400, 404 (1996),

because absent a showing of manifest need for restraints, appearing shackled or handcuffed before a jury can adversely affect a defendant's constitutional presumption of innocence, *People v Dunn*, 446 Mich 409, 425 n 26 (1994); can interfere with a defendant's ability to communicate with his attorney, *Illinois v Allen (William)*, 397 US 337, 344 (1970); can interfere with a defendant's ability to participate in his or her own defense (by freely choosing to testify), *Deck v Missouri*, 544 US 622, 631 (2005); and "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Deck*, *supra* at 631, quoting *Allen (William)*, *supra* at 344.

In order to protect the defendant's presumption of innocence and ensure a fair trial, it is the preferred practice to have the defendant appear before the court without handcuffs. *People v Wells*, 103 Mich App 455, 459 (1981). A defendant may only be shackled on a finding supported by record evidence that it is necessary to prevent escape, injury to persons in the courtroom, or to maintain order. *Dunn*, 446 Mich at 425. "[A]n evidentiary hearing [is] the best way to discern whether there is a state interest in shackling 'specific to a particular trial[,]'" because "a formal hearing with sworn testimony [] allow[s] for factual disputes to be resolved and for a meaningful record to facilitate review." *People v Maxwell*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909),[29] quoting *United States v Miller (Shawn)*, 531 F3d 340, 348 (CA 6, 2008). The decision is discretionary with the trial court, and the trial court should consider the totality of the circumstances, including the defendant's background. *Dixon (Lamont)*, 217 Mich App at 404-405; *People v Williams (Tyrone)*, 173 Mich App 312, 314-315 (1988).

A decision to restrain a defendant may be based on information from the Department of Corrections or a county jail. *Dixon (Lamont)*, 217 Mich App at 405. If restraints are used in the jury's presence, the court may want to consider a cautionary instruction that the restraints are not evidence and should not be considered as evidence. *Wells*, 103 Mich App at 461. A decision to restrain a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *Wells*, *supra* at 404-405. Absent a showing of prejudice, an appellate court will not reverse a conviction simply because the jury happened to see the defendant in handcuffs. *Id*. at 460.

[29] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

In *Maxwell,* unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909), *supra*, the trial court abused its discretion in denying the defendant's request to remove the defendant's shackles or take measures to conceal them from the jury. Specifically, the trial court "dismissed the deleterious effects of shackling, equating them with awareness that the defendant was in custody." *Id*. Additionally, there was no record evidence to support the trial court's implication that the defendant posed a security concern. *Id*. In reversing the defendant's convictions and remanding the case for a new trial, the Court of Appeals noted that "[t]he jury's assessment of [the] defendant's credibility may have been affected by the implicit suggestion that [the] defendant posed such a problem that shackles were needed." Further, "[t]he trial court did not cure th[e] prejudice by indicating that the shackles were merely consistent with being in custody." *Id*. Because "[s]hackles inherently connote a need to restrain someone . . . [s]uch an implication is more prejudicial than a mere understanding that someone is in jail pending a trial." *Id*.

However, "even if a trial court abuses its discretion and requires a defendant to wear restraints, the defendant must show that he [or she] suffered prejudice as a result of the restraints to be entitled to relief." *People v Payne*, 285 Mich App 181, 186 (2009). If the jury was unable to see shackles on the defendant, no prejudice occurs. *Payne*, *supra* at 186. In *Payne*, *supra* at 186-187, the trial court abused its discretion by requiring the defendant to wear leg shackles in the courtroom; however, the defendant was unable to show prejudice, because the defense table was skirted with paper that prevented the jury from viewing the shackles.

An appellate court's harmless error analysis requires more than a cursory review of the totality of circumstances under which a defendant was convicted when no justification existed for shackling a defendant during his jury trial. *Ruimveld v Birkett*, 404 F3d 1006 (CA 6, 2005).

In *Ruimveld*, 404 F3d at 1008, the Michigan Court of Appeals concluded that although the defendant was improperly shackled during trial, the error was harmless. The federal Court of Appeals for the Sixth Circuit noted that the Michigan Court of Appeals failed to conduct a meaningful review of the circumstances surrounding the defendant's conviction, which, according to the federal court, clearly showed that the defendant's shackling likely had a substantial and injurious effect on the jury's verdict. *Ruimveld*, *supra* at 1017-1018. The federal court pointed out that the Michigan Court of Appeals

failed to consider the fact that "[t]he evidence against [the defendant] was merely circumstantial . . . that the jury deliberated for over three hours despite the simple facts, and made inquiries to the judge regarding presumptions of innocence, burdens of proof, and reasonable doubt. Given the closeness of the case, the effect of any error was thus likely to be magnified." *Id*. at 1016.

Due process considerations are only an issue if the defendant is *visibly* restrained at trial. *Mendoza v Berghuis*, 544 F3d 650, 654-655 (CA 6, 2008). In *Mendoza*, *supra* at 651-652, 654-655, the defendant's due process rights were not violated where his leg restraints were concealed from the jury by "skirting both counsel tables with brown paper for the duration of the trial," and where he was unshackled to testify. Additionally, a defendant's constitutional rights are not violated when jurors see him or her shackled during transport to or from the courtroom. *Id*. at 655-656. See also *United States v Moreno*, 933 F2d 362, 368 (CA 6, 1991) (discussing the reasonableness of transporting defendants with restraints).

The court may also face the question whether it is proper to handcuff or otherwise restrain witnesses. In *People v Banks*, 249 Mich App 247, 256-258 (2002), the Court of Appeals held that the trial court abused its discretion to control trial proceedings and infringed on the defendant's right to a fair trial by ordering an alibi witness to be handcuffed without facts on the record to support the need to restrain the witness. In other words, the "propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants." *Banks*, *supra* at 257.

4. Gagging

"[I]f a defendant is unruly, disruptive, rude, and obstreperous, a trial court is within its discretion to gag a defendant when repeated warnings have been ineffective." *People v Conley (Aaron)*, 270 Mich App 301, 309 (2006). Gagging should only be used as a last resort to ensure the defendant's cooperation and maintain an appropriate courtroom atmosphere. *People v Kerridge*, 20 Mich App 184, 188 (1969), overruled on other grounds by *People v Parker (Lorenzo)*, 393 Mich 531 (1975).

There are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant: (1) binding and gagging him or her, and thereby keeping the defendant present; (2) holding the defendant in contempt; and (3) removing the defendant from the courtroom until he or she

promises to properly conduct him- or herself. *Allen (William)*, 397 US at 343-344. In some situations, it might be the most fair and reasonable way to handle a defendant who is disruptive. *Allen (William)*, *supra* at 344.

A defendant is not denied his or her right to a fair 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 disruptive verbal outbursts. *Conley (Aaron)*, 270 Mich App at 309.

B. Right to Be Present

1. Disruptive Conduct of Defendant

A defendant has the constitutional right to be present at his or her trial. US Const, Am VI; Const 1963, art 1, § 20; *Allen (William)*, 397 US at 338. Michigan law requires that a defendant charged with a felony be present at his or her trial. MCL 768.3. However, neither the constitutional nor the statutory right to be present is absolute. *People v Kruger*, 466 Mich 50, 54 n 9 (2002). When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant. *Kruger*, *supra* at 54. "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself [or herself] consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen (William)*, *supra* at 343.

A trial court's decision to remove a defendant from the courtroom during trial is reviewed for an abuse of discretion. *People v Harris (Reginald)*, 80 Mich App 228, 230 (1977).

2. Defendant's Absence

A defendant may waive his or her right to be present by failing to appear for trial. *People v Woods (Art)*, 172 Mich App 476, 479 (1988). Two elements are necessary for a valid waiver of the right to be present at trial: (1) specific knowledge of the right, and (2) an intentional decision to abandon the right. *Woods (Art)*, *supra* at 479. In *Woods (Art)*, the defendant was voluntarily absent from his trial, but the record was silent regarding whether he was aware that he had a right to be present at trial. *Id*. The Court declined to presume waiver from the record, and found that the defendant did not waive his right to be present at trial. *Id*. However, the Court held that the

defendant's absence made no difference in the result reached, and declined to reverse his conviction because he failed to demonstrate any reasonable possibility of prejudice. *Id*. at 480.

A defendant's voluntary departure from the courtroom after trial has begun may waive the defendant's right to be present and may not preclude the trial judge from proceeding with the trial. *People v Swan*, 394 Mich 451, 452 (1975). In *Swan*, *supra* at 451, the defendant, who was free on bond, did not return to the courtroom after a recess during trial. The trial court waited several hours for the defendant to return, and then adjourned the case. *Id*. at 451-452. Defendant failed to appear when the court reconvened four days later, and a record was made regarding attempts to locate the defendant. *Id*. at 452. The trial court decided to complete the trial in the defendant's absence, and the jury convicted the defendant of the charged offense. *Id*. In that situation, the Michigan Supreme Court upheld the defendant's conviction. *Id*.

3. Standard of Review

"The proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction is whether there is any reasonable possibility of prejudice." *Woods (Art)*, 172 Mich App at 480.

C. Testimony

1. Right to Testify

The trial court is not required to advise the defendant that he or she has a right to testify, or to obtain a waiver of that right on the record. *People v Harris (Derrick)*, 190 Mich App 652, 661-662 (1991). "In fact, courts have recognized that it is inadvisable for a [] court to develop such a record because it may infringe on the defendant's right *to* testify." *United States v Yono*, 605 F3d 425, 426 (CA 6, 2010) (trial court's failure to develop a record indicating that the defendant's decision to testify on his own behalf at trial was made knowingly and voluntarily did not violate the defendant's Fifth Amendment right against self-incrimination, because he had no right to such a record).

2. Medication

A defendant may have the right to be taken off antipsychotic drugs before testifying unless the court finds that he or she presents a risk to himself or herself, or others. See *Riggins v Nevada*, 504 US 127, 134, 137 (1992) (a defendant has a due

process liberty interest in freedom from the involuntary administration of anti-psychotic drugs).

3. Refusal to Answer Questions

The court may strike all or part of a witness's testimony if the witness refuses to permit meaningful cross-examination. *People v Holguin*, 141 Mich App 268, 272-273 (1985).

D. Self-Incrimination—Requiring Defendant to Display Body or Perform Act

It is not a violation of the Fifth Amendment to require a defendant to do any of the following:

- Display an arm tattoo to the jury. *United States v Alpern*, 564 F2d 755, 762 (CA 7, 1977); *United States v Bay*, 762 F2d 1314, 1315-1317 (CA 9, 1984).

- Shave a beard. *United States v Lamb*, 575 F2d 1310, 1316 (CA 10, 1978); *United States v Valenzuela*, 722 F2d 1431, 1433 (CA 9, 1983).

- Wear an article of clothing. *People v Garner*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1996 (Docket No. 177271).[30]

- Give voice samples. *People v Burhans*, 166 Mich App 758, 762 (1988); *People v Henderson*, 69 Mich App 418, 421 (1976); *People v Roberson*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2002 (Docket No. 223791).[31]

- Give handwriting samples. *Gilbert v California*, 388 US 263, 266 (1967); *Burhans*, 166 Mich App at 762; *United States v Campbell*, 732 F2d 1017, 1020-1021 (CA 1, 1984) (however, it is a violation of the privilege to require the defendant to write words dictated to him or her because that requires the defendant in effect to say "This is the way I spell these words."); *People v Petrac*, 89 Mich App 188, 193 (1979). Similarly, if written answers to incriminating questions or a signature on an incriminating statement were obtained, the

[30] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[31] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

defendant could assert his or her Fifth Amendment privilege. *Petrac*, *supra* at 190.

- Stand for purposes of identification. *United States v Wilson (Loren)*, 719 F2d 1491, 1496 (CA 10, 1983).

- Remove a pair of glasses. *Wilson (Loren)*, 719 F2d at 1496.

- Expose his or her teeth and gums to be viewed by a witness. *United States v Maceo*, 873 F2d 1, 4-6 (CA 1, 1989).

- Utter certain phrases so that the jury can compare the defendant's voice with the voice on a tape of a drug transaction. *United States v Leone*, 823 F2d 246, 249-250 (CA 8, 1987); See also *Burhans*, 166 Mich App at 762 ("[c]ompelling a defendant to perform actions which demonstrate identifying physical characteristics, such as handwriting or voice exemplars, does not compel a defendant to give testimonial or communicative evidence, and so does not violate the privilege against self-incrimination").

5.11 Confrontation

A. Defendant's Right of Confrontation

1. Generally

A criminal defendant has the right to be confronted by the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1. The Confrontation Clause of the Sixth Amendment is made applicable to the states through the Fourteenth Amendment. *Pointer (Bob) v Texas*, 380 US 400, 403 (1965); *People v Sammons*, 191 Mich App 351, 356 (1991). The Confrontation Clause implicates two broad categories of cases: those involving the admission of out-of-court statements and those involving restrictions imposed by law or the trial court on the scope of cross-examination. *Delaware v Fensterer*, 474 US 15, 18 (1985). "By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy compromise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562 (2011).

A defendant's right to confrontation is guaranteed through the right of cross-examination, the oath taken by witnesses, and the defendant's ability to observe a witness's demeanor while testifying. *People v Lawson*, 124 Mich App 371, 374 (1983). The protections of the Confrontation Clause extend to pretrial entrapment hearings, *Sammons*, 191 Mich App at 362, and pretrial suppression hearings. *People v Levine (Brian Eric)*, 231 Mich App 213, 223 (1998), vacated on other grounds 461 Mich 172 (1999). The Confrontation Clause guarantees only that a defendant has the opportunity for effective cross-examination; a defendant is not guaranteed an ideal cross-examination. *United States v Owens*, 484 US 554, 559 (1988). A defendant's right to confrontation is satisfied when he or she has the opportunity to explore matters such as a witness's poor eyesight, bias, and bad memory. *Owens*, *supra* at 559.

Under the "language conduit" rule, "an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant without creating an additional layer of hearsay[;]" thus, where a defendant has a full opportunity to cross-examine the declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson (Andre)*, 292 Mich App 583, 595-597 (2011). In *Jackson (Andre)*, *supra* at 587, 593-594, a hospitalized shooting victim was questioned by a police officer. Because the victim was unable to speak at the time of the interview, he answered the questions by either squeezing the hand of an attending nurse (to indicate "yes") or not (to indicate "no"). *Id*. at 593-594. The Court stated that the following factors should be examined when determining whether statements made through an interpreter are admissible under the language conduit rule:

> "(1) whether actions taken subsequent to the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter." *Jackson (Andre)*, 292 Mich App at 596, citing *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991), and *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

Concluding that none of these factors militated against application of the language conduit rule, the Court held that although the victim's nonverbal answers qualified as

testimonial statements, the defendant did not have a constitutional right to confront the nurse, "because what she reported were properly considered to be [the victim's] statements." *Jackson (Andre)*, 292 Mich App at 596-597. Because he "had a full opportunity to cross-examine" the victim, the defendant's Confrontation Clause rights were satisfied. *Id.* at 597.

2. Scope

The right of the accused to confront witnesses is a crucial element of the trial process and serves to protect the defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20. This is because "[a] witness 'may feel quite differently when he [or she] has to repeat his [or her] story looking at the man [or woman] whom he [or she] will harm greatly by distorting or mistaking the facts." *Iowa v Coy*, 487 US 1012, 1019 (1988), quoting Professor Zecariah Chafee, Jr., *The Blessings of Liberty*, p 35 (1956). In *Coy, supra* at 1020, the defendant's right of confrontation was violated where a screen was placed between him and the complaining witnesses. And in *Sammons*, 191 Mich App at 356, 366, the defendant's right of confrontation was violated when the trial court permitted a police informant to testify at an entrapment hearing while wearing a mask, and without disclosing his true identity.

However, the right to confront witnesses is not absolute and may succumb to other compelling interests. *People v Kasben*, 158 Mich App 252, 255 (1987). A compelling interest is present when the state is protecting victims of sexual assault. *Kasben*, *supra* at 254. For example, "the prohibitions (on questions regarding a victim's previous sexual conduct) in the rape-shield law will not deny a defendant's right of confrontation in the overwhelming majority of cases." *People v Arenda*, 416 Mich 1, 13 (1982). And in *Maryland v Craig*, 497 US 836, 857 (1990), the United States Supreme Court held that the defendant's right of confrontation was not violated in a child sexual abuse case where the child victim testified outside the defendant's physical presence via one-way closed-circuit television. "The Court found that an important state interest was involved (protection of a child witness from trauma caused by testifying in the physical presence of the defendant), while also noting that the procedure employed preserved other important elements of the confrontation right, i.e., oath, cross-examination, and observation of the witness'[s] demeanor." *Sammons*, 191 Mich App at 363.

See also *People v Rose*, 289 Mich App 499, 510-517 (2010). In *Rose*, *supra* at 516-517, the trial court did not violate the defendant's right to confrontation by permitting the child victim to testify with a witness screen, where the trial court found that the victim feared the defendant, that the witness screen was necessary to protect the child's welfare, that there was a high probability that testifying face-to-face with the defendant would cause psychological damage to the victim, and that having to testify face-to-face with the defendant may cause the victim to abstain from testifying altogether. Additionally, "aside from [the victim's] inability to see [the defendant], the use of the witness screen otherwise preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process." *Id*.

The same considerations are applicable "to determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology." *People v Buie (Buie I)*, 285 Mich App 401, 415 (2009). "The trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all of the other elements of the Confrontation Clause," i.e., oath, cross-examination, and the opportunity for the trier of fact to observe the witness's demeanor. *Buie I*, *supra* at 415. In *Buie I*, *supra* at 406-407, the trial court permitted a doctor and a DNA expert to testify at trial via two-way interactive video technology. The Court of Appeals remanded the case because the record was silent as to evidence or trial court findings that the video-conferencing procedure was necessary, and what important public policy or state interest was being furthered. *Id*. at 416. On remand, the trial court held that "there was no error in permitting the video procedure because it furthered several state interests or public policies and [the] defendant consented to the procedure." *People v Buie (Buie II) (After Remand)*, 291 Mich App 259, 262 (2011), lv gtd 489 Mich 938 (2011). However, the Court of Appeals disagreed and found that the trial court failed to "explain how the particular interests it cited, i.e., cost savings, efficiency, the convenience of the witnesses, and avoiding delay, constituted public policies or state interests important enough to outweigh [the] defendant's right to confrontation under the *first* prong of the *Craig*[32] test[,]" and, in addition, "neither party appear[ed] to agree with the trial court's conclusion on this issue[.]" *Buie II, supra* at 270-271. Accordingly, the Court declined to hold that a public policy or

state interest existed that outweighed the defendant's right of confrontation, and found that the use of two-way interactive video technology violated the defendant's right of confrontation. *Id.*[33]

3. Defendant's Conduct

The Sixth Amendment Confrontation Clause guarantees the right of the defendant to be present at trial. *Illinois v Allen (William)*, 397 US 337, 338 (1970). However, as with the compelling interests present in sexual assault cases, the right to confrontation may succumb to a defendant's prior conduct. When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant. A defendant may be removed from the courtroom to ensure that the trial process is conducted in a dignified manner. *People v Staffney*, 187 Mich App 660, 664 (1990). Ordinarily, the defendant must be warned before he or she is removed from the courtroom. *Staffney, supra* at 664. A defendant may be removed without a warning when his or her behavior is aggressive and violent. *Id*. at 665.

4. Unavailable Witnesses

The Confrontation Clause bars the admission of *testimonial* statements of an *unavailable witness* unless the defendant had a prior opportunity for cross-examination. *Crawford (Michael) v Washington*, 541 US 36, 68 (2004).[34, 35] However, *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *United States v Davis*, 577 F3d 660, 667-668 (CA 6, 2009) (the admission of

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[32]*Craig*, 497 US 836, requiring a trial court to "[(1)] hear evidence and make case-specific findings that the use of [two-way, interactive video] technology procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, and [(2)] that it preserves all of the other elements of the Confrontation Clause." *Buie II*, 291 Mich App at 269.

[33]The Court of Appeals also reviewed the trial court's findings that the video procedure was permissible under MCR 6.006(C)(2), and concluded that there was no showing of consent by the defendant, as required by the court rule. *Buie II*, 291 Mich App at 272-274. Therefore, the trial court plainly erred in allowing the witnesses to testify using the video procedure. *Buie II, supra* at 274. Because the trial court plainly erred in permitting the witnesses to testify at trial by way of two-way, interactive video technology, and permitting the video procedure did not constitute harmless error, the Court vacated the defendant's convictions and sentence. *Id.* at 274-276.

[34] *Crawford* (*Michael)* overruled, in part, *Ohio v Roberts (Herschel)*, 448 US 56 (1980), which permitted admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability'" and fell within either a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." *Roberts (Herschel)*, 448 US at 66.

[35] *Crawford (Michael) v Washington* is not retroactive. *Whorton v Bockting*, 549 US 406, 409 (2007).

statements made by an unidentified woman to a police officer was not barred by *Crawford* because the statements were not offered to prove the truth of the matter asserted, but rather, were offered as background for the police officer's investigation).

A witness is constitutionally unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good faith effort to obtain the witness's presence at trial. *Barber v Page*, 390 US 719, 724-725 (1968). MRE 804(a) states that "'[u]navailability as a witness' includes situations in which the declarant—

> "(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> "(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> "(3) has a lack of memory of the subject matter of the declarant's statement; or
>
> "(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> "(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

"[A] 'testimonial statement' is best defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made." *Confrontation and Crawford*, Hon. Mark A. Randon, Michigan Bar Journal, December 2007, p 26. The *Crawford* (*Michael)* Court

declined to delineate a comprehensive definition of "testimonial," but provided the following examples of clearly testimonial and clearly nontestimonial statements:

Clearly testimonial:

- formal police interrogations,
- prior testimony,
- plea allocutions, and
- depositions.

Clearly nontestimonial:

- casual remarks to acquaintances,
- off-hand, overheard remarks,
- statements in furtherance of a conspiracy,
- statements unwittingly made to informants, and
- business records. *Crawford (Michael)*, 541 US at 51-52, 56-58.

Following *Crawford (Michael)*, the United States Supreme Court clarified the definition of "testimonial statement" in *Davis (Adrian) v Washington*, 547 US 813 (2006). *Davis* involved two companion cases: *Davis (Adrian) v Washington* and *Hammon v Indiana*. The Court held that whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant—where the declarant is unavailable and the defendant has not had an opportunity to cross-examine the declarant—requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis (Adrian)*, *supra* at 826. In *Davis (Adrian)*, the Court concluded that statements made to a 911 operator were nontestimonial because they described events "as they were actually happening," in an "ongoing emergency." *Davis (Adrian)*, *supra* at 827. But in *Hammon*, the Court concluded that statements made to the police at a crime scene were testimonial because they were made during the course of an interrogation. *Davis (Adrian)*, *supra* at 826-832.

The following cases further distinguish between testimonial and nontestimonial statements:

- ***Michigan v Bryant*, 562 US ___ (2011).**

Pre-death statements made by a gunshot victim to police officers identifying and describing his shooter and the location of the shooting were nontestimonial and their admission at the defendant's trial did not violate the Confrontation Clause because "the circumstances of the interaction between [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'" *Michigan v Bryant*, 562 US ___, ___ (2011), quoting *Davis v Washington*, 547 US 813, 822 (2006). In *Bryant*, *supra* at ___, the United States Supreme Court found that "there was an ongoing emergency . . . where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." Additionally, the Court found that the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency where the questions the police asked the victim were precisely the type of questions necessary to allow them to assess the situation, the threat to their own safety, and possible danger to the victim and the public. *Id*. at ___.

- ***People v Fackelman*, 489 Mich 515 (2011).**

A non-testifying psychiatrist's out-of-court medical report that "memorialized [the] defendant's medical history and the events that led to his admittance to the hospital, provided [an] all-important diagnosis, and outlined a plan for treatment[]" constituted a testimonial statement that was used as substantive evidence of the defendant's sanity in violation of his Sixth Amendment right of confrontation. *Fackelman*, *supra* at 518-519, 532, 564. In *Fackelman*, *supra* at 519-520, 523, the defendant was found guilty but mentally ill of charges stemming from his armed assault of a man that the defendant believed had caused his son's death. The two testifying expert witnesses disagreed as to whether the defendant was legally insane at the time of the crimes, which was the sole issue at trial. *Id*. at 521-523. The defendant's expert witness testified that in making his determination that the defendant was legally insane, he relied in part on a report prepared by a hospital psychiatrist regarding the defendant's psychiatric condition two days after the incident; however, the report was neither authenticated nor admitted as evidence, and the defendant did not elicit testimony regarding the psychiatrist's diagnosis. *Id*. at 536-541. On cross-examination, the prosecutor revealed the hospital psychiatrist's diagnosis of "'[m]ajor depression, single episode, severe without psychosis[;]'" the prosecutor subsequently referred to the report in his

examination of the prosecution's expert witness, who testified that she agreed with the diagnosis. *Id*. at 522-523.

The Michigan Supreme Court held that the report, which was made following the defendant's arrest and "expressly focused on [the] defendant's alleged crime and the charges pending against him[,]" constituted testimonial evidence because it "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[.]'" *Fackelman*, 489 Mich at 533, quoting *Crawford (Michael)*, 541 US at 52. Moreover, "the prosecutor's improper introduction and repeated use of [the] diagnosis that [the] defendant was not, in fact, experiencing psychosis fully rendered the [psychiatrist] a witness against [the] defendant." *Fackelman*, *supra* at 530. Because the diagnosis "provided a tiebreaking expert opinion" by "the only expert unaffiliated with either party . . . [and] the only doctor who had personal knowledge concerning [the] dispositive issue[,]" its use at trial constituted plain error requiring reversal of the defendant's convictions. *Id*. at 538, 564.

- ***People v Walker (Alvin)*, 273 Mich App 56 (2006).**

A crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted testimonial statements for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *Walker (Alvin)*, *supra* at 64. In *Walker (Alvin)*, the defendant beat the victim and threatened to kill her. *Id*. at 59. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called 911. *Id*. at 59-60. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. *Id*. at 60. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. *Id*. Because the circumstances in *Walker* (*Alvin)* were substantially similar to the circumstances in *Davis* (*Adrian)* and *Hammon*, the Court concluded that a similar outcome was warranted. *Walker (Alvin)*, *supra* at 61-65. Like the United States Supreme Court in *Davis (Adrian)*, the *Walker* (*Alvin)* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *Id*. at 64.

The *Walker* (*Alvin)* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* (*Adrian)* Court found inadmissible under the Confrontation Clause." *Walker (Alvin)*, 273 Mich App at 64. The Court explained:

"As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis (Adrian)*, *supra* at [830]. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis (Adrian)*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis (Adrian)*, *supra* at [830]. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker (Alvin)*, *supra* at 64-65.

- ***People v Jordan (Childred)*, 275 Mich App 659 (2007).**

The lengthy sequence of events following a 73-year-old victim's rape and robbery qualified as an ongoing emergency during which the statements made by the victim (who died before trial) constituted nontestimonial evidence under *Crawford* (*Michael)* and *Davis (Adrian)*. In *Jordan (Childred)*, immediately after the early morning assault, the victim ran out of her house in her nightgown yelling for help. *Jordan (Childred)*, *supra* at 661. The owner/operator of a nearby service station responded to the victim's screams and called 911. *Id*. The police arrived 45 minutes later and although the victim told the service station owner/operator that she had been raped, she failed to tell the police about the rape when she was initially questioned. *Id*. The victim's friend arrived at the scene after the police left, but the victim did not mention the rape. *Id*. After learning of the rape by talking with the service station owner/operator, the friend took the victim to the police station where she told the police about the rape. *Id*. at 661-662. "Because all statements by the victim were necessary to

resolving the ongoing emergency, the statements were nontestimonial." *Id*. at 664-665.

- ***People v Taylor (Geracer)*, 275 Mich App 177, 181-182 (2007).**

A decedent's statements identifying his assailant to the police during the hectic minutes shortly after the fatal shooting took place were admissible as nontestimonial statements under *Crawford (Michael)*. In the alternative, the decedent's statements were also admissible as dying declarations under the historic hearsay exception to the Confrontation Clause. *Taylor (Geracer)*, *supra* at 182-183.

- ***People v Bauder*, 269 Mich App 174, 180-187 (2005).**

A victim's statements to friends, coworkers, and the defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate the defendant's right of confrontation.

- ***Bullcoming v New Mexico*, 564 US ___ (2011).**

An unsworn forensic laboratory report in which a laboratory analyst certified that he had tested the defendant's blood-alcohol concentration ("BAC"), and that the BAC was well above the threshold for the crime of aggravated driving while intoxicated, was created solely for an evidentiary purpose and was therefore testimonial. *Bullcoming v New Mexico*, 564 US at ___ (2011). Accordingly, "[t]he [defendant's] right [was] to be confronted with the analyst who made the certification, unless that analyst [was] unavailable at trial, and the [defendant] had an opportunity, pretrial, to cross-examine that particular scientist[;]" the in-court "surrogate testimony" of a scientist who did not sign the report or perform or observe the test was not sufficient to satisfy the requirements of the Confrontation Clause. *Id.* at ___. See also *Melendez-Diaz v Massachusetts*, 557 US 305, ___ (2009) (the affidavits of state laboratory analysts stating that material seized by police and connected to the defendant was a certain quantity of drugs, constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testified at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits); *People v Payne*, 285 Mich App 181, 196, 198 (2009) (the admission of a nontestifying DNA analyst's laboratory reports violated the defendant's Sixth Amendment right to confrontation because the witnesses who actually testified concerning the laboratory reports "had not personally conducted the testing, had not personally examined

the evidence collected from the victims, and had not personally reached any of the scientific conclusions contained in the reports"; the laboratory reports constituted testimonial hearsay absent a showing that the DNA analyst was unavailable to testify and that the defendant had a prior opportunity for cross-examination).

- ***People v Lonsby*, 268 Mich App 375, 391-393 (2005).**

A nontestifying serologist's notes and laboratory report are testimonial statements under *Crawford (Michael)*. In *Lonsby*, a crime laboratory serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. *Lonsby, supra* at 380-381. The testimony included theories on why the nontestifying serologist conducted certain tests, as well as her notes regarding the tests. *Id*. at 380-381. In *Crawford (Michael)*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at 377, quoting *Crawford (Michael)*, 541 US at 51-52. The Court of Appeals found that because the serologist would clearly expect that her notes and laboratory report would be used for prosecutorial purposes, the information satisfied *Crawford (Michael)'s* definition of a "testimonial statement." *Lonsby, supra* at 619-620. See *People v Lewis*, 490 Mich 921 (2011), vacating in part *People v Lewis (On Remand)*, 287 Mich App 356 (2010), and holding that a statutorily-mandated autopsy report prepared by two nontestifying medical examiners was testimonial and that its admission violated the defendant's Sixth Amendment right to confrontation, but that "the admission of the report was not outcome determinative[;]" see also *People v Dendel (On Second Remand)*, 289 Mich App 445, 468 (2010) (the admission of expert testimony based on a report prepared by non-testifying forensic analysts violated the defendant's Sixth Amendment right to confrontation because "the testing . . . was performed in anticipation of a criminal trial, after the medical examiner's original findings had been challenged." Specifically, "[t]he medical examiner did not merely delegate to the [] laboratory an ordinary duty imposed by law: he sought from the lab specific information to investigate the possibility of criminal activity. Under th[o]se circumstances, any statements made in relation to th[e] investigation took on a testimonial character").

Cf. *People v Dinardo*, 290 Mich App 280, 290 (2010), where, without production of the original Datamaster ticket or a copy of it, the admission of Datamaster breath-test results did not violate the defendant's constitutional right of confrontation, because "the original Datamaster ticket, showing the breath-test procedures and [the] defendant's specific alcohol level, [did not] amount[] to testimonial hearsay within the meaning of *Crawford* [*v Washington*, 541 US 36 (2004)]." The Court of Appeals held that "while the Datamaster ticket showed facts relevant to the ultimate issue of [the] defendant's guilt, the ticket was neither a testimonial statement nor hearsay because it was not the statement of a witness or a declarant." *Dinardo*, *supra* at 294. "Instead, the Datamaster ticket was generated by a machine, following an entirely automated process that did not rely on any human input, data entry, or interpretation." *Id*. The Court directed that "[b]ecause the Datamaster ticket was not a testimonial hearsay statement, [the police officer who administered the test] will be permitted to testify regarding the breath-test results [on remand]." *Id*. Further, the Court directed that "because the contemporaneously prepared [written report] constitutes a recorded recollection pursuant to MRE 803(5), [the officer] will be permitted to read its contents into evidence at trial [on remand]." *Id*.

Statements by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) may be testimonial or nontestimonial. *People v Spangler*, 285 Mich App 136, 154 (2009). To make that determination, "the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *Spangler*, *supra* at 154. See *Spangler*, *supra* at 155-156, for a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause.

In *People v Garland*, 286 Mich App 1, 11 (2009), the statements made by a sexual abuse victim to a SANE were held to be nontestimonial because "under the totality of the circumstances of the [victim's] statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency[,]" and because "the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against

[the] defendant." Specifically, because the victim did not have any outwardly visible signs of physical trauma, the nurse would not have been able to treat the victim without knowing her history. *Garland*, *supra* at 11. Additionally, the police investigation took place after and apart from the nurse taking the victim's history and physically examining her. *Id*. at 9.

- ***Miller (Sharee) v Stovall*, 608 F3d 913 (CA 6, 2010).**

The suicide note of the defendant's deceased lover, "confessing to [the defendant's] husband's murder and accusing [the defendant] of conspiring in the crime," constituted testimonial evidence. *Miller (Sharee) v Stovall*, 608 F3d 913, 928 (CA 6, 2010) (affirming the district court's conditional grant of habeas corpus). Along with the suicide note, which stated that the defendant "was involved and helped set . . . up" the murder of the defendant's husband, the defendant's deceased lover left evidence implicating himself and the defendant in planning and carrying out the murder of the defendant's husband. *Miller (Sharee)*, *supra* at 916-917. The United States Court of Appeals for the Sixth Circuit employed the reasonable-expectation test to determine whether the suicide note was testimonial:

> "'The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his [or her] statement being used against the accused in investigating and prosecuting the crime.'" *Miller (Sharee)*, 608 F3d at 924, quoting *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004).

The Sixth Circuit held that "in light of everything else that [the defendant's deceased lover] did to prepare the case against [the defendant], 'a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.'" *Miller (Sharee)*, 608 F3d at 925, quoting *Cromer*, 389 F3d at 675. Specifically, "[b]ecause [the defendant's deceased lover] took care to assemble, preserve, and arrange delivery to the police of [evidence of the crime], and because the suicide note was placed atop the briefcase [holding evidence of the crime] and contained a direct accusation of [the defendant] . . . it was foreseeable that the authorities would use the note against her." *Miller (Sharee)*, *supra* at 925. The Sixth Circuit ruled that the admission of the testimonial suicide note at the defendant's trial violated her Sixth Amendment right to confrontation. *Id*. at 926.

Crawford (*Michael)* does not bar the admission of an unavailable witness's testimonial statements where the defendant "has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *People v Jones (Kyle)*, 270 Mich App 208, 212-214 (2006). See MRE 804(b)(6). However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial; rather, it only applies when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Giles v California*, 554 US 353, 359-360 (2008).

An unavailable witness's former testimonial statement may be admitted to impeach a witness without violating the Confrontation Clause according to *Crawford (Michael)*. *People v McPherson*, 263 Mich App 124, 134 (2004). For example, in *Tennessee v Street*, 471 US 409, 411 (1985), the defendant testified in his own defense, claiming that his confession was coerced and was derived from an accomplice's testimony. The prosecution was allowed to introduce the accomplice's testimony at trial, and the defendant argued that his right of confrontation was violated because he did not have the opportunity to cross-examine the accomplice. *Street*, *supra* at 410-412. However, the United States Supreme Court held that introduction of the accomplice's confession for the legitimate, nonhearsay purpose of rebutting the defendant's testimony that his own confession was a coerced copy of the accomplice's statement did not violate the defendant's right of confrontation. *Id*. at 417. Similarly, in *McPherson*, *supra* at 131, the defendant argued that the admission of an accomplice's statement that implicated the defendant (the testimony was elicited by the prosecutor from the defendant on cross-examination) violated his right of confrontation. The Court concluded that because the prosecutor's question was intended to impeach the defendant's statement that the accomplice was the gunman, its admission did not violate the defendant's right of confrontation. *Id*. at 134.

5. Codefendant or Coconspirator Testimony

A defendant's Sixth Amendment right of confrontation is violated when his or her nontestifying codefendant's statements—which implicate the defendant—are introduced at their joint trial. *Bruton v United States*, 391 US 123, 126 (1968).

Even though a *Bruton* error is an error of constitutional magnitude, it does not require automatic reversal of a defendant's conviction; rather, it is subject to harmless error analysis. *People v Pipes*, 475 Mich 267, 276-277 (2006). For example, in *Pipes*, *supra* at 269, a joint trial was held for two codefendants charged with first-degree premeditated murder. The trial court admitted into evidence the confessions of the two codefendants that incriminated one another, and a *Bruton* error occurred when both codefendants decided to exercise their right to remain silent. *Id*. at 275-276, 279. However, neither defendant preserved the issue by objecting on *Bruton* grounds, and both defendants were convicted. *Id*. at 273, 277. The Michigan Supreme Court held that the codefendants did not demonstrate plain error affecting their substantial rights, and upheld their convictions. *Id*. at 284.

The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession if the confession is redacted to completely eliminate the defendant's name and other references to the defendant. *Richardson (Gloria) v Marsh*, 481 US 200, 208-209 (1987). However, merely redacting the codefendant's name and replacing it with a blank, the term "deleted," or some other symbol still points too directly at a jointly tried codefendant and violates the Confrontation Clause. *Gray (Kevin) v Maryland*, 523 US 185, 192 (1998).

The admissibility of an unavailable codefendant's *nontestimonial* statement against interest is governed by MRE 804(b)(3) (hearsay exception for statements against the declarant's penal interest); it is not governed by the Confrontation Clause. *People v Taylor (Eric)*, 482 Mich 368, 370 (2008), overruling *People v Poole*, 444 Mich 151 (1993), to the extent that *Poole* held that that type of statement is governed by both MRE 804(b)(3) and the Confrontation Clause. *Poole*'s MRE 804(b)(3) analysis remains valid and sets out the applicable standard for determining the admissibility of a codefendant's statement under MRE 804(b)(3). *Taylor (Eric)*, *supra* at 378. "[W]here . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, *supra* at 161.

Committee Tip:

Remember that if the hearsay in question is not testimonial, it is not barred by Crawford (Michael). People v DeShazo, 469 Mich 1044 (2004). See, e.g., United States v Johnson (Earl), 581 F3d 320, 325 (CA 6, 2009), where the admission of a nontestifying codefendant's tape-recorded statements did not violate the Confrontation Clause because the_statements were not testimonial. Whether a statement is testimonial depends on whether the declarant intended to testify against the accused; that is, whether a reasonable person in the declarant's position would anticipate his or her statement being used against the defendant in investigating and prosecuting the crime. Johnson (Earl), supra at 325. Because the codefendant in Johnson (Earl), supra at 325, "did not know that his statements were being recorded and because . . . he did not anticipate them being used in a criminal proceeding against [the defendant]," they were not testimonial. Therefore, the Confrontation Clause was inapplicable.

B. Special Arrangements to Accommodate Compelling Interests

A defendant can be denied the right to face-to-face confrontation when the court permits a child witness to testify against the defendant outside the defendant's presence. *Staffney*, 187 Mich App at 665. The right to face-to-face confrontation may be denied to further public policy when the reliability of the testimony is assured. In such an instance, a closed-circuit television is an appropriate mode of communication. *Staffney, supra* at 665. In addition, when the witness is mentally and psychologically challenged and the assault was of an extreme nature, closed-circuit television is an appropriate mode of communication. *People v Burton*, 219 Mich App 278, 288-289 (1996).

MCR 6.006 governs the use of video and audio technology in the conduct of specific court proceedings. MCR 6.006 states:

> "(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following

proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

"(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

"(C) 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.

"(D) Mechanics of Use. The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court."

"[T]o determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology[,]" "[t]he trial court must

hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all of the other elements of the Confrontation Clause," i.e., oath, cross-examination, and the opportunity for the trier of fact to observe the witness's demeanor. *People v Buie (Buie I)*, 285 Mich App 401, 415 (2009). In *Buie I*, *supra* at 406-407, the trial court permitted a doctor and a DNA expert to testify at trial via two-way interactive video technology. The Court of Appeals remanded the case because the record was silent as to evidence or trial court findings that the video-conferencing procedure was necessary, and what important public policy or state interest was being furthered. *Id*. at 416. On remand, the trial court held that "there was no error in permitting the video procedure because it furthered several state interests or public policies and [the] defendant consented to the procedure." *People v Buie (Buie II) (After Remand)*, 291 Mich App 259, 262 (2011), lv gtd 489 Mich 938 (2011). However, the Court of Appeals disagreed and found that the trial court failed to "explain how the particular interests it cited, i.e., cost savings, efficiency, the convenience of the witnesses, and avoiding delay, constituted public policies or state interests important enough to outweigh [the] defendant's right to confrontation under the *first* prong of the *Craig*[[36]] test[,]" and, in addition, "neither party appear[ed] to agree with the trial court's conclusion on this issue[.]" *Buie II, supra* at 270-271. Accordingly, the Court declined to hold that a public policy or state interest existed that outweighed the defendant's right of confrontation, and found that the use of two-way interactive technology violated the defendant's right of confrontation. *Id.*[[37]]

C. Standard of Review

Whether a defendant has been denied his or her right to confrontation is a constitutional question reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557 (2000). "Confrontation Clause violations are subject to harmless-error

[36] *Maryland v Craig*, 497 US 836 (1990), requiring a trial court to "[(1)] hear evidence and make case-specific findings that the use of [two-way, interactive video] technology procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, and [(2)] that it preserves all of the other elements of the Confrontation Clause." *Buie II*, 291 Mich App at 269.

[37] The Court of Appeals also reviewed the trial court's findings that the video procedure was permissible under MCR 6.006(C)(2), and concluded that there was no showing of good cause or consent by the defendant, as required by the court rule. *Buie II,* 291 Mich App at 272-274. Therefore, the trial court plainly erred in allowing the witnesses to testify using the video procedure. *Buie II, supra* at 274. Because the trial court plainly erred in permitting the witnesses to testify at trial by way of two-way, interactive video technology, and permitting the video procedure did not constitute harmless error, the Court vacated the defendant's convictions and sentence. *Id.* at 274-276.

analysis." *Miller (Sharee) v Stovall*, 608 F3d 913, 926 (CA 6, 2010), citing *Delaware v Van Arsdall*, 475 US 673, 682 (1986).

A trial court's findings of fact regarding the trustworthiness of a hearsay statement are reviewed for clear error. *People v Barrera*, 451 Mich 261, 268-269 (1996).

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575 (2001).

A *Bruton*[38] error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *Pipes*, 475 Mich at 276-277. Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Pipes*, *supra* at 278, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a nontestifying codefendant's statement was improperly admitted at a joint trial, the other codefendant's self-incriminating statement may be properly admitted against that codefendant and may be considered to determine whether the error was harmless. *Pipes*, *supra* at 280.

5.12 Directed Verdict

A. Rule

MCR 6.419 provides in part:

> "(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) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as

[38] *Bruton v United States*, 391 US 123 (1968).

provided by MCR 6.431(A) for filing a motion for a new trial."

A postjudgment motion for a directed verdict must be filed within six months of entry of the judgment of sentence. MCR 6.419(B); MCR 6.431(A)(3).

B. Test Applied by the Court

A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6 (1997). It is impermissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict, no matter how inconsistent or vague that testimony may be. *Mehall*, *supra* at 6.

"The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial." MCR 6.419(E).

C. Double Jeopardy Implications

When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix*, 453 Mich 619, 626-627 (1996). Moreover, "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." *People v Evans (Evans II)*, 491 Mich 1, 15 (2012), citing *Smith v Massachusetts*, 543 US 462 (2005); *Smalis v Pennsylvania*, 476 US 140 (1986); *Arizona v Rumsey*, 467 US 203 (1984).

However, "'[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.'" *Evans II*, 491 Mich at 20, quoting *Mehall*, 454 Mich at 5. Rather, "~~[A]~~an ~~actual~~ acquittal ~~occurs,~~ for the purposes of double jeopardy ~~purposes,~~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.'"~~only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction.'"~~ ~~*People v Evans*~~*Evans II*, *supra* at 11,~~288 Mich App 410, 421-422 (2010),~~[39] quoting *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977)~~*Nix, supra* at 634-635~~.

Thus, "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." *Evans II*, *supra* at 4, 25.

In *Evans II*, ~~*supra*~~ 491 Mich at ~~422~~3, "the trial court wrongly added an extraneous element to the statute under which [the] defendant was charged[, and] . . . ruled that the prosecution was required to present proof" of that element. "As a result of the trial court's erroneous addition of this extraneous element to the charged offense, it granted [the] defendant's motion for a directed verdict and entered an order of acquittal, dismissing the case." *Evans II*, *supra* at 3-4. The Court of Appeals reversed, "conclud[ing] that double-jeopardy principles did not bar retrial because the trial court had not resolved a factual element necessary to establish a conviction." *Id.* at 8-9; see *People v Evans (Evans I)*, 288 Mich App 410, 411, 423 (2010). The Michigan Supreme Court affirmed. *Evans II*, *supra* at 25. The Court noted that United States Supreme Court precedent "establish[ed] 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." *Id.* at 12-15, citing *Smith*, 543 US 462; *Smalis*, 476 US 140; *Rumsey*, 467 US 203. In contrast, where "[a] trial court's legal error d[oes] not involve a resolution of any of the factual elements of the charged offense, . . . its ruling does not fall within the definition of acquittal for the purposes of double jeopardy." *Evans II*, *supra* at 22~~'s order granting a directed verdict in favor of the defendant did not constitute an acquittal for double jeopardy purposes, because the trial court "failed to resolve any of the elements that actually [had to] be satisfied to establish the [charged] offense[.]" Specifically, in *Evans*, *supra* at 417, the trial court "directed a verdict of acquittal on the ground that the prosecution had failed to present evidence of [a] nonelement [of the charged offense]."~~[40]

[39] ~~**Note:** Based on a similar set of facts, the Court of Appeals in *Evans* came to the opposite conclusion of the Michigan Supreme Court in *People v Szalma*, 487 Mich 708 (2010). The *Evans* Court relied on the dissent in *People v Nix*, 453 Mich 619 (1996), while the *Szalma* Court relied on the majority in *Nix*, *supra*.~~

[40] The *Evans II* Court held that its prior ruling in *Nix*, 453 Mich at 628, "wrongly observed [(in nonbinding obiter dicta)] that the phrase 'correct or not' from *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.'" *Evans II*, 491 Mich at 15-17, 21-22; see *Martin Linen*, 430 US at 571. The *Evans II* Court additionally distinguished *People v Szalma*, 487 Mich 708, 709, 712, 722, 725 (2010), in which the Court held that *Nix*, *supra*, barred retrial where the trial court entered a directed verdict of acquittal on the ground that insufficient evidence was presented to support a finding of "sexual purpose," which both parties had erroneously informed the trial court was an element of the charged offense, first-degree criminal sexual conduct. In *Evans II*, unlike in *Szalma*, "the prosecutor did not concede the underlying legal error at trial[]"; therefore, "*Szalma* [did] not control[.]" *Evans II*, *supra* at 18.

~~Where a trial court's determination that insufficient evidence exists to support a conviction is based on an erroneous legal analysis, the double jeopardy provisions of the United States and Michigan Constitutions preclude retrial. *People v Szalma*, 487 Mich 708, 709 (2010).[41] In *Szalma*, *supra* at 712, the prosecutor and defense counsel erroneously informed the trial court that for the defendant to be convicted of first-degree criminal sexual conduct (CSC-I), the sexual penetration at issue had to be for a sexual purpose. The defendant moved for a directed verdict of acquittal, and the trial court ruled that the defendant "could not be convicted of the offense as charged because no evidence existed in the record to prove that he penetrated the complainant's anus for the purpose of sexual gratification." *Id.* at 722. The Michigan Supreme Court held that the "acquittal on the merits of the charged offense [wa]s final under the holding of [*People v*] *Nix*[, 453 Mich 619 (1996)]. *Szalma*, *supra* at 722. "While it is true that the Legislature did not require any specific 'sexual purpose' as an element of CSC-I, 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*, *supra* at 725.~~

D. Standard of Review

In reviewing a trial court's decision on a motion for a directed verdict, an appellate court reviews the record de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecution, could have persuaded a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122 (2001).

"[P]ostponing a hearing on a defendant's motion for directed verdict is harmless error where the prosecutor presented sufficient evidence to convict the defendant at the close of his proofs." *People v Vincent*, 455 Mich 110, 114 n 1 (1997).

5.13 Jury Instructions

A. Generally

A defendant has a constitutional right to instructions that include: (1) the elements of the offense, *United States v Gaudin*, 515 US 506, 510 (1995); (2) any applicable defenses, *Mathews v United States*, 485

[41] ~~**Note:** Based on a similar set of facts, the Michigan Supreme Court in *Szalma* came to the opposite conclusion of the Court of Appeals in *People v Evans*, 288 Mich App 410 (2010). The *Szalma* Court relied on the majority in *People v Nix*, 453 Mich 619 (1996), while the *Evans* Court relied on the dissent in *Nix*, *supra*.~~

US 58, 63 (1988); (3) the requisite intent, *Morissette v United States*, 342 US 246, 274 (1952); and (4) a proper reasonable doubt instruction, *In re Winship*, 397 US 358, 363 (1970). Taken as a whole, the instructions must be accurate and fair. *Estelle v McGuire*, 502 US 62, 72 (1991).

The court is required to instruct the jury on the law applicable to the case. MCL 768.29. "The trial court must instruct the jury not only on all the elements of the charged offense, but also, upon request, on material issues, defenses, and theories that are supported by the evidence. *People v Anstey*, 476 Mich 436, 453 (2006). Instructions for which no supporting evidence exists should not be given. *People v Wess*, 235 Mich App 241, 243 (1999).

Use of the Standard Criminal Jury Instructions is not mandated. *People v Stinnett*, 163 Mich App 213, 215 (1987).

The court should be careful to characterize the instructions given as the court's instructions rather than identify them as instructions requested by a party. *People v Hunter*, 370 Mich 262, 268 (1963).

Failure to give an instruction is not grounds for setting aside the verdict unless it was requested by the defendant. MCL 768.29.

B. Preliminary Instructions

MCR 2.513(A) provides, in relevant part:

> "After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all . . . charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) [(requiring copies of model civil jury instructions be given to jury)] does not apply to such preliminary instructions."

C. Interim Instructions

"At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will

materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1).

The court must also instruct the jury on the applicable law, issues presented, and if requested under MCR 2.512(A)(2), a party's theory of the case. MCR 2.512(B)(2). These instructions may be given "[b]efore or after arguments, or at both times, as the court elects." *Id.*

D. Final Instructions

1. Required Instructions

The trial court is required to instruct the jury *after* closing arguments are made or waived. MCR 2.513(N)(1). However, the trial court has the discretion (after giving notice to the parties) to instruct the jury *before* the parties give their closing arguments. *Id*. If instructions are given before closing arguments, the trial court may give any appropriate further instructions afterwards. *Id*.

2. Providing Copies of Instructions

The court must provide the jury with a written copy of the final instructions to take into the jury room during deliberations. MCR 2.513(N)(3). If a juror requests additional copies, the court may provide them as necessary. *Id.* The court also has discretion to provide the jury with a copy of electronically recorded instructions." *Id.*

3. Clarifying or Amplifying Instructions

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4).

E. Content of Instructions

Each party has the opportunity to submit requested instructions to the court before closing argument. MCR 2.513(N)(1). A copy of the written instructions submitted to the court must be served on the other parties. *Id*. Before closing argument, the court must inform the parties of its proposed action on the requests. *Id*.

"It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to

instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan (Timothy)*, 462 Mich 47, 48 (2000) (the defendant's two felony-firearm convictions were reversed because the jury was not instructed on any elements of that offense).

The omission of an essential element of a criminal jury instruction is an error of constitutional magnitude. *People v Carines*, 460 Mich 750, 761 (1999). If the defendant preserves the issue at trial, and the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it was harmless beyond a reasonable doubt. *Id*. at 774. See also *Neder v United States*, 527 US 1, 10 (1999) (indicating that failure to instruct a jury on one of several elements may be subject to a harmless-error analysis). If the defendant fails to preserve the issue at trial, review on appeal is for plain error. *Carines*, *supra* at 764. Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *People v Kowalski*, 489 Mich 488, 506 (2011). Furthermore, where a defendant's attorney "clearly expresses satisfaction with a trial court's decision [regarding a jury instruction], counsel's action will be deemed to constitute a waiver[]" of the defendant's claim on appeal that a jury instruction was improper. *Kowalski*, *supra* at 503-504 ("by expressly and repeatedly approving the jury instructions on the record, [the] defendant waived any objection to the erroneous instructions[]").

Jury instructions, when read as a whole, must convey the correct concept of reasonable doubt. *Victor v Nebraska*, 511 US 1, 5, 7, 18, 22 (1994) (approving of instructions defining reasonable doubt as, among other things, "not a mere possible doubt," but one "depending on moral evidence," such that the jurors could not say they felt an abiding conviction, "to a moral certainty," of the truth of the charge; and as a doubt that will not permit an abiding conviction, "to a moral certainty," of the accused's guilt, and an "actual and substantial doubt" that is not excluded by the "strong probabilities of the case").

"The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, ___ Mich App ___, ___ (2012), citing *People v Wade (Michael)*, 283 Mich App 462, 464-468 (2009). Accordingly, where the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, the error's prejudicial effect was mitigated by the presence of the missing element on the verdict form; thus, no reversible error occurred. *Eisen*, *supra* at ___.

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F. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

"'Necessarily included' lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser." *People v Hendricks*, 446 Mich 435, 443 (1994). Either party may request instructions on lesser included offenses. *Hendricks*, *supra* at 442.

"[A] requested instruction on a necessarily included lesser offense is proper if [(1)] the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and [(2)] a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357 (2002).

MCL 768.32 expressly allows a jury to find a defendant guilty of an inferior degree of an offense. *Hendricks*, 446 Mich at 441-442.

"(1) Except as provided in subsection (2),[42] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." MCL 768.32.

"[T]he word 'inferior' in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." *People v Torres (Gavino) (On Remand)*, 222 Mich App 411, 419-420 (1997). "MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese (Clinton)*, 466 Mich 440, 446 (2002).

Where an offense is divided into degrees, MCL 768.32(1) permits finding a defendant guilty of a lesser degree of the charged offense if the lesser degree is an "inferior" offense as defined in *Cornell*, 466 Mich 335. In other words, the lesser degree of the offense must be a necessarily included lesser

[42] Subsection (2) concerns indictments for controlled substance offenses listed in MCL 333.7401(2)(a)*(i)* or MCL 333.7401(2)(a)*(ii)*, or MCL 333.7403(2)(a)*(i)* or MCL 333.7403(2)(a)*(ii)*.

offense and not a cognate lesser offense of the crime charged. *People v Nyx (Maurice)*, 479 Mich 112 (2007) (plurality opinion).

"[W]hen dealing with degreed offenses that can be committed by alternative methods[,]" "a more narrowly focused evaluation of the statutory elements at issue is necessary[.]" *People v Wilder*, 485 Mich 35, 44 (2010). "Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense." *Wilder*, *supra* at 44-45.

In *Wilder*, 485 Mich at 38, the defendant entered a residence without permission, displayed a weapon, and committed a larceny; he was charged with first-degree home invasion under MCL 750.110a(2) (requires commission/intent to commit a felony, larceny, or assault in the dwelling), and was convicted of third-degree home invasion under MCL 750.110a(4)(a) (requires commission/intent to commit a misdemeanor in the dwelling). The Court instructed that "in order to determine whether the specific elements used to convict [the] defendant of third-degree home invasion in this case constitute a necessarily included lesser offense of first-degree home invasion, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense." *Wilder*, *supra* at 45.

In *Wilder*, *supra* at 44, the Court of Appeals erred in concluding that third-degree home invasion in this case was not a necessarily included lesser offense of first-degree home invasion because "it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue." In reaching its conclusion, the Court of Appeals wrongly "reasoned that if there *could* be any instance in which the underlying misdemeanor is not subsumed within the predicate felony, then the entire crime is a cognate offense." *Id*. The Michigan Supreme Court concluded that in this case, third-degree home invasion under MCL 750.110a(4)(a) based on the commission of misdemeanor larceny is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2), because "every felony larceny necessarily includes within it a misdemeanor larceny." *Wilder*, *supra* at 46. The remaining

alternative elements on which a third-degree home invasion conviction can be based were not relevant to the analysis in this case. *Id*. at 44.

The Michigan Supreme Court held that it was error for the trial court to instruct the jury on the cognate lesser offense of felonious assault where, although the defendant was originally charged with felonious assault, the information was amended to instead charge assault with intent to commit murder. *People v Wheeler*, 480 Mich 965 (2007). Thus, where the defendant was no longer charged with felonious assault, instruction on that offense constituted plain error because felonious assault is a cognate lesser offense of assault with intent to commit murder. *Id*.

Third-degree criminal sexual conduct (CSC-III) is not a necessarily included offense of first-degree criminal sexual conduct (CSC-I) because it is possible to commit CSC-I without first committing CSC-III. *People v Apgar*, 264 Mich App 321, 326-327 (2004). In *Apgar*, *supra* at 324, the defendant was charged with two counts of CSC-I. After jury selection, the prosecution moved to amend the information to include a charge of CSC-III. *Id*. at 324-325. The trial court denied the motion, but instructed the jury on CSC-III. *Id*. at 325. The jury ultimately convicted the defendant of CSC-III. *Id*. While the trial court improperly instructed the jury on CSC-III because the defendant was not charged with CSC-III and CSC-III is a *cognate* lesser offense of CSC-I, the error did not require reversal because the defendant was provided adequate notice of the uncharged offense (CSC-III) when all elements of the offense were proved, without objection, at the defendant's preliminary examination and trial. *Id*. at 327-329.

See also *People v Walls*, 265 Mich App 642, 646 (2005), where the Court concluded that felonious assault (MCL 750.82) is a cognate lesser offense of assault with intent to rob while armed (MCL 750.89), and not a necessarily included lesser offense as the defendant argued. Whereas a conviction for felonious assault requires that the offender possess a dangerous weapon, a conviction for assault with intent to rob while armed may be based on the offender's possession of "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. Because conviction of felonious assault (lesser offense) requires possession of a dangerous weapon, and conviction of assault with intent to rob while armed (greater offense) does not require possession of a dangerous weapon, it is possible to commit the greater offense without first committing the lesser offense. *Walls*, *supra* at 646.

Where "the only difference [] between the possession with intent to deliver offenses is the amount of the illegal substance, it [is] not [] possible to commit the greater offense without committing the lesser offense." *People v McGhee (Larry A)*, 268 Mich App 600, 607 (2005). However, this does not necessarily mean that a trial court must give instructions for all possible amounts if the defendant so requests. *McGhee (Larry A)*, *supra* at 607-608. In *McGhee (Larry A)*, *supra* at 606, the defendant requested the trial court to instruct the jury on possession with intent to deliver 50 to 225 grams of cocaine. The trial court declined to give the defendant's requested instruction, and instead instructed the jury on possession with intent to deliver 225 to 650 grams of cocaine, and possession with intent to deliver more than 650 grams of cocaine. *Id*. at 608 n 2. "[A]n instruction on the lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *Id*. at 607. Because the "defendant did not argue or present evidence that he possessed a lesser amount[,]" "a rational view of the evidence d[id] not support defendant's claim that the amount of cocaine possessed was in dispute." *Id*. at 608.

Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown (Tommy)*, 267 Mich App 141, 150-151 (2005). In *Brown (Tommy)*, *supra* at 143-144, the defendant fired a gun toward several individuals, three of whom were injured, and one of whom suffered serious and permanent injuries. The defendant asserted that assault with intent to do great bodily harm less than murder was a cognate lesser offense of assault with intent to commit murder and objected to the trial court's decision to instruct the jury on the lesser charge. *Id*. at 144. A majority of the *Brown* (*Tommy)* panel concluded that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder. *Id*. at 150-151.

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. *Torres (Gavino)*, 222 Mich App at 416. If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is error requiring reversal. *Torres (Gavino)*, *supra* at 416. Even over the objection of counsel, a defendant can make a knowing waiver of the right to

instructions on lesser included offenses. *People v Jones (Ponce)*, 424 Mich 893 (1986).

Statutory involuntary manslaughter is not an inferior offense of second-degree murder because it is possible to commit second-degree murder without first committing involuntary manslaughter. *People v Smith (Randy)*, 478 Mich 64, 71 (2007). Because statutory involuntary manslaughter requires elements not required to commit second-degree murder (that the death resulted from the discharge of a firearm intentionally pointed at the victim), statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder, and denial of a defendant's request for such a jury instruction is proper. *Smith (Randy)*, *supra* at 71.

It is not error to refuse to instruct the jury on a lesser offense or attempted offense that is unsupported by the evidence. *People v Davis (Keith)*, 277 Mich App 676, 688-689 (2008), vacated in part on other grounds 482 Mich 978 (2008). In *Davis (Keith)*, *supra* at 677-678, codefendants Davis and Perez were convicted of assault with intent to rob while armed, stemming from an incident in which their efforts to rob a liquor store were thwarted. Perez argued on appeal that the trial court erred in failing to instruct the jury on the crime of attempted assault with intent to rob. *Id*. at 688. The Court of Appeals ruled that the trial court did not err because the evidence did not support a finding that Perez's efforts to assault the storeowner were prematurely thwarted. *Id*. at 688-689. Instead, the evidence only suggested that Perez completed the assault but was prevented from completing the robbery. *Id*. at 689. Attempted robbery is a necessarily included lesser offense of assault with intent to rob while armed; the only difference between the two offenses is the element of assault. *Id*. Even if the jury concluded that Perez's conduct did not constitute an assault, the assault element would fail, but the attempt to rob would remain. *Id*. Therefore, the trial court's refusal to instruct the jury on attempted assault with intent to rob was not error because the facts did not support the instruction. *Id*.

2. Cognate Lesser Included Offenses

"'Cognate' lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense." *Hendricks*, 446 Mich at 443.

In *Cornell*, 446 Mich at 357, the Michigan Supreme Court announced that the jury should not be instructed on cognate

lesser offenses. The Court held that except as provided in MCL 768.32(2) (regarding major controlled substance offenses), the jury must be instructed on necessarily included lesser offenses, if the difference between the greater and lesser offense is in dispute. *Cornell*, *supra* at 357.

3. Lesser Included Misdemeanors

The five conditions for a lesser included misdemeanor offense instruction are: (1) there must be a proper request for the instruction; (2) there must be an inherent relationship between the greater and lesser offenses (to be inherently related, the offenses must relate to the protection of the same interests, and by their general nature, proof of the lesser offense is necessarily presented in showing the greater offense); (3) a rational view of the evidence at trial must support the requested misdemeanor instruction; (4) if the prosecution is requesting the instruction on a lesser included offense, the defendant must have been given adequate notice; and (5) the instructions requested must not result in undue confusion or injustice. *People v Steele (Chester)*, 429 Mich 13, 19-22 (1987).

G. Questions About Instructions

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after giving its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.* If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." MCR 2.513(N). The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

H. Objections to the Instructions

If a party wishes to object to the giving or the failure to give a jury instruction, it must be done "on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations)[.]" MCR 2.512(C). Objections must be "stat[ed] specifically to the

matter to which the party objects and [must state] the grounds for the objection." *Id.* The court must give the objecting party the opportunity to make the objection without the jury present. *Id.*

I. Standard of Review

Claims of instructional error are generally reviewed de novo on appeal, but a trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82 (2007). The trial court's role is to clearly present the case to the jury and to instruct the jury on the applicable law. *Dobek*, *supra* at 82. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the issues to be tried to the jury. *Id*.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *McGhee (Larry A)*, 268 Mich App at 603. The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freeland*, 178 Mich App 761, 766 (1989). Even if somewhat imperfect, jury instructions are not erroneous if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McLaughlin*, 258 Mich App 635, 668 (2003). "The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, ___ Mich App ___, ___ (2012) (holding that, although the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, no reversible error occurred because the verdict form reflected the missing element).

"A trial judge, having properly applied the law to the facts in a criminal case in which intent is not involved, and where the facts are undisputed, may say to the jury that it is their duty to bring in a verdict of guilty, but he [or she] may not go further and peremptorily direct or compel such verdict. The responsibility for the verdict must be left with the jury. It must be their verdict, not the verdict of the judge." *People v Heikkala*, 226 Mich 332, 337 (1924). In *Heikkala*, *supra* at 333-334, the defendant was charged with manslaughter—killing another person by discharging a firearm pointed or aimed, intentionally but without malice, at the person. The trial court instructed the jury as follows:

> "It becomes my duty, gentlemen, to instruct you to render a verdict of guilty in this case. The court in a criminal case has no right to require a verdict of guilty from the jury—that is to say, has no right to take the verdict without the consent of the jury—but it is the

> duty of the court to permit the jury to render a verdict. However, gentlemen, I charge you that it is your duty in this case as jurors to render a verdict of guilty." *Heikkala*, 226 Mich at 334.

The jury found the defendant guilty. *Heikkala*, 226 Mich at 334. Even though the facts were not disputed, because the charged crime required the jury to find that the defendant intentionally pointed or aimed a firearm, the trial court erred in instructing the jury to render a guilty verdict. *Heikkala*, *supra* at 337. If intent were not involved and the facts were undisputed, the last two sentences of the trial court's instruction would not be objectionable, but the first sentence would be objectionable as peremptorily instructing a guilty verdict. *Id*. at 337-338. The Michigan Supreme Court reversed the defendant's conviction and granted a new trial, noting that an instruction regarding the presumption of innocence, if requested, should have been given. *Id*. at 338.

Failure to instruct the jury on the defense of accident is not subject to automatic reversal. *People v Hawthorne*, 474 Mich 174, 181 (2006). When a trial judge refuses a defendant's request to deliver an instruction on the defense of accident, a verdict is reversible if the defendant "establishe[s] that the alleged error undermined the reliability of the verdict." *Hawthorne*, *supra* at 176.

To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates. *People v Gonzalez*, 256 Mich App 212, 225 (2003). Failure to make a timely objection to a jury instruction constitutes forfeiture and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *Kowalski*, 489 Mich at 505-506; *Carines*, 460 Mich at 763. In contrast, if a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter (Vincent)*, 462 Mich 206, 215 (2000).

Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *Kowalski*, 489 Mich at 506. In *Kowalski*, *supra* at 502-503, the defendant established plain error with respect to the trial court's instruction on the elements of accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a, because the instruction entirely omitted the *actus reus* element of one of the two alternative theories allowing conviction under the statute. However, because the undisputed evidence "established beyond any reasonable doubt" that the defendant's conduct "constituted the *actus reus*

under either prong of the offense[,]" he "[could not] establish that the trial court's charge to the jury affected the outcome of the lower court proceedings[]" as required under *Carines*, 460 Mich at 770-771. *Kowalski*, *supra* at 507, 510.

5.14 Jury Matters During Deliberations

A. Separation of the Jury

It is within the trial court's discretion whether to permit jurors to separate after deliberations have started. *People v Nick*, 360 Mich 219, 225 (1960). MCL 768.16 provides that "[a]fter the jurors retire to consider their verdict, the court may permit the jurors to separate temporarily, whenever in his [or her] judgment such a separation is deemed proper[.]" Where the deliberations are lengthy, it is "quite proper to permit [the jury] to recess from time to time and go to their respective homes at night." *Nick*, *supra* at 225.

"Where it appears that a separation of jurors after submission of a criminal case to the jury was with authority of the court and not in violation of a statute or rule, or in some instances, where the separation was of such temporary or trivial nature as not to reasonably suggest the likelihood of prejudice, the defendant generally has the burden of proving reversible harm. In other words, to meet the burden of showing an abuse of discretion in a trial court's denial of a motion to sequester a jury during deliberations, a defendant must show more than the mere existence of circumstances capable of prejudicing the jury; he must demonstrate a nexus between the events or circumstances and juror taint." 75B Am Jur 2d Trial § 1291.

"Where a separation of a jury during deliberations in a criminal case is unauthorized, as being, for instance, in violation of a statute, rule, or order of the court, or if such separation occurs under circumstances which might expose the jurors to improper influences, a presumption of prejudice is created and the burden is placed upon the prosecution to show that no injury resulted. This rule has been supported by reasoning that admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations, and that the use of juror affidavits to prove a probability of prejudice is of dubious value because a juror cannot swear to being prejudiced by influences of which he [or she] is unaware." 75B Am Jur 2d Trial § 1291.

"Where a presumption of prejudice or injury [] arise[s] from a separation of the jurors after submission, the presumption may be

rebutted by showing that the jurors were not subjected to any outside influence of any kind during the separation." 75B Am Jur 2d Trial § 1291.

B. Communication with the Jury

There are three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142-144 (1990). These categories are discussed below. Ex parte communication with a deliberating jury is discouraged. *France*, *supra* at 161. Consistent with MCR 2.513(B), a court must ensure that all case-related communications between the court and the jury are made part of the record.

1. Substantive

"Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice." *France*, 436 Mich at 143.

- An example of a substantive communication is where the jury asks the trial court for a further definition of a particular crime, and the trial court provides the jury with a typewritten definition of that crime. *France*, 436 Mich at 144, 146 n 9.

2. Administrative

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *France*, 436 Mich at 143.

- An example of an administrative communication is where the jury asks the trial court for an exhibit or police report, and the trial court responds that because those items were not received in evidence, they are unavailable to the jury. *France*, 436 Mich at 145-146. See also *Bourne*

v Curtin, 666 F3d 411, 412-414 (CA 6, 2012) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable[]").

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France*, 436 Mich at 144.

4. Committee Tips on Making a Written Response to a Written Jury Question

- Provide jury with envelopes and paper for questions;
- Meet with attorneys to see if an agreement can be reached on a response;
- Have attorneys review the written response;
- When next on the record, describe the question, agreement with counsel, and the response;
- Always obtain consent of counsel, on the record, for written, substantive communications with the jury.

C. Materials in Jury Room

The court *must* allow the jurors to take their notes (if they were permitted to take notes)[43] and final jury instructions[44] into the jury room when retiring to deliberate. MCR 2.513(O); see also MCR 2.513(H). The court *may* allow the jurors to take the reference

document (if prepared under MCR 2.513[E]) and any exhibits or writings admitted into evidence into the jury room when retiring to deliberate. MCR 2.513(O).A trial court may not provide the jury with evidence that has not been admitted. *People v Davis (John)*, 216 Mich App 47, 57 (1996). "'[I]t is perfectly plain that the jury room must be kept free of evidence not received during trial, and that its presence, if prejudicial, will vitiate the verdict.'" *People v Keeth*, 63 Mich App 589, 593 (1975), quoting *Dallago v United States*, 427 F2d 546, 553 (1969). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *People v Budzyn*, 456 Mich 77, 88 (1997).

"When a jury is exposed to extraneous evidence not properly admitted during trial, prompt action by the trial court may render the error harmless. If the extraneous evidence is removed from the jury immediately upon its discovery, the trial court cautions the jury that they cannot consider the extraneous evidence and the jury is instructed to start their deliberations over without consideration of the extraneous evidence, any error arising from the improper submission of evidence to the jury may be purged from the jury's verdict." *People v Sampson,* unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket Nos. 239329, 239330).[45]

In *Sampson,* unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003, (Docket Nos. 239329, 239330), *supra*, the defendant appealed his convictions arising from two robberies that he "claim[ed] to have committed at the behest of two unknown men who chained a remote-controlled bomb to his chest." The Court of Appeals reversed the defendant's convictions and remanded the case for a new trial "[b]ecause the jury was inadvertently permitted to see a portion of [the defendant's] police statement in which he apparently admitted that the bomb was not real, thus prejudicing his duress defense." *Id*. The Court specifically noted that "neither the trial court nor the prosecution made any effort to purge the jury deliberations of this error through the removal of the objectionable exhibit, the use of cautionary instructions, and further jury deliberations." *Id*.

To establish that the jury's exposure to the extraneous evidence was error requiring reversal, a defendant must prove that the jury was

[43] See Section 5.9(A) for information on jury note taking.

[44] See Section 5.13(A)(2) for information on providing copies of final jury instructions to the jurors.

[45] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

exposed to extraneous influences, and that the extraneous influences created a real and substantial possibility of affecting the jury's verdict (i.e., that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict). *Budzyn*, 456 Mich at 88-89. If the defendant establishes his or her initial burden, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt, by proving that the extraneous evidence was duplicative of evidence produced at trial, or that the evidence of guilt was overwhelming. *Budzyn*, *supra* at 89-90.

The jury's use of a dictionary to define a relevant legal term is error, but is not per se prejudicial. *People v Messenger*, 221 Mich App 171, 175-177 (1997) (jury's use of dictionary definition of "premeditation" did not constitute prejudicial error, "because the trial court's instructions regarding premeditation were substantively identical to the dictionary definition").

A collective reenactment by the jury with a gun as to where the victim was likely sitting and where the gun should have fallen was not a sufficient basis for a new trial. *People v Fletcher*, 260 Mich App 531, 541-544 (2004). The Court of Appeals distinguished this conduct from a reenactment or experiment outside of the jury room by a juror or group of jurors.

D. Requests to Review Testimony or Evidence

If, after retiring to deliberate, the jury requests to review any testimony or evidence that has not been allowed into the jury room under MCR 2.513(O), "the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." MCR 2.513(P).

If a court decides to permit the jury to review requested testimony or evidence, it may "make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration." MCR 2.513(P).

If a court decides not to permit the jury to review requested testimony or evidence, it may order the jury to continue deliberating, "as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 2.513(P).

It may not constitute an abuse of discretion for a trial court to deny a jury's request for a copy of the entire transcript after deliberating for only a short time. *People v Holmes*, 482 Mich 1105 (2008). Where "the

jury requested the entire transcript and did not request 'a review of certain testimony or evidence,' the trial court did not violate [former] MCR 6.414(J)[46]." *Holmes, supra* at 1105. See also *People v McDonald (Deandre)*, 293 Mich App 292, 297 (2011) (trial court did not violate former MCR 6.414(J) or deprive the defendant of due process when it denied jury's request, made one hour into deliberations, to review certain testimony; although "[i]t might have been better practice to have told the jury explicitly that if they continued to feel a need for a transcript in the future, they could make another request[,]" the trial court "did not foreclose the possibility of the jury obtaining transcripts in the future"); see also *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable[]").

E. Requests to Clarify Instructions

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after giving its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.* If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." *Id.* The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

Additionally, "[w]hen it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4).

[46] Effective September 1, 2011, ADM 2005-19 deleted MCR 6.414 and created MCR 2.513(P), which contains language similar to former MCR 6.414(J).

"'There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all the instructions previously given. The trial judge need only give those instructions specifically asked.'" *People v Katt*, 248 Mich App 282, 311 (2001), quoting *People v Darwall*, 82 Mich App 652, 663 (1978). If a juror exhibits confusion, the trial court is obligated to provide guidance by stating the relevant legal criteria in an understandable manner. *People v Martin (Walter)*, 392 Mich 553, 558 (1974). The decision to provide additional instructions at the request of the jury is within the discretion of the trial court. *Martin (Walter)*, *supra* at 558. If there is confusion about the verdict and the jury has not been discharged, the court has the authority to reinstruct the jury and have it clarify, after further deliberation, its intended verdict. *People v Henry (Rahiem)*, 248 Mich App 313, 320 n 20 (2001).

F. Hung Jury

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). However, "[t]he court may discharge a jury from the action . . . whenever the jurors have deliberated and it appears that they cannot agree." MCR 2.514(C)(4). If the jury is discharged, the court may order a new trial before a new jury. MCR 2.514(C).

Principle 16 of the Principles for Juries and Jury Trials, Commission on the American Jury Project,[47] states that "deliberating jurors should be offered assistance when an apparent impasse is reported":

> "(A) If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how the court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.
>
> "(B) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an

[47] http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

> unreasonable length of time or for unreasonable intervals.
>
> "(C) If there is no reasonable probability of agreement, the jury may be discharged."

"The [United States] Supreme Court has long maintained that a trial judge may properly encourage a deadlocked jury to continue deliberating by issuing a supplemental instruction that urges the jury to reach a unanimous verdict." *Hardaway v Robinson*, 637 F3d 640, 643 (CA 6, 2011), citing *Allen v United States*, 164 US 492, 501-502 (1896). "These so-called *Allen* charges serve the important purpose of avoiding the social costs of a retrial, including the time, expense, and potential loss of evidence that a new trial would entail." *Hardaway, supra* at 643.

If a jury appears to be deadlocked, read CJI2d 3.12[48] to see if that prompts a verdict:

> "(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
>
> "(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
>
> "(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
>
> "(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.
>
> "(5) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

[48] CJI2d 3.12 is a derivation of the American Bar Association Standard 5.4, which was adopted by the Michigan Supreme Court in *People v Sullivan (Charles)*, 392 Mich 324, 342 (1974).

> "(6) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement."

If it appears the jury is unable to reach a verdict after having been given CJI2d 3.12, the court should have the jury return and then question the foreperson on the record to determine whether it appears that it is impossible for the jury to reach a verdict. The trial court should not ask how the jury's voting stands. *People v Hickey*, 103 Mich App 350, 353 (1981).

"Trial judges are hereafter prohibited from asking any questions of jurors the answer to which might reasonably be expected to disclose the numerical division of the jury. Hence, it is strongly urged upon the trial bench that this be explained before any necessary and proper questioning regarding the state of the jury's deliberations begins." *People v Luther*, 53 Mich App 648, 650-651 (1974). However, the court may direct the jury to return "to the jury room, and direct the foreman to poll the jury in private and then advise the court only that a majority of the jury believes a verdict can be reached or a majority does not." *Luther*, *supra* at 651.

Committee Tip:

Possible questions include:

- *Is the jury deadlocked?*
- *How long has it been deadlocked?*
- *Has there been any change in the voting one way or the other?*
- *Do the jurors appear to have fundamental differences that cannot be resolved?*
- *Also, ask counsel if they wish to inquire of the foreperson.*

Generally, comments made to the jury by the trial court *before* delivering CJI2d 3.12 that do not represent a substantial departure from the instruction will not require reversal of a defendant's conviction. *People v Rouse (Rouse II)*, 477 Mich 1063 (2007). In *Rouse (John)*, the judge's extraneous comments included reference to the fact that if the jury was unable to reach a verdict, the defendant would have to be retried and all involved would be required to "go[] through this entire process again with another jury." *People v Rouse (Rouse I)*, 272 Mich App 665, 667 (2006). The Court of Appeals

concluded that the trial court's comments constituted a coercive supplemental instruction. *Rouse I*, *supra* at 672-673. In *Rouse II*, the Michigan Supreme Court reversed the Court of Appeals "for the reasons stated in the Court of Appeals dissenting opinion[.]" *Rouse II*, 477 Mich at 1063. In concluding that the trial court's comments did *not* represent a substantial departure from the standard instruction, the dissenting judge stated:

> "Before reading CJI2d 3.12 to the jury, the trial court advised the jury that if it did not reach a verdict, a new trial would be required. However, immediately thereafter, the trial court emphasized that no juror should change his or her honest beliefs simply for the sake of reaching a verdict. The trial court then read CJI2d 3.12, which also cautions that a juror should not relinquish his or her honest beliefs simply to reach a verdict. Contrary to defendant's assertion, the jury did not return its verdict shortly after hearing these instructions. Instead, the jury deliberated for approximately five more hours. During this time span, the jury responded to an inquiry from the trial court by indicating that it wished to continue deliberating.
>
> "The trial court's remarks did not appeal to the jury's sense of civic duty and did not suggest a failure of purpose. Nor did the trial court's remarks coerce the jurors by informing them that they were *required* to reach a verdict. Quite simply, the trial court's statement that another trial would be necessary if the jury could not reach a verdict did not suggest that the jury should take a different approach to its deliberations. Accordingly, the remarks did not constitute a substantial departure from the instruction mandated by [*People v Sullivan (Charles)*, 392 Mich 324, 341-342 (1974)]." *Rouse II*, *supra* at 676-677 (internal citations omitted).

The United States Court of Appeals for the Sixth Circuit has "generally upheld 'verdict-urging' charges, even when they contain flaws . . . and despite 'troubling' references to trial expense and effort[.]" *Hardaway v Robinson*, 637 F3d 640, 643 (CA 6, 2011). In *Hardaway*, *supra* at 641, 643, the trial court instructed the deadlocked jury that it would "deliberate for as long as necessary . . . to reach agreement." On collateral review, the trial court denied the defendant's jury coercion claim, stating "'[i]n this case, the overall effect of the comment was not coercive, rather it stressed the need of the jurors to seriously engage in deliberations.'" *Id*. at 642. On habeas review, the Sixth Circuit held that "the Michigan trial court did not unreasonably apply federal law in rejecting [the

defendant's] [jury coercion] charge claim on post-conviction review[.]" *Id*. at 643. But see *Jenkins v United States*, 380 US 445, 446 (1965), where the United States Supreme Court ordered a new trial after the trial judge told a deadlocked jury "[y]ou have got to reach a decision in this case" because "[u]pon review of the record . . . in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Jenkins*, *supra* at 446.

Committee Tip:

If the trial court decides to declare a mistrial, explain to the jury on the record that the declaration of a mistrial is discretionary with the court, and that the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.

G. Multiple Charges—Verdict on One or More Counts But Not All

Where a defendant is charged with multiple counts and the jury reaches a unanimous verdict on any of the counts, the court may accept the jury's verdict with regard to that count or those counts, even if the jury is unable to reach a unanimous verdict on all counts charged against the defendant. Specifically, MCR 6.420(C) states:

> "If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts."

H. Standard of Review

A trial court's declaration of a mistrial on the basis that the jury is unable to reach a unanimous verdict is reviewed for an abuse of discretion. *People v Lett*, 466 Mich 206, 208 (2002), aff'd sub nom *Renico v Lett*, 559 US ___ (2010).

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352 (1989).

A trial court's decisions with regard to jury communication and questions are reviewed for an abuse of discretion. *Fetterley,* 229 Mich App at 520.

5.15 Verdict

A. Unanimity Requirement

"A jury verdict must be unanimous." MCR 6.410(B). "This mandate implicitly prohibits a stipulation or waiver to a less than unanimous verdict." 1989 Staff Comment to MCR 6.410.

When the prosecution "offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Cooks*, 446 Mich 503, 530 (1994). "When neither of these factors is present . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his [or her] right to a unanimous verdict." *Cooks*, *supra* at 530.

In *Cooks*, 446 Mich at 505, the defendant was charged with CSC-I, but the victim's testimony referenced three instances of sexual penetration. The trial court provided the jury with a general instruction regarding jury unanimity, and the defendant was convicted of CSC-II. *Id*. The Michigan Supreme Court held that the trial court's general unanimity instruction was not error "[b]ecause materially identical evidence was offered with respect to each of the alleged acts of penetration and there [wa]s no reason to believe the jury was confused or disagreed about the basis of [the] defendant's guilt." *Id*. at 505-506. However, the Court cautioned that "in most cases, the evidence will be materially distinct regarding one of the multiple acts allegedly committed by the defendant." *Id*. at 530 n 34.

"The alternate theories of a defendant's state of mind relate to a single element of a single offense." *People v Johnson (William)*, 187 Mich App 621, 629 (1991). "When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *Johnson (William)*, *supra* at 629-630. For example, the mental state of malice necessary to support a conviction for second-degree murder may be established in three ways: (1) by proof that the defendant acted with an intent to kill; (2) by proof that the defendant acted with an intent to inflict great bodily harm; or (3) by proof that the defendant acted with wanton

and willful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. *Id*. at 629. Where the trial court instructed the jurors that it was unnecessary that they unanimously agree on *which* of those three alternative states of mind the defendant held so long as they unanimously agreed that the defendant acted with *one* of those states of mind, the defendant's right to a unanimous verdict was not violated. *Id*. at 629-630.

Likewise, the jury does not have to unanimously decide whether the defendant was the principal or an aider and abettor where both theories are supported by the evidence. *People v Smielewski (Timothy Richard)*, 235 Mich App 196, 201-203 (1999).

Likewise, because bodily injury, mental anguish, and the other conditions listed in MCL 750.520a(j) are merely different ways of defining the single element of personal injury, they should not be construed to represent alternative theories upon which jury unanimity is required. *People v Acevedo*, 217 Mich App 393, 397 (1996). Accordingly, if the evidence of any one of the listed definitions is sufficient, then the element of personal injury has been proven. *Acevedo*, *supra* at 397.

B. Inconsistent Verdicts

"Consistency in [a jury's] verdict is not necessary." *Dunn v United States*, 284 US 390, 393 (1932). "Each count in an indictment is regarded as if it was a separate indictment." *Dunn*, *supra* at 393. "[A]n apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts [does not] affect[] the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment." *Yeager v United States*, 557 US 110, 112 (2009).

"Juries are not held to any rules of logic nor are they required to explain their decisions." *People v Vaughn (Marcus)*, 409 Mich 463, 466 (1980). "The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power." *Vaughn (Marcus)*, *supra* at 466. "An element of this power is the jury's capacity for leniency." *Id*. Conversely, "a trial judge sitting as the trier of fact may not enter an inconsistent verdict." *People v Walker (Alonzo)*, 461 Mich 908 (1999).

C. Several Counts

A verdict must be returned on each count if there is more than one count; a general verdict of guilty cannot be received. *People v Huffman*, 315 Mich 134, 137-139 (1946).

MCR 6.420(C) allows a jury deadlocked on one or more of multiple charges to issue verdicts on those counts on which it can reach a unanimous verdict.

A verdict form is defective if it does not give the jury the opportunity to return a general verdict of not guilty. *People v Wade (Michael)*, 283 Mich App 462, 468 (2009) (defendant's conviction was reversed where the verdict form only gave the jury the options of finding the defendant guilty or not guilty of first-degree murder, guilty of second-degree murder, or guilty of involuntary manslaughter; the jury was not given the opportunity to find the defendant generally not guilty, or not guilty of the lesser included offenses).

D. Use of Special Verdicts

"The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." MCR 2.515(A). The form of a special verdict must be settled on the record or in writing, "in advance of argument and in the absence of the jury[.]" *Id.* "The court may submit to the jury:

> "(1) written questions that may be answered categorically and briefly;
>
> "(2) written forms of the several special findings that might properly be made under the pleadings or evidence; or
>
> "(3) the issues by another method, and require the written findings it deems most appropriate." *Id.*

The court must adequately instruct the jury on the matter submitted so that the jury is able to make findings on each issue. *Id.*

The court must enter judgment in accordance with the special verdict. MCR 2.515(B).

Where the court omits from the special verdict form an issue of fact that was raised in the pleadings or the evidence, a party must demand its submission before the jury retires, or else the party is deemed to have waived the right to a jury trial on that issue. MCR 2.515(C). "The court may make a finding as to an issue omitted without a demand; or, if the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

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E. Polling

After returning its verdict and before the jury is discharged,

> "the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury." MCR 6.420(D).
>
> "The option . . . permitting the court to 'discontinue the poll and order the jury to retire for further deliberations' requires the court to cut off the polling as soon as disagreement is disclosed. The court should not allow the polling to continue because of its potentially coercive effect. Nor, for the same reason, should the court question the jury to determine where the jury stands numerically. See *People v Wilson (Albert)*, 390 Mich 689[, 692] (1973)." 1989 Staff Comment to MCR 6.420.

F. Reconvening Jury

A jury verdict in a criminal case becomes final when it is announced in open court, assented to by the jury, and accepted by the trial court. *People v Henry (Rahiem)*, 248 Mich App 313, 319-320 n 19 (2001); MCR 6.420(A). But a jury may change the form and substance of its verdict to coincide with its intent if the jury has not yet been discharged. *Henry (Rahiem)*, *supra* at 320 n 20. Before being discharged, a jury may return to deliberations after announcing a verdict and polling discloses lack of unanimity. MCR 6.420(D). The jury cannot be reconvened after being discharged in a criminal case. *Henry (Rahiem)*, *supra* at 320.

Committee Tip:

Because the jury cannot be reconvened after being discharged, trial judges should individually poll jurors in every case, even if the attorneys do not request it.

G. Meeting With Jury After Verdict

A judge may meet with the jury informally after the jury returns its verdict. The judge should be careful not to commend or condemn the jury's verdict. Principles for Juries and Jury Trials, Commission on the American Jury Project, Principle 18(B)[49]. A postverdict discussion with the jury is an opportunity to address concerns about confidentiality, contacts from parties and counsel, media contacts, and security concerns. Jurors may also be curious about the rules of law and evidence that apply to criminal proceedings and possible sentencing if the jury returned a guilty verdict. There are potential pitfalls, such as where information may surface that could trigger a motion for a new trial, or where the jurors ascertain information that would impact their return for further service.

5.16 Mistrial

A. Determination

A motion for mistrial raises the issue of double jeopardy. The federal and state constitutions prohibit twice placing an individual in jeopardy of life or limb for the same offense. US Const, Am V; Const 1963, art 1, § 15. The declaration of a mistrial is an extreme remedy that should only be granted once all other options are explored and exhausted. Unless the defendant has consented, a mistrial should only be granted for "manifest necessity." *People v Hicks (Tyrone)*, 447 Mich 819, 828-829 (1994). The defendant's consent to a mistrial cannot be implied and must be expressly obtained on the record. *People v Anglin*, 6 Mich App 666, 671-675 (1967). A mistrial granted on the defendant's motion or with his consent waives double jeopardy protections unless the motion or consent is prompted by prosecutorial conduct intended to goad the defendant into the mistrial request. *Oregon v Kennedy*, 456 US 667, 669, 675-676, 679 (1982) (where the prosecutor did not intend to provoke a mistrial when he asked a prosecution witness if the reason the witness had not done business with the defendant was because the defendant was "a crook," the double jeopardy clause did not bar retrial after the defendant successfully moved for a mistrial).

[49] http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

B. Attachment of Jeopardy

"Jeopardy attaches 'once the defendant is put to trial before the trier of fact, whether [it] be a jury or a judge.'" *Hicks (Tyrone)*, 447 Mich at 826, quoting *United States v Jorn*, 400 US 470, 479 (1971). When a defendant is tried by a jury, jeopardy attaches when the jury is impaneled and sworn. *Hicks (Tyrone)*, *supra* at 827 n 13. When a defendant is tried by a judge, jeopardy attaches when the judge begins to hear the evidence of the case. *Id*. at 826-827.

C. Permissible Retrials

A defendant may be retried when the first trial is interrupted and the defendant agreed to the interruption or when manifest necessity results in a mistrial being declared. *People v Mehall*, 454 Mich 1, 4 (1997). A defendant may be retried, and there is no violation of the protection against double jeopardy, when the defendant either moves for or consents to the declaration of a mistrial. *Hicks (Tyrone)*, 447 Mich at 827. A manifest necessity may be declared when a jury is unable to reach a unanimous verdict. *Mehall*, *supra* at 4-5. Retrial on the same offense is permissible in this situation because the sufficiency of the evidence had not been evaluated. *Id*. at 5.

Retrial after a mistrial due to a deadlocked jury does not violate the Double Jeopardy Clause. *Renico v Lett*, 559 US ___, ___ (2010). "A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.'" *Renico*, *supra* at ___, quoting *Arizona v Washington*, 434 US 497, 509 (1978). In *Renico*, *supra* at ___, quoting *Washington*, *supra* at 517, the United States Supreme Court reiterated its holding "that a trial judge declaring a mistrial is not required to make explicit findings of "'"manifest necessity"'" nor to 'articulate on the record all the factors which informed the deliberate exercise of his [or her] discretion.'" The United States Supreme Court has "never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Renico*, *supra* at ___. In fact, the United States Supreme Court has never "'overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met.'" *Id*. at ___, quoting *Winston v Moore*, 452 US 944, 947 (1981).

A defendant's protection against double jeopardy was not violated and the defendant may be retried when the defendant was not implicitly acquitted of the charge at issue in the second prosecution.

People v Garcia, 448 Mich 442, 449 (1995). A defendant is implicitly acquitted of the greater charged offense when the fact-finder is given the opportunity to choose to convict the defendant of a lesser included offense and either convicts or acquits the defendant of the lesser offense. *Garcia*, *supra* at 450-451.

D. Example—Polygraph Test Results

Reference to a polygraph test is normally inadmissible before a jury. *People v Nash*, 244 Mich App 93, 97 (2000). However, an inadvertent, unsolicited mention by a witness that a polygraph was administered does not necessarily require a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 514 (1999). Factors to be considered in determining whether the mention of a polygraph was grounds for a mistrial include:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *People v Rocha*, 110 Mich App 1, 9 (1981).

1. Mention of Polygraph Required Reversal

Where the prosecutor mentioned a polygraph examination of the defendant during a bench trial, the defendant's conviction was reversed and the case was remanded for a new trial, because the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to the defendant's case, despite the court's finding that it was not influenced by the information. *People v Smith (Kerry)*, 211 Mich App 233, 234-235 (1995).

In *People v Brocato*, 17 Mich App 277, 291-294 (1969), a prosecutor's repeated references to polygraph tests, after a warning by the court, were held improper and contemptuous. Due to the prosecutorial misconduct and numerous other trial errors, the case was reversed and remanded for a new trial. *Brocato*, *supra* at 305.

In *Nash*, 244 Mich App at 96, in response to the prosecutor's question, "[s]o, then, why should we believe you?" a key prosecution witness, who was the only witness who directly implicated the defendant during a jury trial for murder and

felony firearm, stated, "That's up to you. I took a lie detector test." The Court of Appeals, after analyzing the foregoing factors, concluded that the reference to a lie detector test seriously affected the fairness of the trial and constituted reversible error:

> "Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against defendant, gave a responsive answer to the prosecutor's question that was posed with the intent of bolstering the witness'[s] credibility and was later repeated before the jury during deliberations, we believe that prejudice to defendant occurred." *Nash*, 244 Mich App at 101.

2. Mention of Polygraph Did Not Require Reversal

In *People v Triplett*, 163 Mich App 339, 343 (1987), remanded on other grounds 432 Mich 568 (1989), a witness's reference to a "specialized interview" was not considered improper or inadmissible because there was no specific reference to the fact that the defendant had failed a polygraph examination.

In *People v Tyrer*, 19 Mich App 48, 50 (1969), a police officer's comment that the defendant said he would take a polygraph examination if his attorney advised him to do so was not prejudicial when the defendant was aware of the possible error and chose to waive his objection and proceed with the trial.

In *People v Kosters*, 175 Mich App 748, 755 (1989), a prosecution witness's cross-examination testimony in a CSC jury trial that the defendant had taken a polygraph in conjunction with a previous sexual abuse charge was "brief and inadvertent and . . . therefore harmless."

In *People v Kahley*, 277 Mich App 182, 183-184 (2007), a police officer's testimony that the defendant refused to take a polygraph examination did not require reversal because the officer's reference was singular and brief; the prosecutor did not argue that the defendant's failure to take a polygraph examination was evidence of the defendant's guilt; the defendant himself testified that he asked to take a polygraph test but was never given one; and the defendant confessed to the crime.

E. Juror Conduct

Possible issues that may warrant a mistrial:

- Juror engages in premature discussion or forms opinion before deliberation (*People v Bergin*, 16 Mich App 443, 448 (1969) (no abuse of discretion in trial court's denial of the defendant's motion for mistrial where trial court investigated the matter and two jurors denied discussing the defendant's guilt during a trial lunch break, and a third juror confirmed as much, contrary to the defendant's mother's claim that she overheard such a conversation));
- Juror has preconceived notion (*People v Bigge*, 297 Mich 58, 61, 64-67 (1941) (no abuse of discretion in declaring a mistrial where the defendant engaged in a private conversation with a juror during a break));
- Juror not paying attention or sleeping;
- Juror fails to return;
- Juror sick (MCL 768.17); or
- Juror has outside contact.

MRE 606(b)[50] provides:

> "Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

[50] Effective January 1, 2012, ADM 2010-12 amended MRE 606 ("Competency of Juror as Witness[]") by adding subsection (b) to address the permissible scope of a juror's testimony upon inquiry into the validity of a verdict or an indictment.

F. Standard of Review

The trial court's decision on a motion for mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194 (2005). A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his or her ability to get a fair trial. *Id*.

5.17 New Trial

A. Generally

1. Jury Trial

"A motion for a new trial may be filed before the filing of a timely claim of appeal." MCR 6.431(A)(1). "If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence." MCR 6.431(A)(3). (See MCR 7.204(A)(2), MCR (A), and MCR (F) for further detail concerning appellate time requirements.) If a claim of appeal has been filed, a motion for a new trial must be filed as required by MCR 7.208(B)(1) (no later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(*iii*)) or MCR 7.211(C)(1) (motions to remand). MCR 6.431(A)(2). The court may order a new trial on any ground that would support appellate reversal of the conviction or because the court believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). The court must make a record of its reasons for granting or denying the motion. *Id*. The court may state the reasons on the record or state them in a written ruling made part of the record. *Id*. See also MCL 769.26 and MCL 770.1.

If an appeal has been filed, an expedited hearing is required within 28 days of filing, with the transcript to be filed within 28 days of the hearing. MCR 7.208(B)(3). The trial court can adjourn the hearing to secure evidence or for other good cause. *Id*.

A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627 (1998).

MCL 769.26 states:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

MCL 769.26 embodies what is commonly referred to as Michigan's "harmless error rule." *People v Lukity*, 460 Mich 484, 491 (1999). MCL 769.26 not only "creates a presumption that preserved, nonconstitutional error is harmless," it also demands that the defendant (rather than the prosecution) bear the burden of demonstrating that it is "more probable than not" that the error complained of undermined the reliability of the verdict or resulted in a miscarriage of justice. *Lukity, supra* at 493-494.

"In contrast, [MCL 769.]26 does not apply to preserved, constitutional error." *Lukity*, 460 Mich at 495 n 3. For preserved, constitutional errors, the reviewing court must first determine whether the error is a structural defect that defies harmless error analysis (such as total deprivation of the right to counsel or denial of the right to self-representation). *People v Anderson (James) (After Remand)*, 446 Mich 392, 404-405 (1994). If any of these types of errors occur, automatic reversal is required. *Anderson (James)*, *supra* at 405. If the error is instead a trial error that occurred during the presentation of the case to the jury, it is subject to harmless error analysis, and the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *Id*. at 405-406.

Regarding both unpreserved constitutional and nonconstitutional errors, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-764, 774 (1999). "Reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, *supra* at 763-764 (internal quotations omitted).

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2. Bench Trial

MCR 6.431(C) addresses a motion for new trial after a bench trial. "[O]n granting a new trial and with the defendant's consent, [the court may] vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment." *Id*.

B. Grounds for a New Trial

1. Jury Misconduct

A juror's misconduct does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103-104 (1995) (trial court did not abuse its discretion when it denied the defendant's motion for a new trial where, after trial, two jurors said they learned of the defendant's prior sexual assault conviction but questioned whether the information was true and said that it did not affect the impartiality of their verdicts). See also *People v Jackson (Andre)*, 292 Mich App 583, 592-593 (2011) (trial court did not abuse its discretion in denying defendant's request for a new trial where a juror was dismissed after disclosing she was "too stressed and overwhelmed to continue[,]" and the trial court did not question the remaining jurors, but questioned the dismissed juror and found that "the remaining jurors had [not] been exposed to improper influences [and] their ability to render a fair and impartial verdict had [not] been compromised"). To obtain a new trial based on juror misconduct, the defendant must show that the misconduct "affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 557 (1998). Also, "[t]he fact that the jury violated the express instructions of the court is not in and of itself a ground for reversal. Prejudice is not assumed; it must be shown." *People v Rohrer*, 174 Mich App 732, 739 (1989).

A new trial can also be granted based on a juror's failure to disclose information during voir dire. See *People v Hannum*, 362 Mich 660, 666 (1961) (defendant entitled to a new trial where a juror did not disclose that he was a township police officer and special deputy sheriff); and *People v DeHaven*, 321 Mich 327, 329, 334-335 (1948) (trial court erroneously denied the defendant's motion for a new trial where jurors, in effect, falsely denied they or any relative had been involved in a similar case). But see *People v Miller (Michael)*, 482 Mich 540, 542-543, 561 (2008) (denial of motion for new trial proper exercise of discretion where juror testified at a posttrial evidentiary hearing that he concealed the fact that he was a

convicted felon so that he could serve on the jury, that he had attempted to be fair during the trial, and that he had not tried to improperly persuade the jury); and *People v Crear*, 242 Mich App 158, 167 (2000) (denial of motion for new trial proper exercise of discretion where juror failed to reveal during voir dire that, two weeks before trial, she was present when the prosecutor spoke to her college class and mentioned the case).

"The rule is well established that jurors may not impeach [i.e., cast doubt on] their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict." *People v Pizzino*, 313 Mich 97, 105 (1945). "Once a jury has been polled and discharged, oral testimony or affidavits by its members or outside parties may only be received on 'extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.'" *People v Riemersma*, 104 Mich App 773, 785 (1981), quoting *Hoffman v Monroe Pub Schools*, 96 Mich App 256, 261 (1980). To establish that an extrinsic influence is error requiring reversal, the defendant must prove: (1) that the jury was exposed to an extraneous influence, and (2) that the extraneous influence created a real and substantial possibility that the jury's verdict was affected. *People v Budzyn*, 456 Mich 77, 88-89 (1997).

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial. *Remmer v United States*, 347 US 227, 229 (1954). The presumption is not conclusive, but the burden rests heavily on the government to establish that such contact with the juror was harmless to the defendant. *Id*.

The remedy for juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Smith (Harold) v Phillips (William)*, 455 US 209, 215 (1982).

2. Misconduct Involving the Parties, Witnesses, or Attorneys

Witnesses may give testimony that the court concludes should be struck. The usual remedy is a cautionary instruction. *People v Droste*, 160 Mich 66, 77-78 (1910). See also *People v Stinson*, 113 Mich App 719, 727 (1982) ("an unresponsive, volunteered answer [given by a police officer] to a proper question [posed by defense counsel] is not cause for granting a mistrial"; "where the trial court sustains an objection to an answer and instructs the jury to disregard the answer, no error occurs"),

and *People v Von Everett*, 156 Mich App 615, 622 (1986) (where a police officer's reference to the defendant's "mug shot" was not inherently prejudicial or intentionally injected into the proceedings, and a lay witness's testimony that he had seen the defendant while the defendant was on "parole" was an unresponsive, volunteered answer to a proper question, the trial court did not abuse its discretion in denying a mistrial). However, a different outcome may be warranted where the impermissible testimony was given by a police officer. *People v Holly*, 129 Mich App 405 (1983)[51]. In *Holly*, *supra* at 14-15, the Court of Appeals reviewed a police officer's nonresponsive and inadmissible answer on cross-examination and held:

> "[W]hen an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. Police witnesses have a special obligation not to venture into such forbidden areas. The police officer's original response was clearly nonresponsive. Being a police sergeant and the officer in charge of the case, he should have known better than to volunteer such information. Inadmissible evidence tying a defendant to other crimes is highly prejudicial."

To the extent that an attorney's remarks are prejudicial, they can be cured by the trial court's instructions that the jury must decide the case based on the evidence, and that the remarks of counsel are not evidence. *People v Thomas (Carl)*, 260 Mich App 450, 456 (2004).

A violation of the Fourteenth Amendment Due Process Clause of the United States Constitution occurs when a prosecutor in bad faith fails to preserve potentially exculpatory evidence. *Arizona v Youngblood*, 488 US 51, 57-58 (1988). Whether the prosecutor acted in bad faith is a question of law for the court, not the jury. *People v Cress*, 468 Mich 678, 690 n 4 (2003).

A conviction obtained through the knowing use of perjured testimony violates a defendant's Fourteenth Amendment due process rights, and will be reversed and a new trial ordered if the tainted evidence is material to the defendant's guilt or punishment. *People v Aceval*, 282 Mich App 379, 389 (2009). "To prove that the prosecutor's failure to correct false testimony violated due process rights, [the defendant] must demonstrate

[51] But see *Stinson*, 113 Mich App at 727.

that: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Rosencrantz v Lafler*, 568 F3d 577, 583-584 (CA 6, 2009). "[T]he crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial." *Id*. at 391. In *Aceval*, *supra* at 383-384, the prosecutor and trial judge acquiesced in the presentation of perjured testimony to protect the identity of a confidential informant. However, the defendant's first trial resulted in a hung jury and a mistrial, and the defendant ultimately pleaded guilty during his second trial. *Id*. at 394-385, 392. On appeal, the Court of Appeals held that "the complained-of misconduct did not prejudice [the] defendant because he received the remedy that was due him: a new trial." *Id*. at 393. According to the Court, "[a]lthough both the trial court's and the prosecutor's conduct was plainly reprehensible, the blameworthiness of either is not the critical factor, because the primary inquiry is the misconduct's effect on the trial." *Id*. at 392-393. Consequently, the Court declined to bar retrial based on the facts of the case, but noted that its decision "[wa]s not to suggest, however, that prosecutorial misconduct can never invoke the constitutional protection against double jeopardy." *Id*. at 391-392 n 5. The Court emphasized that the defendant was not convicted at the first trial and that a mistrial granted because of "manifest necessity" (in this case, the hung jury) does not generally violate a defendant's double jeopardy protection. *Id*. at 392, 392 n 6.

3. 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." *Cress*, 468 Mich at 692, quoting *People v Johnson (Johnnie)*, 451 Mich 115, 118 n 6 (1996).

"[W]hen a defendant knew or should have known that his [or her] codefendant could provide exculpatory testimony, but does 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." *People v Terrell*, 289 Mich App 553, 555 (2010). Although there may be cases in which a codefendant's post-

trial or post-conviction exculpatory statements may qualify as newly discovered evidence under MCR 6.431(B), where a defendant "knew or should have known that his [or her] codefendant could offer material testimony as to [the] defendant's role in the charged crime, his [or her] inability or unwillingness to procure that testimony before or during trial should not be redressed by granting him [or her] a new trial." *Terrell*, *supra* at 570.

When a third party's confession is the newly discovered evidence on which a defendant's new trial motion is based, the trial court should determine the veracity of the confession in light of established evidence. *Cress*, 468 Mich at 692. "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, *supra* at 692.

"The discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483 (1994).

The affidavit of a recanting witness may not be sufficient grounds for a new trial. *People v Dupree*, 128 Mich App 368, 370-371 (1983). In *Dupree*, *supra* at 370-371, a prosecution witness stated in an affidavit, and testified at a remand hearing, that he had perjured himself at the defendant's trial, and that he had not actually seen the defendant shoot the victim. The trial court denied the defendant's motion for a new trial on the basis of this evidence, noting that the witness had not been credible at trial, and that the witness's testimony had been cumulative and not essential to the case. *Id*. For these reasons, the trial court did not abuse its discretion in finding that the recanting witness's testimony did not render a different result probable on retrial. *Id*.

The trial court has discretion whether to grant a new trial on the basis of recanted testimony and due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witnesses and other trial witnesses. *People v Canter*, 197 Mich App 550, 560 (1992). Where newly discovered evidence takes the form of recantation testimony, Michigan courts traditionally regard it as suspect and untrustworthy and only reluctantly grant new trials on this basis. *Canter*, *supra* at 559-560.

Newly discovered evidence is not grounds for a new trial where it would merely be used for impeachment purposes. *People v Davis (David)*, 199 Mich App 502, 516 (1993).

4. Insufficient Evidence

"The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done." *People v Abraham (Nathaniel)*, 256 Mich App 265, 269 (2003).

There is a distinction between the standard for granting a new trial and that required to grant a directed verdict of acquittal. *Lemmon*, 456 Mich at 633, 645 n 25. "If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *Lemmon*, *supra* at 634. In contrast, "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 627.

"The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400 (2000). "The scope of review is the same whether the evidence is direct or circumstantial." *Nowack*, *supra* at 400. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428 (2002). "'[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.'" *People v Wolfe*, 440 Mich 508, 514-515 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376 (1974).

5. Polygraph Examinations

Polygraph results may be admissible in support of a defendant's motion for a new trial. *People v Barbara*, 400 Mich 352, 412 (1977).

"Polygraph test results may be considered in deciding a motion for [a] new trial where . . . (1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meets with the approval of the court, (4) either the

prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject." *Mechura*, 205 Mich App at 484.

C. Standard of Review

A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Lonsby*, 268 Mich App 375, 382 (2005).

A court's decision to dismiss a juror during deliberations based on misconduct, illness, or other valid reason is reviewed for an abuse of discretion. *People v Mason*, 96 Mich App 47, 49-50 (1980).

A trial court's decision whether to grant a mistrial based on juror misconduct during deliberations is reviewed for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175 (1997).

The trial court's grant or denial of a motion for a new trial on the basis of juror misconduct is reviewed for an abuse of discretion. *People v Johnson (Benny)*, 245 Mich App 243, 250 (2001).

5.18 Ineffective Assistance of Counsel

A. General Standard

The Michigan and United States Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v LeBlanc*, 465 Mich 575, 578 (2002).

Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v McGhee (Larry A)*, 268 Mich App 600, 625 (2005).

1. The *Strickland* Standard

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994). In order to demonstrate that counsel's performance was deficient, the

defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. *People v Taylor (Geracer)*, 275 Mich App 177, 186 (2007). In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Taylor (Geracer), supra* at 186. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *People v Stanaway*, 446 Mich 643, 687-688 (1994). The court must determine whether "'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *People v Mitchell*, 454 Mich 145, 156 (1997), quoting *Strickland*, *supra* at 687.

An attorney has a duty to conduct a reasonable investigation, and failure to do so can amount to ineffective assistance of counsel. *People v Grant (William)*, 470 Mich 477, 485-486 (2004). The investigation must be reasonably conducted to permit a strategic choice on what evidence to present. *Wiggins v Smith (Sewall)*, 539 US 510, 522-523 (2003). However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Davis (Marcus) (On Rehearing)*, 250 Mich App 357, 368 (2002). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon (Darrell)*, 263 Mich App 393, 312 (2004). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly (Robert)*, 186 Mich App 524, 526 (1990). A defendant can establish the factual predicate for his or her claim of ineffective assistance of counsel for failure to call alibi witnesses "by providing affidavits to substantiate that the witnesses would have testified as he [or she] purports." *People v Vaughn (Joseph)*, 291 Mich App 183, 194 (2010), lv gtd 490 Mich 887 (2011). Without proof of substantial prejudice, a defense attorney's choice to pursue one of two weak defense strategies is not ineffective assistance. *People v LaVearn*, 448 Mich 207, 216 (1995).

Counsel's failure to interview witnesses, alone, is not enough to show ineffective assistance; the defendant must show that the failure prevented counsel from discovering valuable information that would have "substantially benefited" the defendant, or that the attorney's unpreparedness prejudiced the defense. *People v Caballero*, 184 Mich App 636, 640-642 (1990).

In *Avery v Prelesnik*, 548 F3d 434, 435 (CA 6, 2008), the defendant was deprived of his right to the effective assistance

of counsel when his attorney never personally attempted to contact or interview any potential alibi witnesses, instead relying on information provided to him by an investigator. *Avery*, *supra* at 437-438. Where "potential alibi witnesses [were] coupled with an otherwise weak case[,] the failure to investigate the testimony [was] sufficient to 'undermine confidence' in the outcome of the jury verdict." *Id*. at 438-439. The Court of Appeals for the Sixth Circuit noted that the relevant inquiry was not "whether [the defendant] was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal." *Id*. at 439.

In *Brown (Michael) v Smith (David)*, 551 F3d 424, 426 (CA 6, 2008), the defendant was deprived of his right to the effective assistance of counsel when his attorneys failed to investigate and obtain records from the victim's counseling sessions, which would have undermined the victim's credibility. The defendant established that defense counsels' failure to investigate constituted deficient performance, where "[t]he prosecution's entire case hinged on the credibility of [the victim], and defense counsel were aware that [the victim's counselor] (who disbelieved [the victim]) had treated her near the time of the alleged assault . . . ." *Brown (Michael)*, *supra* at 431. Where "the verdict turned entirely on [the victim's] credibility as a witness, [the defendant's] attorneys should have taken all reasonable steps to investigate evidence relevant to [the victim's] credibility; [and] their failure to do so left important facts undiscovered." *Id*. at 435. "[W]here there was no other evidence of [the defendant's] guilt," the absence of the missing evidence was an error that sufficiently undermined confidence in the outcome of the defendant's trial. *Id*.

"Competent counsel can be expected to undertake a 'thorough investigation of law and facts relevant to plausible options' for the defense." *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011), quoting *Strickland*, *supra* at 690. "[W]hile this does not require counsel to investigate every conceivable defense, any limitation on counsel's investigation must be supported by a 'reasonable professional judgment[].'" *Couch*, *supra* at 246, quoting *Strickland*, *supra* at 691. "[A] lawyer cannot make a protected strategic decision without investigating the potential bases for it[,]" and "[i]t is particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself [or herself] asks his [or her] counsel to obtain." *Couch*, *supra* at 246. In *Couch*, *supra* at 242, 246, defense counsel was ineffective for failing to investigate a causation defense where he was aware of "several facts that made a causation defense a 'plausible' option" and the defendant "not only told

[him] to pursue the defense but also told him [] to do so . . . by obtaining . . . a [readily available] report about the incident."

"[C]ounsel cannot be charged with ineffective representation when his [or her] failure to locate exculpatory evidence is 'directly attributable to [a defendant's] refusal to cooperate, rather than any insufficiency in the investigation' conducted by counsel." *Hodgson v Warren*, 622 F3d 591, 599 (CA 6, 2010), quoting *Fautenberry v Mitchell*, 515 F3d 614, 625 (CA 6, 2008). However, "a defendant's lack of cooperation could not 'exonerate [defense counsel's] consistent pattern of neglecting his [or her] essential function of investigating the claims against his [or her] client.'" *Hodgson*, *supra* at 599, quoting *White v McAninch*, 235 F3d 988, 997 (CA 6, 2000).

"[T]he waiver of an opening statement involves 'a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.'" *People v Payne*, 285 Mich App 181, 190 (2009), quoting *People v Pawelczak*, 125 Mich App 231, 242 (1983) (defense counsel's decision to forego an opening statement was insufficient to prove ineffective assistance of counsel where the defendant failed to establish that his counsel's performance was deficient under an objective standard of reasonableness, or that the outcome of the lower court proceedings was affected).

An attorney is not ineffective for failing to make a futile objection, *People v Fike*, 228 Mich App 178, 182 (1998), nor is an attorney ineffective for failing to file a meritless motion, *People v Traylor*, 245 Mich App 460, 463 (2001), because trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425 (2000). Whether to object to a perceived impropriety is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58 (2004).

Under certain circumstances, defense counsel's failure to request a limiting instruction may constitute ineffective assistance of counsel. *Thompkins v Berghuis*, 547 F3d 572, 590 (CA 6, 2008). In *Thompkins*, *supra* at 574, 577, the defendant was charged with murder. At trial, the defendant's accomplice testified that he (the accomplice) had been acquitted of murder charges. *Id*. at 578. Defense counsel failed to request a limiting instruction that the jury could not consider the accomplice's testimony as substantive evidence of the defendant's guilt. *Id*. at 579. On appeal, the reviewing court found that in light of the fact that the defendant's primary trial strategy involved shifting responsibility for the murder onto his accomplice, the fact that the accomplice had been acquitted of murder "likely exerted a powerful influence on the jury to convict [the

defendant] of murder. If the jury did not convict [the defendant], the jury knew that no one would be convicted for killing [one victim] and shooting [another]. Most importantly, in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh [the accomplice's] acquittal as significant evidence that [the defendant] must have been the shooter. In fact, the trial court's jury instructions included the statement that '[y]ou may convict the defendant *based only on the accomplice's testimony*, if you believe the testimony and it proves the [d]efendant's guilt[] beyond a reasonable doubt.'" *Id*. at 591. "The jury thus heard that it could convict [the defendant] based solely on [the accomplice's] testimony, which included not only his account of the shooting but also his statement that he had been acquitted of murder." *Id*. The defendant proved that his counsel was ineffective by demonstrating that his attorney's performance was deficient, and that there was a reasonable probability that, but for his attorney's error, the result of the proceeding would have been different. *Id*. at 590-591.

The complete concession of defendant's guilt renders counsel ineffective. *People v Krysztopaniec*, 170 Mich App 588, 596 (1988). However, "[w]here the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others." *People v Walker (Thomas)*, 167 Mich App 377, 382 (1988), overruled in part on other grounds by *People v Mitchell (Shane)*, 456 Mich 693, 698 (1998).

A defendant was not denied his Sixth Amendment right to counsel where his attorney fell asleep for an undetermined period during the defendant's cross-examination by the prosecution. *Muniz v Smith*, 647 F3d 619, 623-625 (CA 6, 2011) (because "[t]he trial evidence against [the defendant] was overwhelming[,]" he could not establish prejudice sufficient to satisfy *Strickland*, 466 US at 687, where the record showed that a juror saw defense counsel sleeping through a single portion of the defendant's "fairly short" cross-examination).

In the defendant's trial for third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but less than 16 years old), defense counsel's failure to pursue the introduction of cell phone records to discredit the complainant's testimony that she had not communicated with the defendant after he raped her "not only fell below an objective standard of reasonableness, but also prejudiced [the] defendant." *People v Armstrong (Richard)*, 490 Mich 281, 283, 286-288, 294 (2011). "Although the issue of consent is . . . irrelevant under MCL 750.520d(1)(a), . . . defense counsel did not seek to admit the

records to establish that the alleged intercourse was consensual[; r]ather, defense counsel sought to establish that the complainant's allegations that intercourse—forcible or otherwise—occurred at all lacked credibility because she falsely testified that she had not called or communicated with [the] defendant after the alleged rapes." *Armstrong (Richard)*, *supra* at 292. Counsel admitted that his failure to pursue admission of the records was a mistake rather than a matter of trial strategy, and the prosecution did not appeal the trial court's finding that counsel's error fell below an objective standard of reasonableness. *Id*. at 290, 293. Furthermore, "the Court of Appeals clearly erred by affirming the trial court's finding of no prejudice[,]" because "even assuming that the evidence would have worked slightly against [the] defendant, it does not follow that the evidence would not also have worked so significantly against the complainant as to destroy her credibility and result in [the] defendant's acquittal." *Id*. at 291, 293.

Where the Michigan Court of Appeals "fail[ed] to apply *Strickland*[, 466 US 668,] to assess [an] ineffective-assistance-of-counsel claim . . . , the [Court's] adjudication was contrary to clearly established federal law[,]" and the respondent was entitled to pursue habeas corpus review. *Lafler v Cooper*, 566 US ___, ___ (2012), citing *Panetti v Quarterman*, 551 US 930, 948 (2007).

"To warrant habeas relief, a petitioner [claiming ineffective assistance of counsel on the ground that defense counsel failed to investigate and present an insanity defense] is not required to show that he had a winning defense or that he [or she] was legally insane at the time of the crime[; i]nstead, he [or she] must only show that he [or she] had a substantial defense . . . and that failure to present that defense rendered the trial fundamentally unfair or unreliable." *Walker v McQuiggan*, 656 F3d 311, 320-321, 321 n 8, 322 (CA 6, 2011) (noting that "[a]lthough the [United States] Supreme Court has not employed the 'substantial defense' language as [has the Sixth] Circuit, this language does not articulate a separate standard from *Strickland*, [466 US 668,] but instead supports the 'reasonable probability' language of *Strickland*'s prejudice prong[,]" and holding that the determination of the Michigan Court of Appeals that the petitioner's actions after his crime suggested that he was conscious of guilt, and thus not legally insane, was unreasonable).

2. Presumption of Prejudice Under *Cronic*

"[T]here is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *United States v Cronic*, 466 US 648, 659 n 26 (1984), citing *Strickland*, 466 US at 693-696. However, in *Cronic*, *supra* at 658-660, the United States Supreme Court identified three rare situations involving "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified[]" and in which prejudice is therefore presumed: (1) the complete denial of counsel, such as where the accused is denied counsel at a critical stage of the proceedings; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is called upon to render assistance under circumstances where even competent counsel very likely could not (as in the case of *Powell v Alabama*, 287 US 45, 56-59 (1932), where defense counsel was appointed to represent defendants in a capital case on the day the trial was scheduled to start); see also *People v Frazier (Corey)*, 478 Mich 231, 243 (2007).[52]

B. Evidentiary (*Ginther*) Hearing

A defendant is entitled to have his or her attorney "prepare, investigate, and present all substantial defenses." *Kelly (Robert)*, 186 Mich App at 526. If a defendant wishes to advance a claim of ineffective assistance of counsel based on matters not of record, an evidentiary (*Ginther*) hearing is required in the trial court. *People v Ginther*, 390 Mich 436, 443-444 (1973).

In *Kelly (Robert)*, 186 Mich App at 526, at a posttrial evidentiary hearing, the defendant claimed that his trial attorney's failure to file a timely notice of alibi defense deprived him of the effective assistance of counsel. The Court of Appeals determined that a substantial alibi defense would have been one in which the defendant's proposed alibi witness verified his version. *Kelly (Robert)*, *supra* at 527. According to the Court:

"[D]efendant failed to show that he was deprived of a substantial defense. There is nothing in the record showing what the proposed alibi witnesses' testimony would have been had they been

[52] See also *People v Gioglio (Gioglio II)*, 490 Mich 868 (2011), holding that "[f]or the reasons stated in the Court of Appeals dissenting opinion [in *People v Gioglio (Gioglio I)*, 292 Mich App 173, 209-237 (2011) (K.F. Kelly, J., dissenting)], [*Cronic*, 466 US 658] does not apply to defense counsel's performance in this case[,]" and remanding for "consideration of whether defense counsel's performance was ineffective under *Strickland*[, 466 US 668][.]"

permitted to testify on the matter and, thus, whether they would have, in fact, provided an alibi for defendant." *Kelly (Robert)*, 186 Mich App at 527.

The court has discretion whether to hold an evidentiary hearing. *People v Mischley*, 164 Mich App 478, 481-482 (1987). An evidentiary hearing may be granted if the record has not been sufficiently developed and the defendant can show evidence of a factual dispute which might, if further developed, possibly be resolved in his or her favor. *People v McMillan*, 213 Mich App 134, 141-142 (1995).

The burden of proof for a new trial traditionally lies with the moving party. *People v Elston*, 462 Mich 751, 762 (2000). Mere assertions of ineffective assistance of counsel by the defendant, without more, do not satisfy that evidentiary requirement. *Elston*, *supra* at 762.

"To warrant habeas relief, a petitioner [claiming ineffective assistance of counsel on the ground that defense counsel failed to investigate and present an insanity defense] is not required to show that he [or she] had a winning defense or that he [or she] was legally insane at the time of the crime[; i]nstead, he [or she] must only show that he [or she] had a substantial defense . . . and that failure to present that defense rendered the trial fundamentally unfair or unreliable." *McQuiggan*, 656 F3d at 321, 321 n 8 ("the evidence that [the petitioner] suffered from chronic and severe mental illness [was] not only overwhelming, but it [was] uncontested[; therefore, t]hat the jury heard *nothing* about his mental illness and its effects clearly render[ed] the result of the trial highly unreliable and fundamentally unfair[]").

C. Waiver of Attorney-Client Privilege

"It is well established that a defendant in a criminal case who asserts ineffective assistance of counsel waives by doing so the attorney-client privilege." *Virgil & Barbara Howe v Detroit Free Press*, 440 Mich 203, 236 (1992) (Levin, J., separate opinion). A client's allegation that an attorney breached his or her duty to the client waives the attorney-client privilege with regard to all communications relevant to the alleged breach. *People v Houston (John)*, 448 Mich 312, 332 (1995). "The fact that the defendant's allegation [i]s not brought in a formal complaint against his [or her] attorney is of no consequence." *Houston* (*John)*, *supra* at 332.

D. Pleas[53]

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US ___, ____ (2010)[54]; see also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*[, 466 US at 687]." *Frye*, 566 US at ___, citing *Hill v Lockhart*, 474 US 52, 57 (1985). First, "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, *supra* at 56 (citation omitted). "The second, or 'prejudice,' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer[;] . . . a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] . . . [and] . . . a reasonable probability that the end result of the criminal process would have been more

[53] See Section 4.4(D) and Section 4.5(C) for additional discussion of ineffective assistance of counsel in the context of pleas and plea negotiations.

[54] "[T]he new rule of criminal procedure announced in *Padilla*[, 559 US at ___,] has prospective application only[]" under both federal and state rules of retroactivity. *People v Gomez*, 295 Mich App 411, 413 (2012).

favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye, supra* at ___.

See Section 4.4(D) for discussion of motions to withdraw pleas based on ineffective assistance of counsel. See Section 4.5(C) for discussion of claims of ineffective assistance of counsel resulting in the lapse or rejection of favorable plea offers.

E. Appellate Standard

An appellate attorney may be ineffective for failing to raise the issue of the defendant's trial counsel's effectiveness. *People v Reed*, 198 Mich App 639, 646 (1993). The standard set out in *Strickland*, 466 US 668, also applies when analyzing a claim of ineffective assistance of appellate counsel. *Reed*, *supra* at 646. According to the *Reed* Court:

> "An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. Thus, to permit proper review in cases where appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in the trial court in connection with a claim of ineffective assistance of appellate counsel." *Reed*, 198 Mich App at 646-647 (internal citations omitted).

F. Standard of Review

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Grant (William)*, 470 Mich at 484-485. A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Grant (William)*, *supra* at 484-485. If the defendant failed to move for a new trial or evidentiary hearing, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38 (2002).

Chapter 6: Sentencing & Post-Sentencing

6.1 Felony Sentencing 6-1
6.2 Habitual Offender Sentencing 6-43
6.3 Delayed/Deferred/Diversionary Sentences 6-48
6.4 Juvenile Sentencing 6-56
6.5 Sentencing a Sexually Delinquent Person 6-68
6.6 Jail Credit 6-70
6.7 Probation Revocation 6-76
6.8 Postappeal Relief 6-82
6.9 Setting Aside a Conviction 6-89

6.1 Felony Sentencing[1]

Generally, a defendant should be sentenced by the judge who presided at his [or her] trial, or accepted his or her plea, if the judge is reasonably available. *People v Pierce*, 158 Mich App 113, 115 (1987). However, resentencing is not required if the defendant does not object. *People v Robinson*, 203 Mich App 196, 197-198 (1993).

A. Presentence Investigation Report

A presentence investigation report (PSIR) is required for felony cases, MCL 771.14(1), and cannot be waived. *People v Hemphill*, 439 Mich 576, 581 (1992); *People v Brown (Lewis)*, 393 Mich 174, 179 (1974).

"Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court." MCR 6.425(A). MCR 6.425(A)(1)(a)–MCR 6.425(A)(1)(l) states that,

[1] See also the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing*.

"[t]he report must be succinct and, depending on the circumstances, include:

> "(a) a description of the defendant's prior criminal convictions and juvenile adjudications,
>
> "(b) a complete description of the offense and the circumstances surrounding it,
>
> "(c) a brief description of the defendant's vocational background and work history, including military record and present employment status,
>
> "(d) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
>
> "(e) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report [, MCL 771.14(2)(g)],
>
> "(f) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
>
> "(g) if provided and requested by the victim, a written victim's impact statement as provided by law [, MCL 771.14(2)(b); MCL 780.764],
>
> "(h) any statement the defendant wishes to make,
>
> "(i) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision [, MCL 771.14(2)(d)],
>
> "(j) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report [, MCL 771.14(2)(a)],
>
> "(k) a specific [written] recommendation for disposition [, MCL 771.14(2)(c)], and
>
> "(l) any other information that may aid the court in sentencing."

In addition, MCL 771.14(2)(e) states that the PSIR must include:

> "(*i*) For each conviction for which a consecutive sentence is authorized or required, the sentence grid in

[MCL 777.61—MCL 777.69] that contains the recommended minimum sentence range.

"(*ii*) Unless otherwise provided in [MCL 771.14(2)(e)(*i*)], for each crime having the highest crime class, the sentence grid in [MCL 777.61—MCL 777.69] that contains the recommended minimum sentence range.

"(*iii*) Unless otherwise provided in [MCL 771.14(2)(e)(*i*)], the computation that determines the recommended minimum sentence range for the crime having the highest crime class.

Note: There is an apparent split of authority in the Court of Appeals regarding the number of sentencing information reports that trial courts must prepare when a defendant has multiple convictions. *People v Smith (Rhasiaon)*, 475 Mich 891 (2006) (Corrigan, J., concurring).

"In *People v Mack*, 265 Mich App 122, 128 (2005), relying on MCL 771.14, the Court of Appeals stated that 'for sentencing on multiple concurrent convictions, a [presentence information report] would only be prepared for the highest crime class felony conviction, and would [not] be prepared for each of the defendant's multiple convictions.' But in *People v Johnigan*, 265 Mich App 463, 472 (2005), relying on MCL 777.21(2), the Court of Appeals stated that, despite the requirement for the *probation department* to score the guidelines only for the highest crime class, 'the *sentencing court* must score the guidelines for the remaining crimes as well.' (Emphasis added.) Thus, these two decisions may impose competing obligations with respect to the number of sentencing investigation reports when a defendant has multiple convictions." *Smith (Rhasiaon)*, 475 Mich at 892 (Corrigan, J., concurring). This issue has not been decided by the Michigan Supreme Court.

"(*iv*) A specific statement as to the applicability of intermediate sanctions, as defined in [MCL 769.31(b)].

"(*v*) The recommended sentence."

MCL 771.14(2)(h) further provides that the PSIR must include a statement as to whether the offender has provided to the Department of Corrections personal identification documents, such as a Social Security card, photographic identity document, or birth

certificate, for purposes of obtaining an operator's license or state personal identification card upon release from incarceration.[2] See MCL 791.234c(1)(b) and MCL 28.291(1).

Finally, "[i]f a person is to be sentenced for a felony or misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the person is licensed or registered under . . . MCL 333.16101 to 333.18838, if applicable." MCL 777.14(2)(f).

A presentence investigation report must not include "any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual." MCL 771.14(2). "Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual." *Id*.

Proposed guidelines scoring must accompany the PSIR. MCR 6.425(D).

The rules of evidence do not apply to sentencing proceedings. See MRE 1101(b)(3); *People v Potrafka*, 140 Mich App 749, 751-752 (1985).

A trial court must provide the prosecutor and the defendant's attorney, or the defendant, if he or she is not represented by an attorney, with copies of the PSIR at a reasonable time, but not less than two business days, before the day of sentencing. MCR 6.425(B). "The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report." *Id*. See also MCL 771.14(7), which provides that a copy of the PSIR (and any amended report) must be provided to the prosecutor and defense counsel or defendant, if he or she is not represented by an attorney. The copy of the PSIR must

[2] Effective February 23, 2012, 2012 PA 27, as part of a package of public acts designed to assist prisoners in obtaining operator's licenses and state personal identification cards upon their release, amended MCL 771.14(9) to require that a person committed to a state correctional facility be provided notification explaining the importance of obtaining an operator's license or a state identification card, listing the personal identification documents that are necessary to do so, and requesting that the person obtain those documents and provide them to the Department of Corrections. MCL 771.14(9)(b). 2012 PA 27 additionally amended MCL 771.14(2) to require that a PSIR include "[a] statement as to whether the person has provided the identification documents referenced in [MCL 771.14(9)(b)]." MCL 771.14(2)(h). Related provisions were amended or added by 2012 PA 24—2012 PA 26, also effective February 23, 2012. See, e.g., MCL 791.234c and MCL 28.291.

be provided no fewer than two business days before sentencing unless the defendant waives that time period. The prosecutor and defense counsel or defendant, if he or she is not represented by an attorney, have the right to keep a copy of the report (and any amended report). *Id*.

MCR 6.425(E)(1)(a)–MCR 6.425(E)(1)(c) states that, at sentencing, a trial court must:

- determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the PSIR;
- give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the PSIR, and resolve any challenges in accordance with the procedure set out in MCR 6.425(E)(2); and
- give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

A probation agent may use undisputed facts to draw conclusions included in a defendant's PSIR. See *People v Wybrecht*, 222 Mich App 160, 173 (1997) (the defendant's sentence was held valid where a probation agent characterized the defendant as a pedophile by using undisputed facts from which the agent drew a conclusion that conflicted with the defendant's psychologist's conclusion).

"A challenge to the validity of information contained in the PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand." *People v Lloyd*, 284 Mich App 703, 706 (2009); MCL 769.34(10); MCR 6.429(C).

Regarding the resolution of challenges to the PSIR, MCR 6.425(E)(2) states:

> "(2) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

> "(a) correct or delete the challenged information in the report, whichever is appropriate, and
>
> "(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections."

Once a defendant challenges the accuracy of the information in the PSIR, the trial court is required to respond to that challenge. *People v Spanke*, 254 Mich App 642, 648 (2003). "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Spanke*, *supra* at 648. The court may disregard the challenged information in the PSIR if it "clearly indicate[s] that it did not consider the alleged inaccuracy in determining the sentence." *Id*. at 649. "If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *Id*. If the court elects to determine the accuracy of the information, the prosecutor must prove the facts asserted by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125 (1993).

B. Sentencing Guidelines

The judicial sentencing guidelines apply to offenses committed before January 1, 1999. The legislative sentencing guidelines apply to felony offenses listed in MCL 777.11 to 777.19 that were committed on or after January 1, 1999. MCL 769.34(2). The legislative sentencing guidelines do not apply if a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment. MCL 769.34(5).

"The court is required to use the sentencing guidelines, as provided by law." MCR 6.425(D). The legislative sentencing guidelines that were in effect on the date the crime was committed govern the calculation of an offender's minimum sentence. MCL 769.34(2).

C. Scoring Offense Variables (OVs) and Prior Record Variables (PRVs)

The minimum sentence range for an offense to which the sentencing guidelines apply is determined by scoring the appropriate offense variables (OVs) and prior record variables (PRVs) for a specific conviction. MCL 777.21[3].

[3] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8*: *Felony Sentencing* for detailed information on scoring OVs and PRVs.

A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich 140, 164 (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan*, *supra* at 164. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan*, *supra* at 159-160. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at 159-161. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at 159 (citations omitted).

A trial court's judicial fact-finding to score an offender's OVs and PRVs does not offend the principles espoused in *Blakely*, 542 US 296, because under Michigan's "true indeterminate sentencing scheme," the guidelines as scored never increase the statutory maximum sentence applicable to the scored offense and to which a defendant is subject when convicted of the scored offense. *People v McCuller*, 479 Mich 672 (2007). Because no *Blakely* violation occurs when a court engages in judicial fact-finding to score a defendant's OVs, a minimum range with the possibility of prison that results from scoring a defendant's OVs and PRVs is constitutionally and statutorily sound even if the defendant's PRV total alone would place him or her in an intermediate sanction cell. *McCuller*, *supra* at 677. In addition, under Michigan's sentencing scheme,

> "A sentencing court scores the OVs only to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute. The conditional limit on incarceration contained in MCL 769.34(4)(a)—an intermediate sanction—does not establish the defendant's statutorily required maximum sentence authorized by the jury's verdict or the guilty plea, but is instead a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury's verdict or the guilty plea." *McCuller*, 479 Mich at 677-678, citing *People v Harper*, 479 Mich 599, 603-604 (2007).

> **Note:** *McCuller* is one of three companion cases concerning the application of *Blakely* principles to Michigan's sentencing scheme. The *Blakely* issue as applied to intermediate sanctions was addressed in detail by the Court in *Harper*, 479 Mich 599. *McCuller*, 479 Mich at 676.

Notably, in *McCuller*, the Michigan Supreme Court determined that even if the sentence imposed did violate *Blakely,* the error was harmless because "[t]he factors underlying the scoring of the OVs were uncontested and supported by overwhelming evidence," and the Court was "firmly convinced that a jury would have reached precisely the same result." *McCuller*, 479 Mich at 678.

A sentence within the guidelines must be affirmed on appeal, absent an error in scoring the guidelines or the use of inaccurate information on which the court relied when sentencing the defendant. MCL 769.34(10).[4] A defendant must be resentenced when the sentencing judge relied on the minimum range indicated in a cell that, due to an error in scoring, was later determined to be the wrong cell range, even when the defendant's original sentence falls within either of the cell ranges. *People v Jackson (Leonard)*, 487 Mich 783, 786-788, 792 (2010). Stated another way, "the Court shall not remand for resentencing *unless* there was either an error in scoring or [the] defendant's sentence was based on inaccurate information." *Jackson (Leonard)*, *supra* at 792. "Conversely, this means that the Court is required to remand whenever one of these two circumstances is present." *Id*. In sum, "the Court may not ignore the two criteria for when a case should be remanded merely because the sentence is within the appropriate guidelines range. When the defendant's sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required." *Id*. In *Jackson (Leonard)*, *supra* at 786-788, the defendant was entitled to resentencing for an armed robbery conviction where the Court of Appeals vacated his concurrent convictions for felonious assault that had been used in calculating prior record variable (PRV) 7 for his armed robbery sentence. Because the defendant's sentence was based on inaccurate information, the Court of Appeals erred in holding that it was barred from remanding for resentencing because the defendant's minimum sentence still fell within the corrected sentencing guidelines range. *Id*. at 801-802.[5]

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[4]"An error in scoring the judicial [sentencing] guidelines does not provide a basis for appellate relief." *People v Walker (Robert)*, 485 Mich 870 (2009), citing *People v Raby*, 456 Mich 487, 496 (1998).

[5]However, *Jackson (Leonard)*, 487 Mich 783, "does not require resentencing if [an] inaccurate score did not affect the applicable sentencing guidelines range." *People v Sims,* 489 Mich 970 (2011), modified on other grounds 490 Mich 857 (2011).

A defendant must be resentenced when he or she is sentenced pursuant to a cell range based on inaccurate guidelines scoring, even if the sentence imposed falls within the cell range indicated after any errors are corrected. *People v Francisco*, 474 Mich 82, 92 (2006). See, e.g., *People v Freeman*, 476 Mich 863 (2006),[6] where even though the sentence imposed on the defendant was within the guidelines range as calculated without the scoring error, resentencing was required because the trial court referenced a different guidelines range (the guidelines range as calculated using the incorrect OV score) when it imposed the defendant's initial sentence. Resentencing is not required "[w]here a scoring error does not alter the appropriate guidelines range," nor is it required "where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *Francisco*, *supra* at 89 n 8; see also *People v Sims*, 489 Mich 970 (2011), modified on other grounds 490 Mich 857 (2011) (reversing the judgment of the Court of Appeals to the extent that it ordered resentencing based on an error in the scoring of an offense variable and reaffirming that under *Jackson (Leonard)*, 487 Mich 783, and *Francisco*, *supra* at 89 n 8, resentencing is not required where a scoring error did not alter the applicable sentencing guidelines range).

1. Departing From the Guidelines

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). See also MCR 6.425(E)(1)(e) ("if the sentence imposed is not within the guidelines range, [the court must, on the record] articulate the substantial and compelling reasons justifying that specific departure").

"[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional 'substantial and compelling' reasons by the sentencing court." *People v Wiley*, 472 Mich 153, 154 (2005). "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *Wiley*, *supra* at 154.

[6]Order for resentencing in lieu of granting leave to appeal the decision in *People v Freeman*, memorandum opinion of the Court of Appeals, issued February 16, 2006 (Docket No. 258261) .

MCL 769.34(3) states that the court may *not* use any of the following factors to support a departure:

- gender,
- race,
- ethnicity,
- alienage,
- national origin,
- religion,
- occupation,
- lack of employment,
- whether the defendant is represented by appointed or retained counsel, or is representing him- or herself, or
- an offense or offender characteristic already taken into account in determining the appropriate sentence range (unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight).

The trial court must specifically articulate a substantial and compelling reason to depart from the guidelines range. *People v Babcock*, 469 Mich 247, 257-259 (2003). A *substantial and compelling reason*:

- is an objective and verifiable reason that keenly or irresistibly grabs the court's attention;
- is of considerable worth in deciding the length of a sentence; and
- exists only in exceptional cases. *Babcock*, 469 Mich at 257-259.

An *objective and verifiable fact* is an action or occurrence "external to the minds of those involved in the decision and capable of being confirmed." *People v Petri*, 279 Mich App 407, 422 (2008).

Examples of factors that were considered objective and verifiable include:

- the defendant's perjury, where he admitted at sentencing that he lied to the jury and committed the offenses with which he was charged (coupled with the fact that the defendant was a pedophile and the fact that the guidelines did not adequately address defendant's sexual abuse of his son) - *People v Kahley*, 277 Mich App 182, 187-188 (2007).

- that, on the basis of his actions, the defendant was a pedophile and that long-term confinement was necessary because pedophilia is not amenable to treatment and pedophiles are likely to repeat their conduct and offenses - *Kahley*, 277 Mich App at 188.

- the defendant's past criminal history of sex crimes with children, his admitted sexual attraction to children, and his repeated failure to rehabilitate himself when given an opportunity to do so - *People v Geno*, 261 Mich App 624, 636 (2004).

- the defendant's probation violation - *People v Schaafsma*, 267 Mich App 184, 186 (2005).

Examples of factors that were *not* considered objective and verifiable include:

- the defendant's expression of remorse - *People v Daniel (Danny)*, 462 Mich 1, 8 (2000).

- the defendant's perjury, standing alone - *Kahley*, 277 Mich App at 188.

- the defendant's cooperation with defense counsel - *People v Raymond Young*, 276 Mich App 446, 458 (2007).the defendant's respect for the trial court – *Raymond Young*, 276 Mich App at 458.

- the trial court's characterization of defendant's offenses as "egregious" - *People v Havens*, 268 Mich App 15, 18 (2005).

- the defendant's danger to himself and the public - *People v Solomonson*, 261 Mich App 657, 670 (2004).

In determining whether substantial and compelling reasons exist that would warrant a departure from the guidelines range, factors the court may consider include:

- mitigating circumstances surrounding the offense – *Daniel (Danny)*, 462 Mich at 7.

- the defendant's prior record – *Daniel (Danny)*, 462 Mich at 7.

- the defendant's age – *Daniel (Danny)* , 462 Mich at 7.

- the defendant's work history – *Daniel (Danny)* , 462 Mich at 7.

- factors that arose after the defendant's arrest, such as the defendant's cooperation with law enforcement officials—see *People v Fields (Warren)*, 448 Mich 58, 76-77 (1995), and *Raymond Young*, 276 Mich App at 450-458 [addressing all of the factors specified by the Court in *Fields* (*Warren)* as appropriate for a sentencing court to consider in deciding whether to depart downward from the recommended sentencing range]), or

- factors that arose at trial, such as the defendant's commission of perjury, as long as the conclusion that the defendant perjured him- or herself is objective and verifiable—*Kahley*, 277 Mich App at 188 (the defendant admitted at sentencing that he lied to the jury and that he committed the offenses).

The sentencing guidelines alone are not a substantial and compelling reason to depart from a mandatory minimum sentence, but may suggest the magnitude of the departure if there are substantial and compelling reasons to depart from the mandatory minimum. *People v Izarraras-Placante*, 246 Mich App 490, 498-499 (2001).

"A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Babcock*, 469 Mich at 272.

"In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Babcock*, 469 Mich at 272. Providing substantial and compelling reasons for a departure does not satisfy the trial court's duty to "establish why the sentences imposed were proportionate to the offense and the offender." *People v Smith (Gary)*, 482 Mich

292, 295 (2008). "[T]he statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Smith (Gary), supra* at 303.

The Michigan Supreme Court set out the following summary to assist trial courts in fulfilling their statutory obligations under MCL 769.34(3):

> "(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.
>
> "(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.
>
> "(3) The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.
>
> "(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.
>
> "(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.
>
> "(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would

> produce a guidelines-range sentence of the same length as the departure sentence.
>
> "(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines . . . to further the legislative goal of sentencing uniformity." *Smith (Gary)* , 482 Mich at 317-319.

See *People v Cline*, 276 Mich App 634, 652-653 (2007) (where OV 7 assesses a maximum of 50 points for an offender's excessively brutal or sadistic treatment of a victim on a single occasion, a trial court did not abuse its discretion when it based an upward departure on the variable's failure to adequately account for the defendant's brutal or sadistic treatment of the victim on 18 separate occasions). See also *People v Horn*, 279 Mich App 31, 46-47 (2008) (the trial court did not err in departing upward from the guidelines based on the defendant's repetitive and escalating violent conduct toward a specific victim where OV 7 (aggravated physical abuse), OV 13 (continuing pattern of criminal behavior), and the prior record variables did not adequately account for the "defendant's repeated criminal assaults upon his wife and his relentless attempts to brutalize and kill his wife").

Absent a substantial and compelling reason to depart from the guidelines, a defendant whose recommended minimum sentence range requires the imposition of an intermediate sanction may not be sentenced to serve time in prison because an intermediate sanction does not include a prison sentence. *People v Muttscheler*, 481 Mich 372, 373 (2008). See, e.g., *People v Lucey*, 287 Mich App 267 (2010). In *Lucey*, *supra* at 269-270, the guidelines recommended a minimum term of five to 17 months, and the trial court was required to impose an intermediate sanction unless it provided a substantial and compelling reason to sentence the defendant to prison. Without a substantial and compelling reason, the defendant's sentence of 17 to 30 months in prison—a "location departure"—to run consecutively to the sentence for which he was on parole at the time he committed the offenses in the case at issue, constituted an unsubstantiated guidelines departure. *Id*. at 269, 274. According to the Court, "[t]he fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation cannot be a substantial and compelling reason to depart from the sentencing guidelines." *Id*. at 273.

~~The extent of a defendant's criminal history and recidivist behavior, when afforded inadequate weight in the sentencing guidelines, constitutes an objective and verifiable fact that may support an upward departure from the minimum guidelines range. *People v Brooks (Anthony)*, ___293 Mich App 525, 546 (2011) (because "six of [the defendant's] 10 prior low-severity felony convictions received inadequate weight or consideration in the guidelines as they could not further increase [the defendant's] score for PRV 2[,]" a departure was justified; nevertheless, despite the defendant's status as a repeat offender, the trial court abused its discretion in imposing a disproportionate life sentence for a Class E offense).~~

2. Standard of Review

"In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing." *Babcock*, 469 Mich at 273 (internal citations omitted).

"If a trial court articulates multiple substantial and compelling reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone." *Babcock*, 469 Mich at 273 (internal citations and quotations omitted).

"If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and his [or her] criminal history, the Court of Appeals must remand to the trial court for resentencing." *Babcock*, 469 Mich at 273 (internal citation omitted).

"The existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *Babcock*, 469 Mich at 273 (internal citations and quotations omitted).

"The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate

court as a matter of law." *Babcock*, 469 Mich at 273 (internal citations and quotations omitted).

"A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock*, 469 Mich at 274 (internal citations and quotations omitted).

D. Allocution

At sentencing, the court is required to give the defendant, defense counsel, the prosecutor, and the crime victim(s) an opportunity to advise the court of any circumstances they believe the court should take into consideration in imposing sentence. MCR 6.425(E)(1)(c).

"[I]n order to provide the defendant an opportunity to allocute, the trial court need not 'specifically' ask the defendant if he [or she] has anything to say on his [or her] own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he [or she] so chooses." *People v Petit*, 466 Mich 624, 628 (2002). However, "the best way to provide such an opportunity is to specifically ask the defendant if he [or she] has anything to say." *Petit*, *supra* at 629 n 3.

A crime victim[7] has a constitutional and statutory right to make a statement to the court at sentencing. Const 1963, art 1, § 24(1); MCL 780.765; *People v Williams (Anterio)*, 244 Mich App 249, 253-254 (2001). A victim includes the person who suffered harm as a result of the commission of a crime, relatives of a deceased victim, and parents, guardians, or custodians of a victim under 18 years of age. MCL 780.752(1)(*l*). If the victim is physically or emotionally unable to make a statement, he or she may designate someone who is 18 years of age or older, who is not the defendant and who is not incarcerated, to speak on his or her behalf. MCL 780.765.

The court also has discretion to allow a nonparty to address the court at sentencing. *People v Albert*, 207 Mich App 73, 75 (1994) (trial court did not abuse its discretion in allowing a victim's attorney in a civil case against the defendant to address the court, over the defendant's objection).

[7] See the Michigan Judicial Institute's *Crime Victim Rights Manual* for comprehensive information regarding crime victim rights.

The rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *People v Uphaus (On Remand)*, 278 Mich App 174, 183 (2008). "Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence." *Uphaus*, *supra* at 184. Also, the "'right to confront adverse witnesses and to prohibit the introduction of testimonial hearsay without cross-examination does not apply at sentencing.'" *Id*., quoting *United States v Hamad*, 495 F3d 241, 246 (CA 6, 2007). However, the defendant must be given an adequate opportunity to rebut any matter that he or she believes is inaccurate. *Uphaus*, *supra* at 184. In *Uphaus*, *supra* at 184, the Court of Appeals found that the defendant had an adequate opportunity to respond to the hearsay testimony of a police officer concerning threats the defendant allegedly made against other officers, when the defendant was permitted to explain his position and argue that the officers were not credible.

E. Imposition of Sentence[8]

The trial court is required to state on the record "the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled." MCR 6.425(E)(1)(d). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

Generally, "if the sentence imposed is not within the guidelines range, [the court must, on the record] articulate the substantial and compelling reasons justifying that specific departure." MCR 6.425(E)(1)(e). However, if the sentence is imposed as part of a valid plea agreement, the trial court is not required to articulate the reasons for departure. *Wiley*, 472 Mich at 154.

"If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range." MCL 769.34(7).

[8] See SCAO form CC 219b, *Judgment of Sentence/ Commitment to Department of Corrections*, available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/cc219b.pdf.

1. Minimum and Maximum Prison Sentences

Unless a mandatory sentence is required, the court must state both the minimum and maximum sentence. MCL 769.8; MCL 769.9. The maximum sentence is the statutory maximum. *People v Maxson (John)*, 163 Mich App 467, 471 (1987).

The minimum sentence cannot be more than two-thirds of the maximum sentence. *People v Tanner (Richard)*, 387 Mich 683, 690 (1972). The *Tanner* rule is now statutory. MCL 769.34(2)(b). The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *Tanner (Richard)*, *supra* at 690, is a reduction in the minimum sentence. *People v Thomas (Gerry)*, 447 Mich 390, 392-394 (1994). However, "MCL 769.34(2)(b) does not apply when a defendant is convicted of a crime punishable with imprisonment for life or any term of years because the minimum will never exceed two-thirds of the statutory maximum of life." *People v Lewis (Curtis)*, 489 Mich 939, 939-940 (2011), citing *People v Washington (Sylvester)*, 489 Mich 871 (2011); *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006); *People v Harper (Bernard)*, 479 Mich 599, 617 n 31 (2007). Accordingly, where the defendant was convicted of armed robbery, a crime punishable with imprisonment for life or any term of years, the Court of Appeals erred in remanding for resentencing under *Tanner (Richard)*, *supra* at 690. *Lewis*, *supra* at 939.

The court does not have to tailor a defendant's sentence to his or her age, but may "consider a defendant's age at sentencing in deciding whether the sentence about to be imposed is proper[.]" *People v Lemons*, 454 Mich 234, 255, 257-260 (1997) (affirming sentence of life imprisonment and two terms of 60 to 90 years for 45-year-old defendant).

2. Consecutive and Concurrent Sentences[9]

Absent statutory authority for imposing a consecutive sentence, a concurrent sentence is required. *People v Sawyer (Ralph)*, 410 Mich 531, 534 (1981). A presentence investigation report must include a statement prepared by the prosecuting attorney regarding whether consecutive sentencing is required or authorized by law. MCL 771.14(2)(d); MCR 6.425(A)(1)(i). The trial court must specify in the judgment of sentence whether the sentence is concurrent or consecutive. MCL 769.1h(1).

[9] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for more information.

Consecutive sentencing is mandatory for certain offenses and discretionary for others. Mandatory consecutive sentences are required for offenses committed while on parole (MCL 768.7a), escape (MCL 750.193, 750.195, 750.197), and major drug offenses (MCL 333.7401(3)). A jail sentence is a term of imprisonment for purposes of the consecutive sentencing provision of MCL 333.7401(3). *People v Spann*, 250 Mich App 527, 533 (2002), aff'd 469 Mich 904 (2003). Unless the subsequent offense is a major controlled substance offense, consecutive sentencing is discretionary where a defendant commits a subsequent felony while disposition of a previously charged felony is pending. MCL 768.7b(2)(a); *People v Chambers (Dwight)*, 430 Mich 217, 219 (1988).

With the exception of the offenses listed in the statute,[10] a felony-firearm sentence, MCL 750.227b(2), is in addition to and must be imposed consecutively only to the sentence for the specific underlying felony in which the defendant possessed a firearm. *People v Clark (Rajahaan)*, 463 Mich 459, 463-464 (2000).

3. Habitual Offenders[11]

MCL 769.10, MCL 769.11 and MCL 769.12 govern sentencing for habitual offenders. These provisions increase the statutory maximum for offenses depending on the number of the defendant's prior felony convictions.

Second Habitual Offender: If a person is convicted of a felony or an attempt to commit a felony, and that person commits a subsequent felony in Michigan, the person must be sentenced as follows:

- If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court (except as otherwise provided in MCL 769.10 or MCL 771.1) may, in its discretion, place the person on probation or sentence the person to imprisonment for a maximum term that is not more than one and a half times the longest term prescribed for a first conviction of that offense, or for a lesser term. MCL 769.10(1)(a).

[10] MCL 750.223 (illegal sale), MCL 750.227 (concealed weapon), MCL 750.227a (unlawful possession), and MCL 750.230 (alter/remove firearm identification).

[11] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for more information on habitual offenders.

- If the subsequent felony is punishable upon a first conviction by imprisonment for life, the court (except as otherwise provided in MCL 769.10 or MCL 771.1) may place the person on probation or sentence the person to imprisonment for life, or for a lesser term. MCL 769.10(1)(b).

Third Habitual Offender: If a person is convicted of any combination of two or more felonies or attempted felonies, the person must be sentenced as follows:

- If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court (except as otherwise provided in MCL 769.11) may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense, or for a lesser term. MCL 769.11(1)(a).

- If the subsequent felony is punishable upon a first conviction by imprisonment for life, the court (except as otherwise provided in MCL 769.11) may sentence the person to imprisonment for life, or for a lesser term. MCL 769.11(1)(b).

***Fourth Habitual Offender*:** If a person is convicted of any combination of three or more felonies or attempted felonies, the person must be sentenced as follows:

- If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of five years or more or for life, the court (except as otherwise provided in MCL 769.12) may sentence the person to imprisonment for life, or for a lesser term. MCL 769.12(1)(a).

- If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than five years, the court (except as otherwise provided in MCL 769.12) may sentence the person to imprisonment for a maximum term of not more than 15 years. MCL 769.12(1)(b).

For all habitual offenders (second, third, and fourth), if the subsequent felony is a major controlled substance offense, the person must be punished as provided by MCL 333.7401 to

MCL 333.7461. MCL 769.10(1)(c); MCL 769.11(1)(c); and MCL 769.12(1)(c).

If the court imposes a sentence of imprisonment for any term of years, the court must fix the length of both the minimum and maximum sentence (within any specified limits) in terms of years or a fraction of a year, and the sentence must be considered an indeterminate sentence. MCL 769.10(2); MCL 769.11(2); MCL 769.12(2). The court must not fix a maximum sentence that is less than the maximum term for a first conviction. MCL 769.10(2); MCL 769.11(2); MCL 769.12(2).

Because the language of the habitual offender statute is permissive, it only fixes the upper limits of the trial court's sentencing discretion. *People v Bewersdorf*, 438 Mich 55, 66 (1991). Accordingly, if a defendant is convicted as a habitual offender, the trial court is not obligated to impose an enhanced sentence. *People v Bonilla-Machado*, 489 Mich 412, 429-430 (2011); *Bewersdorf*, *supra* at 66. Where a trial court erroneously asserts that it lacks discretion in enhancing a maximum sentence, the case is properly remanded "to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentence[] or to redetermine the maximum sentence[] after properly exercising its discretion." *Bonilla-Machado*, *supra* at 418, 429-430.

~~The trial court abused its discretion in imposing a life sentence upon a fourth habitual offender where the applicable minimum sentencing guidelines range was nine to 46 months. *People v Brooks (Anthony)*, 293 Mich App 525, 548 (2011). In *Brooks (Anthony)*, *supra* at ___, the trial court declined to impose an intermediate sanction or a sentence within the guidelines range because the defendant was a "'career criminal'" with 12 prior felony convictions and three prior misdemeanor convictions. The Court of Appeals agreed that the extent of the defendant's criminal history and recidivist behavior was afforded inadequate weight in the sentencing guidelines and that an upward departure was therefore justified. *Id*. at ___. Nevertheless, "[a] life sentence [fell] outside the range of principled outcomes, even for a repeat offender, where the current charge essentially amounted to trespassing." *Id*. at ___.~~

Committee Tip: Although MCR 6.302(B)(2) requires that the court advise a defendant of "the maximum possible prison sentence for the offense," it does not specifically require the trial court to inform a habitual offender about the effects of that status on the maximum sentence. However, case law appears to require it. In *People v*

Boatman, 273 Mich App 405, 413 (2006), the Court of Appeals vacated the defendant's guilty plea on the basis that it was not intelligently made where the trial court failed to inform the defendant of the maximum possible sentence he could receive as a habitual offender.

4. Special Alternative Incarceration (SAI)—"Boot Camp"

Certain defendants are eligible to be placed in "boot camp" as a condition of probation, MCL 771.3b(1). The Special Alternative Incarceration (SAI) units provide a program of physically strenuous work and exercise, modeled after military basic training. MCL 798.14(1).

a. Prisoners:

If a defendant is serving an indeterminate prison term, the DOC is required to consider placing him or her in an SAI program, unless the sentencing court prohibited that type of placement. MCL 791.234a(1), MCL 791.234a(2)(f), MCL 791.234a(4). The DOC must determine whether a defendant within its jurisdiction and sentenced to an indeterminate term is eligible for placement in an SAI program according to the requirements in MCL 791.234a(2) and MCL 791.234a(3).

To be eligible for placement in an SAI program, the prisoner must meet all of the following requirements set out in MCL 791.234a(2) and MCL 791.234a(3):

- The prisoner's minimum sentence does not exceed either of the following limits, as applicable: (1) 24 months or less for a violation of MCL 750.110 or MCL 750.110a, if the violation involved any occupied dwelling house; or (2) 36 months or less for any other crime.
- The prisoner is physically able to participate in the program.
- The prisoner does not appear to have any mental disability that would prevent participation in the program.
- The prisoner is serving his or her first or second prison sentence.

- The sentencing judge did not prohibit the prisoner's participation in the program.
- The prisoner is otherwise suitable for the program.
- The prisoner has not served and is not serving a sentence for various crimes set out in MCL 791.234a(2)(g).

The prisoner has served the equivalent of the mandatory minimum sentence prescribed by statute for a violation of

MCL 333.7401 to 333.7403.

If the sentencing judge permitted the prisoner's participation in the SAI program in the judgment of sentence, that prisoner may be placed in an SAI unit if the DOC determines that the prisoner also meets the requirements of MCL 791.234a(2) and MCL 791.234a(3). MCL 791.234a(4).

If the sentencing judge neither prohibited nor permitted a prisoner's participation in the SAI program in the judgment of sentence, and the DOC determines that the prisoner meets the eligibility requirements of MCL 791.234a(2) and 791.234a(3), the DOC must notify the judge or successor judge, the prosecuting attorney for the county in which the prisoner was sentenced, and any crime victim who has requested notification of the proposed placement in the SAI unit. MCL 791.234a(4). The notices must be sent no later than 30 days before placement is intended to occur. *Id*.

The DOC is not allowed to place a prisoner in an SAI unit unless the sentencing judge or successor judge notifies the DOC in writing that he or she does not object to the proposed placement. MCL 791.234a(4). In deciding whether to object, the judge or successor judge is required to review any victim impact statements submitted by the victim(s) of the crime for which the prisoner was convicted. *Id*.

The prosecution waives objection to a defendant's placement in an SAI program if it does not raise the issue at sentencing. *People v Krim*, 220 Mich App 314, 320-321 (1997).

The prisoner's consent is required for placement in an SAI program. MCL 791.234a(5).

A prisoner may not be placed in an SAI unit unless:

- the prisoner has been given a fully developed transition accountability plan as determined under the Michigan prisoner reentry initiative, and

- the community in-reach provisions of the Michigan prisoner reentry initiative—which requires interaction between the prisoner and community-based service providers from the community to which the prisoner will return—is in place for that prisoner and those in-reach services have started. MCL 791.234a(6).

- A prisoner who fails to work diligently and productively in an SAI program, or who fails to obey the rules of behavior established for an SAI unit, must be returned to a state correctional facility and is no longer eligible for placement in the program. MCL 798.16(2). A prisoner removed from an SAI unit on this basis must be credited for time served in the unit, except that all disciplinary credits accumulated in the unit may be forfeited. *Id*.

- The maximum amount of time a prisoner may be placed in an SAI program is 120 days. MCL 798.14(1). A prisoner who satisfactorily completes an SAI program must be placed on parole under intensive supervision for a minimum of 120 days following completion of the SAI program. *Id*.

b. Probationers:

In addition to any other term or condition of probation, the court may require an individual convicted of a crime for which he or she may be sentenced to a state correctional facility to satisfactorily complete an SAI program and to serve 120 days of probation under intense supervision. MCL 771.3b(1). This does not apply if the individual was convicted of a crime specified in MCL 771.3b(17).

To be eligible for placement in an SAI program and placement on probation, the individual must meet all of the following requirements set out in MCL 771.3b(2):

- The individual has never served a sentence of imprisonment in a state correctional facility.

- The individual would likely be sentenced to imprisonment in a state correctional facility.
- The upper limit under the sentencing guidelines of the recommended minimum sentence for the individual's offense is 12 months or more, unless (1) the individual's offense is not covered by the felony sentencing guidelines, or (2) the reason the individual is being considered for placement is that he or she violated the conditions of his or her probation.
- The individual is physically able to participate in the SAI program.
- The individual does not appear to have any mental disability that would prevent participation in the SAI program.

An individual is ineligible for placement in an SAI program if:

- he or she has previously been incarcerated in an SAI unit (MCL 771.3b[15]), except that an individual may be placed in an SAI program for a second time if that individual had been placed in an SAI program but was returned to court for sentencing due to a medical condition existing at the time of the placement, and the medical condition has been corrected (MCL 771.3b[16]).
- he or she has been convicted of any of the following crimes, or attempts to commit the following crimes: MCL 750.145c, 750.520b, 750.520c, 750.520d, 750.520g, 750.72, 750.73, 750.75 (MCL 771.3b[17]).

Before a court can place an individual in an SAI program, an initial investigation to establish that the person meets the requirements of MCL 771.3b(2)(a) and MCL 771.3b(2)(b) must be completed by a probation officer. MCL 771.3b(4).

After an individual is placed in an SAI program, the DOC must establish that the person meets the requirements set out in MCL 771.3b(2). If the person does not meet those requirements, the probation order is rescinded, and he or she must be returned to the court for sentencing. MCL 771.3b(5).

An individual must consent to his or her placement in an SAI program. MCL 771.3b(6).

The maximum amount of time an individual may be placed in an SAI program is 120 days. MCL 771.3b(8); MCL 798.14(1). Participants are required to make up for days they miss due to illness or injury. MCL 771.3b(8). If an individual misses more than five days of participation in the program because of an illness or injury that occurred after he or she was placed in the unit, one day is added to the term of his or her placement, beginning with the sixth day missed. *Id*. A maximum of 20 days may be added to an individual's placement. *Id*.

If the local unit of government has created a residential program providing vocational training, education, and substance abuse treatment designed for individuals who have completed an SAI program, a probationer may be required, immediately after successful completion of the SAI program, to successfully complete an additional period of up to 120 days in the local unit of government's residential program. MCL 771.3b(9); MCL 798.14(1).

A probationer who satisfactorily completes an SAI program must be placed on probation under intensive supervision for a minimum of 120 days following completion of the SAI program. MCL 771.3b(12).

The court must authorize the release of the individual from confinement in the SAI unit after receipt of a satisfactory report of performance in the program from the DOC. MCL 771.3b(13). The court must revoke probation after receiving an unsatisfactory report. *Id*.

A probationer who fails to work diligently and productively in an SAI program, or who fails to obey the rules of behavior established for an SAI unit, may be reported to the sentencing court for potential probation revocation. MCL 798.16(1). While the probationer awaits a probation revocation hearing on his or her failure to satisfactorily perform in the SAI program, he or she may be incarcerated in a county jail as an alternative to remaining in the SAI program. *Id*.

A probationer is entitled to credit for time spent in an SAI program if his or her probation is later revoked and he or she is sentenced to a term of imprisonment on the underlying crime. *People v Hite (After Remand)*, 200 Mich App 1, 2 (1993).

5. Jail Sentence[12]

Determinate jail sentences, with or without probation, are proper penalties under the sentencing guidelines as intermediate sanctions. *People v Martin (George Henry III)*, 257 Mich App 457, 460-462 (2003); MCL 750.506; MCL 769.8(1).

MCL 801.251 states that a person sentenced to a county jail (except for a person serving all or any part of a sentence of imprisonment for any of the following crimes or attempted crimes: MCL 750.145c, 750.520b, 750.520c, 750.520d, 750.520g, and murder in connection with sexual misconduct) may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

- Job seeking
- Working at his or her job
- Conducting his or her own self-employed business or occupation (including housekeeping and caring for the needs of his or her family)
- Attending school

A person sentenced or committed to a county jail may be granted the privilege of leaving the jail during necessary and reasonable hours for medical treatment, substance abuse treatment, mental health counseling, or psychological counseling. MCL 801.251(1)(e).

An individual may petition the court for the privilege of leaving jail when he or she is sentenced, and the court has the discretion to renew the individual's petition. MCL 801.251(1). The court may withdraw the privilege at any time by entering an order to that effect, and notice is not required. *Id*.

6. Probation

A court may place a defendant on probation under the charge and supervision of a probation officer, if the court determines that a defendant convicted of any crime other than murder, treason, CSC-1, CSC-3, armed robbery, or major controlled substance offenses, is unlikely to engage in an offensive or criminal course of conduct again, and that the public good

[12] See SCAO form MC 219, *Judgment of Sentence/Commitment to Jail*, available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/mc219.pdf.

does not require that the defendant suffer the penalty imposed by law. MCL 771.1(1).

> **Note:** Although not included in MCL 771.1(1), the court may not place a defendant on probation when he or she was convicted of any of the offenses for which mandatory prison sentences are prescribed by statute. See the Michigan Judicial Institute's *Criminal Procedure Monograph 8*: *Felony Sentencing*, Appendix E, for a list of those offenses.

Whether probation is an authorized alternative to imprisonment depends also on whether the legislative sentencing guidelines apply to a specific sentencing offense. *People v Buehler*, 477 Mich 18, 27-28 (2007). The legislative sentencing guidelines expressly authorize probationary terms for offenses subject to the guidelines when the recommended minimum sentence range falls within an intermediate sanction cell. MCL 769.31(b). Therefore, absent any substantial and compelling reason for departure, when an offense is expressly made subject to the legislative sentencing guidelines, probation is a valid alternative sentence only if the properly scored guidelines place a defendant in an intermediate sanction cell. *Buehler*, *supra* at 27-28.

Except as provided in MCL 771.2a (dealing with probation periods for various stalking and sex offenses), the term of probation imposed on a defendant convicted of a felony offense must not exceed five years. MCL 771.2(1). For purposes of the Code of Criminal Procedure's probation statute, "felony" includes two-year misdemeanors. MCL 761.1(g); *People v Smith (Timothy)*, 423 Mich 427, 434 (1985).

If a court sentences a defendant to probation, it must, in a court order filed with the case and made a part of the record, set the length of the probationary period and determine the terms on which the probation is conditioned. MCL 771.2(2). A court may amend the order in form or substance at any time, *id*., and a defendant is not entitled to notice or an opportunity to be heard regarding an amendment, unless the amendment would result in a fundamental change in his or her liberty interest, such as confinement. *People v Britt*, 202 Mich App 714, 716 (1993). "If during the probation period the sentencing court 'determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation." MCL 771.4. A trial court only has jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment during the probationary period; if the

probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass (Brent)*, 288 Mich App 399, 408-409 (2010).

During the term of an individual's probation, he or she must comply with all of the mandatory conditions of probation set out in MCL 771.3(1)(a)–MCL 771.3(1)(h):

- the probationer must not violate any criminal law.
- the probationer must not leave Michigan without the court's consent.
- the probationer must report (in person or in writing) to his or her probation officer each month, or as often as the probation officer requires.
- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee as set out in MCL 771.3c.
- the probationer must pay restitution to the victim of the probationer's course of conduct leading to the conviction, or to the victim's estate.
- the probationer must pay a crime victim assessment as set out in MCL 780.905.[13]
- the probationer must pay the minimum state cost as set out in MCL 769.1j.[14]
- if required, the probationer must be registered under the sex offender registration act (MCL 28.721 to 28.732).

A trial court has broad discretion in determining any additional terms and conditions to impose as part of probation. *People v Oswald*, 208 Mich App 444, 446 (1995). During the term of an individual's probation, he or she may be required to comply with one or more of the following discretionary terms and conditions set out in MCL 771.3(2)(a)–MCL 771.3(2)(q) and MCL 771.3(3):

[13] See Section 6.1(E)(7) for discussion of crime victim assessments.

[14] See Section 6.1(E)(7) for discussion of minimum state costs.

- be imprisoned in the county jail for a maximum period of 12 months or up to the maximum period of confinement allowed for the charged offense if less than 12 months

  —a period of incarceration may be served at one time or in consecutive or nonconsecutive intervals

  —the probationer may be allowed day parole or a work or school release from jail

- pay immediately, or within the period of his or her probation, any fine imposed when the individual was placed on probation

- pay costs, limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant, and supervision of the probationer

- pay any assessment ordered by the court in addition to the crime victim assessment[15]

- perform community service

- agree to pay any restitution, assessment, fine, or cost imposed by wage assignment

- participate in inpatient or outpatient drug treatment or a drug treatment court

- participate in mental health treatment

- participate in mental health or substance abuse counseling

- participate in a community corrections program

- be under house arrest

- be subject to electronic monitoring

- participate in a residential probation program

- satisfactorily complete a program of incarceration in a special alternative incarceration unit as set out in MCL 771.3b

[15] See Section 6.1(E)(7) for discussion of crime victim assessments.

- be subject to conditions reasonably necessary for the protection of one or more named persons
- reimburse the county for expenses incurred in connection with the probationer's conviction as set out in
- MCL 801.81 to 801.93
- complete a high school education or the equivalent by attaining a general education development (GED) certificate
- be subject to other lawful conditions of probation deemed proper by the court or warranted by the circumstances of the case

If costs are imposed on a probationer under MCL 771.3(2) as part of a sentence of probation, MCL 771.3(6) provides:

- the court must not require the probationer to pay costs unless he or she is, or will be, able to pay them during the term of probation.
- the court must take into account the probationer's financial resources and the nature of the burden that payment of the costs will impose, giving regard to the probationer's other obligations.
- a probationer who is required to pay costs under

MCL 771.3(1)(g) or MCL 771.3(2)(c), and who is not in willful default of the payment of the costs, may petition the sentencing judge (or his or her successor) at any time for a remission of the payment of any unpaid portion of those costs.

if the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs, or modify the payment method.

If a probationer is required to pay costs as part of a sentence of probation, the court may require him or her to pay in any of the following manners set out in MCL 771.3(7):

- immediately
- within a specified time period

- in installments

If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order must be a condition of probation. MCL 771.3(8). If the probationer fails to comply with the order to pay costs, and has not made a good faith effort to comply with the order to pay costs, the court has discretion to revoke probation. *Id*. In deciding whether to revoke probation, the court must consider the factors set out in MCL 771.3(8):

- the probationer's employment status
- the probationer's earning ability
- the probationer's financial resources
- the willfulness of the probationer's failure to pay
- any other special circumstances that may impact a probationer's ability to pay

7. Fines and Costs

A criminal defendant may be required to pay costs only where the imposition of costs is expressly authorized by statute. *People v Jones (Michael)*, 182 Mich App 125, 126 (1989).

MCL 769.1k provides a general statutory basis for a court's authority to impose fines and costs. If a defendant pleads guilty or nolo contendere, or the defendant is found guilty following a trial, the court must impose the minimum state costs as set out in MCL 769.1j. MCL 769.1k(1)(a). Under MCL 769.1k(1)(b) and MCL 769.1k(2), the court may also impose:

- any fine
- any cost in addition to the minimum state cost set out in MCL 769.1k(1)(a)
- the expenses of providing legal assistance to the defendant[16]

[16]"[W]hen authorized, costs of prosecution 'must bear some reasonable relation to the expenses actually incurred in the prosecution.'" *People v Dilworth*, 291 Mich App 399, 401 (2011), quoting *People v Wallace*, 245 Mich App 310, 314 (1929). "Furthermore, those costs may *not* include 'expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.'" *Dilworth*, *supra* at 401, quoting *People v Teasdale*, 335 Mich 1, 5 (1952).

- any assessment authorized by law
- reimbursement under MCL 769.1f
- any additional costs incurred in compelling the defendant's appearance

The court may order the amounts imposed under MCL 769.1k to be collected at any time, MCL 769.1k(5), and may order a defendant to pay any fine or cost by wage assignment. MCL 769.1k(4).

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it authorizes the court to order court costs ("[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments"). *People v Lloyd*, 284 Mich App 703, 707-708 (2009). Accordingly, the plain language of MCL 769.1k and MCL 769.34(6) "expressly grant[s] authority to a sentencing court to order a defendant to pay court costs." *Lloyd*, *supra* at 709. In *Lloyd*, *supra* at 706-710, the Court relied on MCL 769.1k and MCL 769.34(6) to refute the defendant's argument that he could not be ordered to pay court costs because the statute governing the offense of which he was convicted, felony-firearm (MCL 750.227b), did not contain an express provision addressing costs.

"The plain language of MCL 769.1k does not require the trial court to consider a defendant's ability to pay before imposing discretionary costs and fees . . . ." *People v Wallace*, 284 Mich App 467, 470 (2009).

MCL 769.3(1) states that the court may impose a conditional sentence and order a person convicted of an offense punishable by a fine or imprisonment or both, to pay a fine, with or without the costs of prosecution, within a limited time stated in the sentence. If the person defaults on the payment, the court may sentence him or her as provided by law. *Id*.

Costs of emergency response and prosecution: MCL 769.1f authorizes or requires the court to order a defendant convicted of certain specified offenses[17] to reimburse state or local units of government for expenses incurred in relation to the incident for which the person was convicted. These expenses include, but are not limited to, expenses for an emergency response and expenses for prosecuting the person.

[17] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8*: *Felony Sentencing* for a detailed list of those offenses.

As a condition of probation: A trial court may require a probationer to pay costs as a condition of probation. MCL 771.3(2)(c). If the court requires the probationer to pay costs under MCL 771.3(2), the costs must be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer. MCL 771.3(5). For example, a trial court may impose costs to reimburse the prosecution's expense of an expert witness at trial. *People v Brown (Craig)*, 279 Mich App 116, 140 (2008).

If a trial court imposes costs under MCL 771.3(2) as part of a sentence of probation, the court must not require a probationer to pay those costs unless the probationer is or will be able to pay them during the term of probation. MCL 771.3(6)(a). In determining the amount and method of payment of costs under MCL 771.3(2), the court must take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, giving regard to the probationer's other obligations. MCL 771.3(6)(a). A trial court may consider a defendant's potential for employment when determining the defendant's ability to pay. *Brown (Craig)* , 279 Mich App at 139-140. Where the defendant opted to attend school full-time instead of working full-time, the trial court concluded that the defendant could pay if he chose to do so and properly imposed costs under MCL 771.3. *Brown (Craig)*, *supra* at 139-140.

A probationer may ask the sentencing court to reduce the amount of costs, and a probationer cannot be punished for failure to pay costs that he or she cannot afford. MCL 771.3(8); *People v Music*, 428 Mich 356, 361-363 (1987). Additionally, "a defendant who timely asserts an inability to pay . . . costs must be heard." *Music*, *supra* at 362. In that instance, a sentencing court must determine whether the costs are within the probationer's means. *Id*.

Costs of prosecution authorized by penal statutes: Some statutes authorize a trial court to order a defendant to pay the costs of prosecution if the defendant is convicted of specific offenses. See, e.g., MCL 205.28(2) (prohibiting authorized treasury personnel from unlawful conduct involving state administration of taxes), MCL 257.625k(7) (providing false information with regard to an ignition interlock device), MCL 750.49(5) (fighting, baiting, or shooting an animal, or breeding an animal for those purposes), and MCL 750.50(4) (failing to adequately care for an animal).

Costs of a court-appointed attorney: "If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C).

A trial court is not required to analyze a defendant's ability to pay a fee for a court-appointed attorney before imposing the fee; it is only required to do so if the fee is actually enforced. *People v Jackson (Harvey)*, 483 Mich 271, 275 (2009), overruling in part *People v Dunbar*, 264 Mich App 240 (2004). However, "[o]nce an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *Jackson (Harvey)*, *supra* at 275. In any event, "remittance orders of prisoner funds, under MCL 769.1*l*, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment . . . ." *Id*.

Minimum state costs: If a defendant is ordered to pay any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay costs of not less than~~a minimum state cost of~~ $68 if convicted of a~~ for each~~ felony ~~conviction~~ or~~,~~ $50~~3~~ if convicted of a~~for each serious or specified~~ misdemeanor or ordinance violation~~ conviction, and $48 for each misdemeanor conviction~~. MCL 769.1j(1)(a)-(b).[18]

> **Note:** ~~The statutory language only clearly *requires* a court to impose the minimum state cost *if* other costs, fines, or assessments are ordered. However, there is no express prohibition against ordering the minimum state cost in cases where other costs, fines, or assessments are *not* also imposed.~~Minimum state costs are to be assessed on each qualifying conviction based upon the offense convicted, so long as "any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.)." SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).[19]

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[18] ~~2008 PA 547 amended MCL 769.1j, effective April 1, 2009 (the minimum state cost was previously $60 for each felony conviction, $45 for each serious or specified misdemeanor conviction, and $40 for each misdemeanor conviction).~~Effective April 1, 2012, 2011 PA 293 amended MCL 769.1j(1) and MCL 769.1j(7) to eliminate the distinction between "serious" and "specified" misdemeanors, and to provide for a minimum assessment of $50.00 against a defendant who commits *any* misdemeanor or ordinance violation. Related provisions were amended by 2011 PA 294—2011 PA 296, also effective April 1, 2012.

[19] The Crime Victim Assessment and Minimum State Costs Charts are available at http://courts.michigan.gov/scao/resources/other/CrimeVictimAssessment.pdf.

MCL 769.1k provides a court with general authority to impose several specific monetary penalties at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j]."

Crime victim rights assessment:[20] The court is required to "order each person charged with an offense that is a felony, misdemeanor, or ordinance violation . . . that is resolved by conviction[] . . . or in another way that is not an acquittal or unconditional dismissal, to pay an assessment" . . . of $130 if the offense is a felony or $75.00 if the offense is a misdemeanor or ordinance violation." MCL 780.905(1)(a)-(b).[21] In contrast to the minimum state cost, which may be ordered for each conviction arising from a single case,[22] only one crime victim assessment per criminal case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).[23]

Excessive fines are prohibited by the Michigan Constitution. Const 1963, art 1, § 16. A fine must be proportionate to the offense; a fine may be excessive even when it falls within the amount authorized by statute. *People v Antolovich*, 207 Mich App 714, 718 (1995) (even though authorized by statute, a fine of $25,000 for the defendant's illegal sale of one gram of cocaine was constitutionally excessive).

Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise for good cause shown. MCR 1.110.[24]

Courts have the authority to use their contempt powers to encourage payment of court-ordered payments. MCL 600.1701(e).

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[20] See the Michigan Judicial Institute's *Crime Victim Rights Manual* for more information about crime victim assessments.

[21] Effective April 1, 2012, 2011 PA 294 amended MCL 780.901 and MCL 780.905(1) to provide for a crime victim assessment of $75.00 in cases involving a conviction of *any* misdemeanor or ordinance violation (rather than only a "serious" or "specified" misdemeanor). Related provisions were amended by 2011 PA 293, 2011 PA 295, and 2011 PA 296, also effective April 1, 2012.

[22] Minimum state costs are assessed on each count "if any combination of other assessments is also ordered on that count (e.g. fine + cost, fine + restitution, crime victim assessment + restitution, etc.)." SCAO Crime Victim Assessment and Minimum State Cost Charts, p 2, p 2 n 5 (Revised April 1, 2012).

[23] The crime victim assessment is to be "[b]ased upon the [m]ost [s]erious [o]ffense [c]onvicted" in a case. SCAO Crime Victim Assessment and Minimum State Cost Charts, p 1 (Revised April 1, 2012).

[24] See SCAO form CC 20a, *Order Regarding Suspension of Prisoner Fees/Costs*, available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc20a.pdf.

Fines and penalties are not dischargeable in bankruptcy. 11 USC 523(a)(7).

8. Restitution[25]

Victims have a constitutional right to restitution. Const 1963, art 1, § 24. "At sentencing, the court must, on the record, order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate." MCR 6.425(E)(1)(f); MCL 780.766(2) (felony article); MCL 780.794(2) (juvenile article); MCL 780.826(2) (misdemeanor article[26]); MCL 769.1a(2).

Because restitution is mandatory, defendants are on notice that it will be part of their sentences. *People v Ronowski*, 222 Mich App 58, 61 (1997). Restitution is not open to negotiation during the plea-bargaining or sentence-bargaining process. *Ronowski*, *supra* at 61.

Restitution is "specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Grant (Dennis)*, 455 Mich 221, 230 (1997). "In determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). The court must "consider only the loss sustained by the victims," and must not consider the defendant's ability to pay. *People v Lueth*, 253 Mich App 670, 692 (2002). MCL 780.766(2) "authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction." *People v Gahan*, 456 Mich 264, 270 (1997). These provisions are "'remedial in character and should be liberally construed to effectuate [the] intent [of the Crime Victim's Rights Act, MCL 780.751 *et seq*.].'" *People v Allen (Regina)*, ___ Mich App ___, ___ (2012). "Because [MCL 780.766(2)] plainly requires the trial court to order 'full' restitution, . . . a trial court abuses its discretion when it orders restitution other than full restitution." *Allen (Regina), supra* at ___ n 1.

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the

[25] For detailed information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Manual*, Chapter 10.

[26] The felony, juvenile, and misdemeanor articles of the Crime Victim Rights Act contain substantially similar language.

victim against the defendant. *People v Dimoski*, 286 Mich App 474, 482 (2009). MCL 780.766(8) provides in part that "[t]he court shall not order restitution to be paid to a victim . . . if the victim . . . has received or is to receive compensation for that loss . . . ." The "is to receive" language requires actual receipt of compensation or certainty regarding receipt of compensation, and does not refer to compensation with the potential to be recovered. *Dimoski*, *supra* at 481. The distinction between restitution and civil damages is reflected in the setoff scheme of MCL 780.766(9), which provides that "[a]ny amount paid to a victim . . . under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim . . . ." *Dimoski*, *supra* at 478. "Although [a] victim [may] have the benefit of both a civil judgment and a restitution order to obtain monetary relief from [a] defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed." *Id*. at 482.

Property that cannot be returned. In situations in which a defendant is ordered to make restitution to a victim for property that is lost, damaged, or destroyed and the property cannot be returned, MCL 769.1a(3) applies. MCL 769.1a(3) states:

> "If a felony, misdemeanor, or ordinance violation results in damage to or loss or destruction of property of a victim of the felony, misdemeanor, or ordinance violation or results in the seizure or impoundment of property of a victim of the felony, misdemeanor, or ordinance violation, the order of restitution may require that the defendant do 1 or more of the following, as applicable:
>
> > "(a) Return the property to the owner of the property or to a person designated by the owner.
> >
> > "(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
> >
> > > "(*i*) The fair market value of the property on the date of the damage, loss, or

> destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> "(*ii*) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value."

Civil agreement: A civil agreement between a defendant and a crime victim limiting future claims against the defendant does not negate the statutory requirement that the defendant be ordered to pay restitution to any victim of the defendant's conduct or to an entity from which a victim has received compensation. *People v Bell (Bernice)*, 276 Mich App 342, 343-350 (2007) (the trial court erred in ruling that a civil agreement between a crime victim and the defendant precluded the court from ordering the defendant to pay restitution to the insurance company that had compensated the victim for the defendant's crime).

Insurance company: "An insurance company may be awarded restitution . . . for money paid to a victim for a defendant's criminal act." *Bell (Bernice)*, 276 Mich App at 346-347. "The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount paid by an insurer or other entity." *Bell (Bernice)*, *supra* at 347.

The trial court did not clearly err in determining that an insurance company "suffered a direct financial loss as a result of [the defendant's] course of criminal conduct[]" in attempting to purchase a controlled substance from a pharmacy using an insurance contract number that she extracted from a subscriber database during her employment with the company's vendor. *Allen (Regina)*, ___ Mich App at ___ (affirming the trial court's order requiring the defendant to pay restitution to the company in an amount determined by "assigning a value to the hours [the company's employee] spent on the [fraud] investigation[]").

Cost of labor: The amount of restitution ordered may include the cost of labor necessary to determine the value of property

lost as a result of a defendant's criminal conduct, as well as the labor costs involved in replacing the lost property. *People v Gubachy*, 272 Mich App 706, 709, 713-714 (2006) (where the defendant stole three plumbing trucks, the trial court did not abuse its discretion in ordering reimbursement for the value of the plumbing store's labor costs in conducting an inventory and reequipping the trucks).

If the evidence demonstrates loss based on the replacement value of stolen items as well as expected profits, the trial court may consider lost profits in assessing restitution. *People v Cross (Clifton)*, 281 Mich App 737, 738-740 (2008) (trial court's order of restitution for income loss was supported by prosecutorial evidence and by "the victim's extensive, essentially expert, testimony").

A restitution hearing is not required unless there is an actual dispute as to the amount. *Grant (Dennis)*, 455 Mich at 243. "Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." MCL 780.767(4). "'Preponderance of the evidence' means such evidence, as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *Cross (Clifton)*, 281 Mich App at 740.

MCL 769.1a(14) "prohibits incarceration as a consequence for failure to pay [restitution] unless the failure was wil[l]full." *People v Collins (Richard)*, 239 Mich App 125, 136 (1999). This is because "a sentence that exposes an offender to incarceration unless he [or she] pays restitution . . . violates the Equal Protection Clauses of the federal and state constitutions because it results in unequal punishments for offenders who have and do not have sufficient money." *Collins (Richard)*, *supra* at 135-136 (trial court's sentencing order violated Equal Protection principles because it required the defendant to pay restitution as a condition for reducing his jail term).

While restitution must be imposed as a condition of probation, MCL 771.3(1)(e) and MCL 780.766(11), the court may not revoke probation on the basis of the defendant's failure to pay restitution that the defendant cannot afford. MCL 769.1a(14); MCL 780.766(14). The defendant may petition the sentencing judge to modify the method of payment based upon manifest hardship. MCL 769.1a(12); MCL 780.766(12).

Generally, restitution must be made immediately. MCL 780.766(10). The Department of Corrections may execute a

restitution order by withdrawing funds from a prisoner's account, and there is no legal right "to cessation of [] restitution payments while [a defendant] remains incarcerated." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 222, 225 (2000). However, the court has the discretion to require a defendant to make restitution within a specified period or in installments. MCL 780.766(10).

Restitution ordered as part of a sentence of imprisonment or imposed as a condition of probation is not dischargeable in bankruptcy. 11 USC 523(a)(13).

> **Committee Tip:** To avoid confusion, it is good practice to specify to whom restitution should be paid.

Standard of review. "Trial courts do not have discretion to order a convicted defendant to pay restitution; they must order the defendant to pay restitution and the amount must fully compensate the defendant's victims." *Allen (Regina)*, ___ Mich App at ___.

> "Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and [the Court of Appeals] reviews de novo the proper interpretation of statutes. . . . However, [the] Court reviews the findings underlying a trial court's restitution order for clear error. . . . A finding is clearly erroneous if [the] Court is left with the definite and firm conviction that a mistake has been made." *Allen (Regina)*, ___ Mich App at ___ (citations omitted).

F. Judgment/Reissuance of Judgment

Under MCR 6.427, the court must date and sign a written judgment of sentence within seven days after sentencing that includes the following:

- The title and file number of the case;
- The defendant's name;
- The crime for which the defendant was convicted;
- The defendant's plea;
- The name of the defendant's attorney if one appeared;
- The jury's verdict or the finding of guilt by the court;

- The term of the sentence;
- The place of detention;
- The conditions incident to the sentence; and
- Whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number.

If the defendant was found not guilty or is entitled to be discharged for any other reason, the court must enter judgment accordingly. MCR 6.427.

The date a judgment is signed is its entry date. MCR 6.427.

Under MCR 6.428, the trial court must issue an order restarting the time in which to file an appeal of right "[i]f the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right[.]"

G. Correction and Appeal of Sentence

A "trial court lacks authority to set aside a valid sentence once [a] defendant begins serving it." *Wybrecht*, 222 Mich App at 166. A trial court may not modify a valid sentence after it has been imposed, except as provided by law. MCR 6.429(A).

For example, in *People v Holder*, 483 Mich 168, 170, 177 (2009), the Supreme Court held that the trial court did not have the authority to modify the defendant's sentence under MCR 6.429(A), because the sentence was valid when it was imposed. In *Holder*, *supra* at 169-170, the defendant committed several crimes after being discharged from parole, and thereafter received notice from the DOC that his parole discharge was cancelled. The DOC then asked the trial court to amend the defendant's judgment of sentence to reflect that the sentence imposed was to be served consecutively to the sentence for which the defendant was on parole. *Id*. at 170. However, once a defendant is discharged from parole, the Department of Corrections (DOC) is not permitted to cancel, revoke, or rescind a parole discharge order. *Id*. at 173.

The Court reiterated that "*any* notices sent from the DOC to the courts and parties regarding sentencing errors are merely

informational, and any requests contained therein merely advisory." *Holder*, 483 Mich at 176. The Court instructed that "[a]ny judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC." *Holder*, *supra* at 176. The Court further stated that "[i]t is imperative that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules." *Id*. "[I]f the claimed error is substantive, the court may modify the sentence only '[a]fter giving the parties an opportunity to be heard' *and* if 'it has not yet entered judgment in the case . . . .'" *Id*. at 176-177, quoting MCR 6.435(B).

A motion to correct an invalid sentence may be filed by the prosecution or the defendant. MCR 6.429(A). The court may correct an invalid sentence. MCR 6.429(A); *People v Moore*, 468 Mich 573, 579 (2003). "A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, [] when it conforms to local sentencing policy rather than individualized facts . . . [or] if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96 (1997).[27] "Where a sentence is partially invalid, only the invalid part is to be vacated for resentencing; however, a wholly invalid sentence is to be vacated in its entirety, and resentencing is to be de novo." *People v Parish*, 282 Mich App 106, 108 (2009). A sentence is wholly invalid when it is an impermissible combination of terms—a term of years to life, for example. *Parish*, *supra* at 108.

Ministerial modifications of invalid sentences do not require a resentencing hearing. *Miles*, 454 Mich at 98-99. Other modifications, such as correction of a sentence found invalid because of inaccuracies in information relied on at sentencing, require the due process protections of a resentencing hearing. *Miles*, *supra* at 99.

MCR 6.429(B) sets out the time requirements for filing a motion to correct an invalid sentence. A motion to correct an invalid sentence may be filed before a timely claim of appeal is filed. MCR 6.429(B)(1). If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed under MCR 7.208(B) (postjudgment motions in criminal cases) or MCR 7.211(C)(1) (motion to remand). MCR 6.429(B)(2). If the defendant may only appeal by leave, or files an untimely claim of appeal, a motion to correct an invalid sentence may be filed within six months of entry of the judgment of conviction and sentence. MCR 6.429(B)(3). If the defendant is not entitled to appeal by right or by leave, he or she

[27] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for a detailed list of circumstances under which a sentence is invalid.

may seek relief under the court rules in subchapter 6.500 (postappeal relief). MCR 6.429(B)(4).

A party is precluded from raising on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied on in determining a sentence that is within the appropriate guidelines sentence range unless the party raised the issue at sentencing, or in a proper motion to remand filed in the Court of Appeals. MCR 6.429(C); MCL 769.34(10). "[W]hen the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his [or her] appellate brief." *People v Jackson (Leonard)*, 487 Mich 783, 800 (2010).

If a trial court imposes a minimum sentence that falls above the appropriate sentence range, the court must (as part of the court's advice of the defendant's rights concerning appeal) advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range. MCL 769.34(7).

If a trial court changes any sentence, the court clerk must give written notice of the change to the prosecution, the defendant, and defense counsel. MCL 769.27. Either party may file an objection to the change, and the trial court is required to promptly hold a hearing on any objection filed. *Id*.

If a case is remanded for resentencing, it is before the trial court "in a presentence posture, allowing for objection to any part of the new sentence." *People v Rosenberg*, 477 Mich 1076 (2007).

H. Standard of Review

"The imposition of a sentence is reviewed for an abuse of discretion." *People v Underwood (Michael)*, 278 Mich App 334, 337 (2008). An abuse of discretion occurs when a trial court chooses an outcome falling outside of a reasonable and principled range of outcomes. *Babcock*, 469 Mich at 269.

"The interpretation of the statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to de novo review." *Underwood (Michael)* , 278 Mich App at 337.

The trial court's scoring of a sentencing guidelines variable is reviewed for clear error. *People v Witherspoon*, 257 Mich App 329, 335 (2003). A scoring decision is not clearly erroneous if the record

contains any evidence in support of the decision. *Witherspoon*, *supra* at 335.

The existence of a particular factor articulated in support of a departure is reviewed for clear error, the determination whether a factor is objective and verifiable is reviewed as a matter of law, and a trial court's determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed for an abuse of discretion. *Babcock*, 469 Mich at 264-265.

6.2 Habitual Offender Sentencing

Michigan's sentencing scheme allows for increases in both the minimum and maximum penalties for habitual offenders. MCL 777.21 permits an increase in the recommended minimum sentence range under the statutory sentencing guidelines based on the number of a defendant's prior felony convictions. The general habitual offender statutes, MCL 769.10, 769.11, and 769.12, raise the maximum sentence allowed for repeat offenders based on both the number of a defendant's prior felony convictions and the specific maximum penalty authorized for conviction of the sentencing offense.[28]

A. Notice Required

The prosecution "may seek to enhance the sentence of the defendant as provided under [MCL 769.10, 769.11, or 769.12], by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." MCL 769.13(1); MCR 6.112(F). A notice of intent to seek an enhanced sentence must list the prior conviction(s) that will or may be relied on to enhance the defendant's sentence. MCL 769.13(2); MCR 6.112(F). The notice must be filed with the court and served on the defendant or defense counsel at the arraignment on the information charging the underlying offense, or may be served under the rules governing service of written pleadings. *Id*. The prosecution must also file a written proof of service with the clerk of the court. *Id*.

The prosecution may file a notice of intent to seek an enhanced sentence: (1) after the defendant has been convicted of the underlying offense (or a lesser offense), on a plea of guilty or nolo contendere, if the defendant pleads guilty or nolo contendere at the

[28] See Section 6.1(E).

arraignment on the information charging the underlying offense, or (2) within 21 days after the arraignment. MCL 769.13(3).

"[T]he supplemental information may be amended outside the [21-day] statutory period only to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13, i.e., the amendment may not relate to additional prior convictions not included in the timely filed supplemental information." *People v Ellis (Edward)*, 224 Mich App 752, 757 (1997) (trial court erred in denying the defendant's motion to quash the amended information where the prosecutor's amendment alleged two additional prior convictions, thereby subjecting the defendant to a potential life sentence, rather than a seven-year sentence enhancement as in the original supplemental information). It is permissible to "amend[] . . . a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *People v Hornsby*, 251 Mich App 462, 472 (2002) (trial court properly denied the defendant's motion challenging the amendment of the notice to seek sentence enhancement where the amendment did not change the potential consequences of a conviction).

B. Proof of Prior Convictions

The existence of a defendant's prior conviction(s) must be determined by the court at a special hearing for that purpose before sentencing, or at sentencing. MCL 769.13(5); *People v Green (Rodney)*, 228 Mich App 684, 700 (1998). A defendant is not entitled to a jury trial on the issue of whether he or she is a habitual offender. *Id.*; *People v Zinn*, 217 Mich App 340, 345-347 (1996). MCL 769.13(5)(a)–MCL 769.13(5)(e) states that the existence of a prior conviction may be established by any relevant evidence, including, but not limited to, any of the following:

- a copy of the judgment of conviction
- a transcript of a prior trial, plea-taking proceeding, or sentencing proceeding
- a copy of a court register of actions
- information in a presentence report
- a defendant's statement

A defendant who has been given notice that the prosecution is seeking sentence enhancement may challenge the accuracy or constitutional validity of one or more of the prior convictions listed in the notice by filing a written motion with the court and by

serving a copy of the motion on the prosecution. MCL 769.13(4). An example of a constitutionally invalid conviction is one that has been obtained in violation of a defendant's right to counsel. *People v Hannan (After Remand)*, 200 Mich App 123, 128 (1993) ("a criminal conviction obtained in violation of a defendant's right to counsel cannot be used to enhance a sentence").

The court is required to resolve any challenges to the accuracy or constitutional validity of a prior conviction that have been raised in a motion by the defendant at a separate hearing for that purpose before sentencing, or at sentencing. MCL 769.13(6). The defendant or defense counsel must be given an opportunity to deny, explain, or refute any evidence or information relevant to the defendant's prior conviction(s) before the trial court imposes sentence, as well as permission to present relevant evidence to support his or her assertions. *Id*. The defendant bears the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. *Id*. If the defendant makes out a prima facie showing, the burden shifts to the prosecution to prove, by a preponderance of the evidence, that the information or evidence is accurate or constitutionally valid. *Id*.

Some examples of the types of proof required to collaterally attack a prior conviction for lack of counsel include: a docket entry or transcript showing the absence of counsel, *People v Carpentier*, 446 Mich 19, 31 (1994); evidence that the defendant requested that information and the trial court failed to reply or refused to furnish the records in a reasonable time, *id*.; or a notation on a presentence investigation report indicating that a defendant was not represented by counsel, *People v Alexander (After Remand)*, 207 Mich App 227, 230 (1994). Mere silence regarding counsel on a presentence report does not constitute prima facie proof. *Zinn*, 217 Mich App at 344.

MCL 769.10, 769.11, and 769.12 enhance a defendant's maximum sentence based on a defendant's prior felony convictions. A "felony" is defined in MCL 761.1(g) as "a violation of a penal law of [Michigan] for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." The habitual offender statutes also consider a felony to be a conviction for conduct or attempted conduct that would be felonious if committed in Michigan, regardless where the crime was actually committed. MCL 769.10, 769.11, 769.12.

When counting prior felonies under Michigan's habitual offender statutes, each felony conviction that preceded the sentencing offense is a separate felony conviction, even if more than one conviction arose from the same criminal transaction. *People v Gardner*, 482 Mich

41, 44 (2008). In *Gardner*, *supra* at 53-62, the Michigan Supreme Court rejected its previous method[29] of counting multiple felonies that arose from the same criminal incident or transaction as a single felony. The Court explained that the plain language of the habitual offender statutes, MCL 769.10—MCL 769.13, "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *Gardner*, *supra* at 44.

The habitual offender statutes expressly prohibit the use of a conviction to enhance a sentence "if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under [the habitual offender statutes]." MCL 769.10(3), MCL 769.11(3), and MCL 769.12(3).[30]

C. Calculating a Habitual Offender's Sentence[31]

MCL 777.21(3) governs determining a habitual offender's recommended minimum sentence range under MCL 769.10, MCL 769.11, or MCL 769.12. The enhancements under MCL 777.21 increase the recommended minimum sentence ranges calculated under the sentencing guidelines as the ranges apply to habitual offenders. These increased minimum ranges are reflected in each cell of each sentencing grid (MCL 777.61—MCL 777.69) based on the defendant's habitual offender status as applied to his or her placement in the appropriate sentencing grid.[32]

MCL 769.10, MCL 769.11, and MCL 769.12 relate to the maximum penalty authorized by the statute under which the defendant's conduct was prohibited. These habitual offender enhancement provisions permit a sentencing court to impose on a habitual offender a sentence greater than the maximum sentence permitted by statute for a first conviction of the sentencing offense. The maximum term of imprisonment permitted for a habitual offender's felony conviction (as authorized under MCL 769.10, MCL 769.11, or MCL 769.12) must be determined by reference to the specific criminal statute the defendant's conduct violated.

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[29] See *People v Preuss*, 436 Mich 714 (1990), and *People v Stoudemire*, 429 Mich 262 (1987) (modified by *Preuss*, *supra* at 739).

[30] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for more information on permissible uses of a conviction for enhancement purposes.

[31] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for a detailed discussion of calculating a habitual offender's sentence.

[32] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing*, Appendix A, for all the sentencing grids.

If the court imposes a sentence of imprisonment for any term of years under MCL 769.10, MCL 769.11, or MCL 769.12, it is required to fix the length of both the minimum and maximum sentences within specified limits in terms of years or a fraction of a year, i.e., an indeterminate sentence. MCL 769.10(2); MCL 769.11(2); MCL 769.12(2). The court is prohibited from fixing a maximum sentence that is less than the maximum term for a first conviction. MCL 769.10(2); MCL 769.11(2); MCL 769.12(2). For any sentence imposed for a term of years, the minimum term of years may not exceed two-thirds of the maximum term of years. MCL 769.34(2)(b); *People v Wright*, 432 Mich 84, 85-86 (1989).

When an offender has a previous felony conviction and is subsequently convicted of a "major controlled substance offense," MCL 769.10(1)(c), MCL 769.11(1)(c), and MCL 769.12(1)(c) mandate application of the sentencing provisions in MCL 333.7401—MCL 333.7461.[33] "Where a defendant is subject to sentence enhancement under the controlled substance provisions, the sentence may not be doubly enhanced under the habitual offender provisions." *People v Fetterley*, 229 Mich App 511, 540 (1998). "Where a defendant commits a controlled substances offense, but is not subject to the enhancement provisions of the Public Health Code because, although the defendant is a[] habitual offender, there are no prior controlled substance offenses, enhancement under the habitual offender provisions is permitted." *Fetterley, supra* at 540. "Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted." *Id*. at 540-541.

D. Standard of Review

A trial court's decision to impose an increased sentence under the habitual offender statutes is reviewed for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125 (2005).

6.3 Delayed/Deferred/Diversionary Sentences[34]

Delayed sentencing refers to the process by which a defendant's guilt is adjudicated and the resulting conviction remains on record. However,

[33] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for more information on sentencing habitual offenders for major controlled substance offenses.

[34] An SCAO chart comparing processing for Deferred Judgment of Guilt and Delayed Sentence for Adult Offenders is available at http://courts.michigan.gov/scao/resources/standards/Deferred_vs_Delayed_Sentence.pdf.

where a defendant is eligible for a sentence of probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to demonstrate that probation, or other leniency compatible with the ends of justice and the defendant's rehabilitation is an appropriate sentence for his or her conviction. During the period of delay, the court may require the defendant to comply with any applicable terms and conditions associated with a sentence of probation. See, generally, *People v Saylor (Barry)*, 88 Mich App 270 (1979), and MCL 771.3(9).

Deferred adjudication refers to the situation in which a defendant pleads or is found guilty of a charged offense, but where the adjudication of guilt is not immediately entered. The court instead places the defendant on probation and if he or she successfully completes the terms and conditions of probation, the court must discharge the defendant and dismiss the proceedings; no judgment of guilt is entered against the defendant. If the defendant violates a term or condition of probation during the probationary period, the court has the discretion to continue the probationary period, or to enter an adjudication of guilt and sentence the defendant. Deferred adjudication is limited to specific offenses. See MCL 333.7411 (controlled substance offenses), MCL 436.1703 (minor in possession), MCL 750.430 (impaired healthcare professional), MCL 769.4a (domestic violence/spouse abuse), MCL 762.11 (youthful trainee status), and MCL 750.350a (parental kidnapping).

A. Delayed Sentence[35]

"The purpose of a delayed sentence is to give the defendant an opportunity to demonstrate that he [or she] can fairly be placed on probation rather than be sentenced to prison. The trial court may impose conditions and restrictions with which the defendant must comply during the period of the delay, so long as the restrictions are reasonably designed to help the court determine whether probation will ultimately be appropriate. The imposition of such conditions or restrictions should not be confused with a sentence of probation, even though they are similar to those associated with probation. Thus, a delayed sentence means that no sentence is initially imposed . . . ." *People v Salgat*, 173 Mich App 742, 745-746 (1988).

"The sentence ultimately imposed should be based upon all of the circumstances of the defendant's background. Among the factors to be considered in sentencing is the defendant's failure to comply with the conditions and restrictions imposed in conjunction with the sentence delay." *Salgat*, 173 Mich App at 746.

[35] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for more information on delayed sentencing.

MCL 771.1(2) provides:

> "In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under . . . MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order[36] stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay." MCL 771.1(2).

If the court delays imposing sentence under MCL 771.1(2), it must include in the delayed sentence order that the Department of Corrections must collect a supervision fee as provided in MCL 771.1(3).

"Reasonable conditions may be imposed for the delay if they will give the defendant an opportunity to prove his or her eligibility for probation or leniency." *People v Saenz*, 173 Mich App 405, 409 (1988). Requiring a defendant to participate in a drug court, MCL 771.1(2), or obtain psychiatric treatment, may be valid conditions of a delayed sentence. *Saenz*, *supra* at 409. Jail incarceration is not a valid condition of a delayed sentence. *Id*.

A defendant generally does not have a right to a formal hearing on whether he or she violated a condition of a delayed sentencing arrangement. *Salgat*, 173 Mich App at 746. Due process is satisfied if a defendant is given the opportunity to respond to information contained in his or her presentence investigation report, and to bring any other pertinent information to the court's attention. *Saylor (Barry)*, 88 Mich App at 274-275.

After the one-year period of delay, a court loses jurisdiction to sentence a defendant, unless good cause is shown for the additional delay. *People v Boynton*, 185 Mich App 669, 671 (1990) (court lost jurisdiction to sentence the defendant where, for unexplained reasons, sentencing hearing was held two days past the one year statutory time limit); *People v McLott*, 70 Mich App 524, 529-531 (1976) (court retained jurisdiction to sentence the defendant where

[36] See SCAO form MC 294, *Order Delaying Sentence*, available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/mc294.pdf.

sentencing judge was unavailable and sentencing was only delayed for a few days beyond the one-year statutory time limit).

"A defendant may waive the one-year requirement and consent to the personal jurisdiction of the court for the purpose of sentencing." *People v Richards (Larry)*, 205 Mich App 438, 444 (1994). An unexcused violation of the one-year requirement only affects the court's authority to sentence the defendant. *Boynton*, *supra* at 671. "The defendant remains convicted of the crime and subject to any collateral consequences thereafter." *People v Turner (Halbert)*, 92 Mich App 485, 490 (1979).

B. Deferred Adjudication of Guilt[37]

1. Generally

Under very specific circumstances, a court may defer adjudication of guilt and place an individual on probation for the following types of offenses:

- controlled substances, MCL 333.7411
- minor in possession, MCL 436.1703 (misdemeanor)
- impaired healthcare professional, MCL 750.430 (misdemeanor)
- domestic violence/spousal abuse, MCL 769.4a
- parental kidnapping, MCL 750.350a
- youthful trainee status, MCL 762.11

The procedure for deferring an adjudication of guilt is similar for all of the listed types of offenses, and the steps of the process for deferral are discussed generally below.[38] To qualify for deferral of an adjudication of guilt:

- The defendant must not have a previous conviction for any of the offenses specified by the applicable statute.

[37] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for a detailed discussion of deferred adjudication of guilt.

[38] Because deferral under the youthful trainee act involves issues not shared by the other deferred adjudication of guilt statutes, it is discussed separately in Section 6.3(B)(2).

- The defendant must plead guilty to, or be found guilty of, an offense listed in the statutory provision under which deferred adjudication is sought.
- The defendant must consent to deferral of adjudication.

Once an adjudication of guilt is deferred:

- The court has discretion to impose any terms of probation on a defendant, MCL 771.3(9).
- If adjudication is deferred, the court must require the individual to pay a supervision fee in the same manner as prescribed for a delayed sentence under MCL 771.1, and pay minimum state costs as prescribed in MCL 769.1j, MCL 771.3(9).[39]
- If the defendant violates a term or condition of his or her probation, the court has discretion to enter a judgment of guilt and sentence him or her.
- If the defendant fulfills the terms and conditions of his or her probationary period, the court is required to discharge the defendant and dismiss the proceedings against him or her.

There are specific recordkeeping requirements for each of the offenses for which deferred adjudication of guilt is permitted.

The defendant may only obtain one discharge and dismissal for each of the offenses for which deferred adjudication is permitted.

2. Holmes Youthful Trainee Act (HYTA)[40]

"The [Holmes Youthful Trainee Act, MCL 762.11] provides a mechanism for individuals who commit certain crimes between the time of their seventeenth and twenty-first birthda[41]ys to be excused from having a criminal record." *People v Rahilly*, 247 Mich App 108, 114 (2001). Specifically, MCL 762.11(1) states that "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first

[39] See Section 6.1(E)(7) for discussion of minimum state costs.

[40] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing* for a more detailed discussion of deferred adjudication under the youthful trainee act.

[41] An individual over 14 years of age who waives jurisdiction may be eligible for youthful trainee status. MCL 762.15.

birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee."[42]

Assignment of an individual to youthful trainee status under MCL 762.11 is discretionary. *People v Gow*, 203 Mich App 94, 96 (1993). MCL 762.11 is remedial and should be construed liberally. *People v Trinity*, 189 Mich App 19, 21 (1991). However, the trial court must "take into account the nature and severity of the crimes and the importance of public safety[]" when deciding whether to grant youthful trainee status. *People v Khanani*, ___ Mich App ___, ___ (2012) ("[g]iven the trial court's description of [the] defendant as 'frighten[ing]' and its apparent agreement with the prosecutor's description of [the] defendant as a serious predator," the trial court abused its discretion in nevertheless granting the defendant youthful trainee status for first-degree home invasion and several additional offenses).

a. Certain Individuals Are Ineligible

An individual is not eligible for youthful trainee status if the offense for which he or she seeks deferral is any of the following:

- a felony punishable by life imprisonment, MCL 762.11(2)(a)
- a major controlled substance offense, MCL 762.11(2)(b)
- a specified traffic offense, MCL 762.11(2)(c)
- a violation, attempted violation, or conspiracy to commit a violation of various criminal sexual conduct (CSC) statutes, MCL 762.11(2)(d), MCL 762.11(2)(e)

In addition, an individual is not eligible for youthful trainee status if any of the following apply:

- the individual was previously convicted of, or adjudicated for, an offense requiring registration under the Sex Offenders Registration Act (SORA) (MCL 28.721 to MCL 28.732), MCL 762.11(3)(a)

[42] See SCAO form MC 242, *Assignment to Youthful Trainee Status*, available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/mc242.pdf.

- the individual is charged with an offense for which registration is required under SORA, MCL 762.11(3)(b)

- the court determines that the offense involved certain factors set out in various CSC statutes, MCL 762.11(3)(c)

A "defendant [i]s not ineligible for sentencing under the [youthful trainee act] solely because he [or she] was convicted of two criminal offenses." *People v Giovannini*, 271 Mich App 409, 410 (2006). "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, *supra* at 417.

"[T]he sentencing guidelines have not been held to apply to the decision whether to grant youthful trainee status." *People v Khanani*, ___ Mich App ___, ___ (2012).

b. Individual Must Consent, MCL 762.11(1)

An offender must consent to be assigned the status of a youthful trainee. MCL 762.11(1).

c. Guilt Must Be Established by Guilty Plea, MCL 762.11(1)

A defendant found guilty as a result of a trial does not qualify for youthful trainee status because a guilty plea is required. *People v Dash*, 216 Mich App 412, 413-414 (1996) (trial court erred in assigning the defendant to youthful trainee status where he was convicted of a crime following a bench trial). A no contest plea precludes assignment to youthful trainee status because it is not a plea of "guilty." *People v Harns*, 227 Mich App 573, 580 (1998), vacated in part on other grounds 459 Mich 892 (1998) (trial court reversed because it lacked the authority to assign the defendant to youthful trainee status where the defendant pleaded nolo contendere, as opposed to guilty).

d. Terms and Conditions Imposed Pursuant to Deferred Adjudication

If the underlying charge is an offense punishable by imprisonment for a term of more than one year, the court must do one of the following:

- commit the individual, for not more than three years, to the Department of Corrections (DOC) for custodial supervision and training in an institutional facility designated by the DOC for that purpose, MCL 762.13(1)(a)

- place the individual on probation for not more than three years, subject to the conditions in MCL 771.3, MCL 762.13(1)(b)

- commit the individual to the county jail for not more than one year, MCL 762.13(1)(c) (the court may authorize work release or release for educational purposes, MCL 762.13(4))

If the underlying charge is for an offense punishable by imprisonment for one year or less, the court must place the individual on probation for not more than two years, subject to the conditions in MCL 771.3, MCL 762.13(2).

If the individual is placed on probation, the court must order payment of a supervision fee for each month during which the individual is on probation, MCL 762.13(5).

e. Termination or Revocation of Youthful Trainee Status

A court may terminate its consideration of an individual for youthful trainee status at any time, or may revoke youthful trainee status already granted at any time before the individual's final release. MCL 762.12.

If an individual who is required to be registered under the SORA willfully violates that act, the court is required to revoke the individual's youthful trainee status. MCL 762.12.

If consideration of an individual for youthful trainee status is terminated, or if an individual's youthful trainee status is revoked, the court may enter an adjudication of guilt. MCL 762.12. If a court revokes youthful trainee status, enters an adjudication of guilt, and imposes sentence, it is required to specifically grant credit against the sentence for time served as a youthful trainee in a DOC institutional facility or county jail. *Id*.

f. Successful Completion of Probationary Period

If the individual successfully completes the probationary period, the court is required to discharge the individual

and dismiss the proceedings upon final release of the individual from youthful trainee status. MCL 762.14(1).

g. Assignment as Youthful Trainee Is Not a Conviction

Assignment of an individual to youthful trainee status is not a conviction for a crime, and an individual assigned to youthful trainee status shall not suffer a civil disability or loss of right or privilege following his or her release from that status due to his or her assignment as a youthful trainee. MCL 762.14(2).

An assignment to youthful trainee status before October 1, 2004, constitutes a conviction for purposes of registering under SORA. MCL 28.722(a)(*ii*)(A). An assignment to youthful trainee status on or after October 1, 2004, constitutes a conviction for purposes of registering under SORA if the individual's youthful trainee status is revoked and an adjudication of guilt is entered. MCL 28.722(a)(*ii*)(B).

Assignment to youthful trainee status constitutes a conviction that is counted for scoring the sentencing guidelines. MCL 777.50(4)(a)(*i*).

h. Record of Deferral

Unless the court enters a judgment of conviction under MCL 762.12 against the individual for the criminal offense, all proceedings regarding the disposition of the criminal charge and the individual's assignment to youthful trainee status must be closed to public inspection, but open to state courts, the Department of Corrections, the Department of Human Services, law enforcement personnel, and prosecuting attorneys for use specific to the performance of their duties. MCL 762.14(4).

i. Review of Decision to Assign Youthful Trainee Status

A trial court's decision concerning a defendant's assignment under the HYTA is reviewed for an abuse of discretion. *People v Khanani*, ___ Mich App ___, ___ (2012); *Giovannini*, 271 Mich App at 411. "'An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.'" *Khanani, supra* at ___, quoting *People v Unger*, 278 Mich App 210, 217 (2008).

The trial court abused its discretion in granting youthful trainee status to the defendant, who pleaded guilty in three separate cases to six offenses, including first-degree home invasion; the trial court's decision fell outside the range of reasoned and principled outcomes in light of the defendant's age and the seriousness and timing of the home invasion offense, which was committed shortly after he turned 19 while he was on bond awaiting sentencing for the other offenses. *Khanani*, ___ Mich App at ___.

C. Conditional Sentences

If a person is convicted of an offense punishable by a fine or imprisonment, the court has the discretion to impose a conditional sentence and order the person to pay a fine (with or without the costs of prosecution), and restitution as provided in MCL 769.1a or the Crime Victim Rights Act (MCL 780.751 to 780.834), within a limited time stated in the sentence. MCL 769.3(1). If the person defaults on payment, the court may impose sentence. *Id*.

With the exception of a person convicted of CSC-1 or CSC-3, the court may place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination, in installments within a limited time. MCL 769.3(2). If the person defaults on any of the payments, the court may impose sentence. *Id*.

D. Suspended Sentences

Absent statutory authority to do so, a court may not indefinitely suspend a defendant's sentence, because to do so would effectively pardon a defendant for his or her crime. *People v Morgan*, 205 Mich App 432, 434 (1994). Certain statutes specifically authorize a court to suspend a defendant's sentence. See MCL 750.165(4) (felony nonsupport statute specifically authorizes a court to suspend a defendant's sentence if he or she posts a bond and any sureties required by the court).

A court may not suspend a defendant's sentence once the defendant has started to serve it. *Oakland Co Pros v 52nd Dist Judge*, 172 Mich App 557, 560 (1988).

E. Mandatory Sentences

If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court is required to impose that

penalty. MCL 769.34(5). The sentencing guidelines are inapplicable to mandatory sentences. *Id*.

F. Standard of Review

A trial court's decision to impose a delayed sentence, or to defer an adjudication of guilt, is reviewed for an abuse of discretion. See *People v Petty*, 469 Mich 108, 118 (2003) ("trial court [has] discretion to impose a delayed sentence"); *People v Ware*, 239 Mich App 437, 441 (2000) (discussing MCL 333.7411).

6.4 Juvenile Sentencing

Note: This section applies only to *automatic waiver cases*, i.e., criminal proceedings in circuit court concerning juveniles against whom the prosecution has authorized the filing of a criminal complaint charging a specified juvenile violation (instead of approving the filing of a petition in the family division of the circuit court). MCR 6.901(B). For specified juvenile violations, the court must sentence a juvenile in the same manner as an adult. MCL 769.1(1); MCR 6.931(A). For other violations, the court may sentence the juvenile as an adult, or sentence the juvenile to juvenile probation and commit the juvenile to state wardship. MCL 769.1(3); MCR 6.931(A).[43]

This section does not apply to *traditional waiver cases*,[44] i.e., cases in which a juvenile is charged solely with an offense over which the family division has waived jurisdiction under MCL 712A.4. MCR 6.901(B); *People v Williams (Walter)*, 245 Mich App 427, 436 (2001). In traditional waiver cases, a juvenile must be tried and sentenced as an adult in the criminal division of circuit court. *People v Veling*, 443 Mich 23, 39 (1993); *Williams (Walter)*, *supra* at 434. Therefore, when a juvenile appears in a traditional waiver case, refer to the sentencing procedure applicable to adults.

This section does not apply to *designated proceedings*,[45] i.e., cases in which a juvenile is tried in an adult criminal proceeding within the family division of the circuit court, and where, if convicted, the court may sentence the juvenile as an adult, delay sentence, or order a juvenile disposition. See *People v Petty*, 469 Mich 108, 117-119 (2003).

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[43] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

[44] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

[45] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

A. Automatic Waiver Cases

In automatic waiver cases, under MCR 6.931(A) and MCL 769.1(1)(*a*)–MCL 769.1(1)(*l*), the court[46] must sentence a juvenile in the same manner as an adult if he or she was convicted of any of the following offenses:

- arson of a dwelling, MCL 750.72
- assault with intent to commit murder, MCL 750.83
- assault with intent to maim, MCL 750.86
- attempted murder, MCL 750.91
- conspiracy to commit murder, MCL 750.157a
- solicitation to commit murder, MCL 750.157b
- first-degree murder, MCL 750.316
- second-degree murder, MCL 750.317
- kidnapping, MCL 750.349
- first-degree criminal sexual conduct, MCL 750.520b
- armed robbery, MCL 750.529
- carjacking, MCL 750.529a

Under MCR 6.931(A), MCL 769.1(3), and MCL 600.606, the court must conduct a juvenile sentencing hearing to determine whether to sentence the juvenile as an adult for the following "specified juvenile violation[s]," unless the hearing is waived as provided in MCR 6.931(B):

- assault with intent to rob while armed, MCL 750.89
- bank, safe, and vault robbery, MCL 750.531
- assault with intent to do great bodily harm less than murder, MCL 750.84
- first-degree home invasion, MCL 750.110a(2), if the juvenile is armed with a dangerous weapon
- escape or attempted escape from a juvenile facility or from the custody of an employee of the facility, MCL 750.186a

[46] MCR 6.903(C) defines "court" as "the circuit court as provided in MCL 600.606, but does not include the family division of the circuit court."

- manufacture, sale, or delivery of 1,000 grams or more of a Schedule 1 or 2 narcotic drug or cocaine, MCL 333.7401(2)(a)(*i*), or possession of 1,000 grams or more of a Schedule 1 or 2 narcotic drug or cocaine, MCL 333.7403(2)(a)(*i*)

- any attempt, conspiracy, or solicitation to commit a specified juvenile violation other than murder

- any lesser-included offense of the above offenses if the individual is charged with one of the above offenses

- any other violation arising out of the same transaction if the juvenile is charged with one of the above offenses

B. Sentencing Hearing

Unless a juvenile is required to be sentenced in the same manner as an adult for an offense listed in MCL 769.1(1)(*a*)–(*l*), a judge of a court having jurisdiction over a juvenile must conduct a juvenile sentencing hearing unless the hearing is waived as provided in MCR 6.931(B). MCR 6.931(A); MCL 769.1(3). A trial court may not waive the hearing required by MCL 769.1(3), and then impose an adult sentence on the juvenile.

The court does not need to conduct a juvenile sentencing hearing if the juvenile, the juvenile's attorney, and the prosecuting attorney agree that it is not in the best interest of the public to sentence the juvenile as an adult offender. MCL 769.1(4); MCR 6.931(B). MCL 769.1(4) states that if the juvenile sentencing hearing is waived, the court has the discretion to place the juvenile on juvenile probation and commit the juvenile to state wardship; however, MCR 6.931(B) mandates that the court place the juvenile on probation and commit the juvenile to state wardship. If the juvenile sentencing hearing is waived, the court is prohibited from imposing any other sentence provided by law for an adult offender. MCL 769.1(4); MCR 6.931(B).

If a juvenile sentencing hearing is required, the juvenile, the juvenile's attorney, and the prosecuting attorney must be advised on the record immediately following conviction of the juvenile by a guilty plea or verdict of guilty that, unless waived, a hearing will be conducted at sentencing to determine whether to sentence the juvenile as an adult or to place the juvenile on juvenile probation and commit the juvenile to state wardship as though a delinquent. MCR 6.931(C). The court may announce the scheduled hearing date. *Id*. The court must notify the victim of the juvenile sentencing hearing if requested to do so. *Id*.

The juvenile, the juvenile's attorney, and the prosecuting attorney must be given an opportunity to review the presentence report before the juvenile sentencing hearing. MCR 6.931(D). As provided in MCL 771.14(3) and MCL 771.14a(2), the court has the discretion to exempt from the reports information or a diagnostic opinion that has the potential to seriously disrupt a rehabilitation program, or sources of information obtained on a promise of confidentiality. MCR 6.931(D).

At the juvenile sentencing hearing, all relevant and material evidence may be received by the court and relied on to the extent of its probative value, even though the evidence may not be admissible at trial. MCR 6.931(E)(1). The rules of evidence do not apply to a juvenile sentencing hearing. MCL 769.1(3); MCR 6.931(E)(1). The court must receive and consider the presentence report prepared by the probation officer, as well as the social report prepared by the Department of Human Services. MCR 6.931(E)(1).

The court is required to sentence the juvenile in the same manner as an adult unless it determines by a preponderance of the evidence (except as provided in MCR 6.931(E)(3)(c) and MCL 769.1(5)) that the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, MCL 803.301 to MCL 803.309. MCL 769.1(3); MCR 6.931(E)(2).

If a juvenile is convicted of a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(*i*), the court must determine whether the best interests of the public would be served by imposing the sentence provided by law for an adult offender; placing the individual on probation and committing the individual to a state institution or agency as provided in MCL 769.1(3); or imposing a sentence of imprisonment for any term of years, but not less than 25 years, if the court determines by clear and convincing evidence that that type of sentence would serve the best interests of the public. MCL 769.1(5); MCR 6.931(E)(3). In making its determination, the court must use the criteria set out in MCL 769.1(3) and MCR 6.931(E)(4). MCL 769.1(5); MCR 6.931(E)(3).

The court must consider the criteria detailed in MCL 769.1(3) and MCR 6.931(E)(4) in deciding whether to sentence a juvenile as an adult offender, or whether to place the juvenile on juvenile probation and commit the juvenile to state wardship, giving more weight to the italicized criteria:

- The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the

sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim

- The juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior
- The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines
- The juvenile's programming history, including, but not limited to, the juvenile's past willingness to meaningfully participate in available programming
- The adequacy of the punishment or programming available in the juvenile justice system
- the dispositional options available for the juvenile

At the end of the juvenile sentencing hearing, the court must decide either to sentence the juvenile as an adult offender, or to place the juvenile on juvenile probation and commit the juvenile to state wardship under MCL 769.1b. MCR 6.931(A).

The court must make findings of fact and conclusions of law forming the basis for the juvenile probation and commitment decision, or the decision to sentence the juvenile as an adult offender. MCL 769.1(6); MCR 6.931(E)(5). MCL 769.1(6) states that the findings and conclusions must be made on the record; MCR 6.931(E)(5) states that the findings and conclusions may be incorporated in a written opinion or stated on the record. The Michigan Court of Appeals has held that the court must make detailed findings regarding each of the statutory factors. *People v Hazzard*, 206 Mich App 658, 659-661 (1994). While *Hazzard* remains binding authority, a panel of the Michigan Court of Appeals has questioned whether *Hazzard* imposes a duty on trial courts beyond that which is mandated by statute and court rule. *People v Conley (Charles),* unpublished opinion per curiam of the Court of Appeals, issued June 13, 2000 (Docket No. 219741).

C. Postjudgment Procedure

If the court retains jurisdiction over the juvenile, places the juvenile on juvenile probation, and commits the juvenile to state wardship[47], the court must adhere to the following requirements listed in MCR 6.931(F):

- The court must enter a judgment that includes a provision for reimbursement by the juvenile or those responsible for the juvenile's support, or both, for the cost of care and services under MCL 769.1(7). MCR 6.931(F)(1).

- An order assessing the cost against a person responsible for the support of a juvenile must not be binding on the person, unless an opportunity for a hearing has been given, and until a copy of the order is served on the person, personally or by first class mail to the person's last known address. MCL 769.1(9); MCR 6.931(F)(1).

- The court must advise the juvenile at sentencing that if, while on juvenile probation, he or she is convicted of a felony or a misdemeanor punishable by more than one year in prison, the court is required to revoke juvenile probation and sentence the juvenile to a term of years in prison not to exceed the penalty that might have been imposed for the offense for which the juvenile was originally convicted. MCR 6.931(F)(2). See also *People v Stanley*, 207 Mich App 300, 307 (1994) ("[t]he court rule is very clear and exists to ensure that juvenile offenders receive due process of law").

- The court must assure that the juvenile receives a copy of the social report. MCR 6.931(F)(3).

- The court must send a copy of the order and a copy of the written opinion or transcript of the findings of fact and conclusions of law to the Department of Human Services. MCR 6.931(F)(4).

- The court must not place the juvenile on delayed sentencing, as provided in MCL 771.1(2). MCR 6.931(F)(5).

- The court must not place the juvenile on life probation for conviction of a controlled substance violation, as set out in MCL 771.1(4). MCR 6.931(F)(6).

- The five-year limit on the term of probation for an adult felony offender is inapplicable. MCR 6.931(F)(7).

- The court must not require as a condition of juvenile probation that the juvenile report to a Department of Corrections probation officer. MCR 6.931(F)(8).

- The court must not, as a condition of juvenile probation, impose jail time against the juvenile, except as provided in MCR 6.933(B)(2) (conditions under which court may

[47] See SCAO form CC 236, *Order Committing Juvenile to Department of Human Services*, available at http://courts.michigan.gov/scao/courtforms/criminaldisposition/cc236.pdf.

revoke juvenile's probation and sentence to term of imprisonment). MCR 6.931(F)(9).

- The court must not commit the juvenile to the Department of Corrections for failing to comply with a restitution order. MCR 6.931(F)(10).

- The court must not place the juvenile in a Department of Corrections camp for one year, as otherwise authorized in MCL 771.3a(1). MCR 6.931(F)(11).

- If the court appoints an attorney to represent a juvenile, an order entered under MCL 769.1 may require the juvenile or person responsible for the juvenile's support, or both, to reimburse the court for attorney fees. MCL 769.1(8).

D. Retention of Jurisdiction

If a juvenile is placed on probation and committed to a state institution or agency, the court must retain jurisdiction over the juvenile while he or she is on probation and committed to that state institution or agency. MCL 769.1(10); MCR 6.935(A).

The court is required to review the progress of a juvenile it has placed on juvenile probation and committed to state wardship. MCR 6.935(A).

The court must conduct a progress review no later than 182 days after entry of the order placing the juvenile on juvenile probation and committing the juvenile to state wardship. MCR 6.935(B)(1).

The court must conduct a semiannual review thereafter as long as the juvenile remains a ward of the state. MCR 6.935(B)(1).

The court must conduct an annual review of the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement. MCL 769.1(11); MCR 6.935(B)(2).

In conducting the above-listed reviews, the court must examine:

- the progress review report prepared by the Department of Human Services, covering placement and services being provided the juvenile and the progress of the juvenile. MCR 6.935(C).

- the juvenile's annual report prepared under MCL 803.223. MCR 6.935(C).

On the basis of the review, the court may order changes in the juvenile's placement or treatment plan, including, but not limited to,

committing the juvenile to the jurisdiction of the Department of Corrections. MCR 6.935(C).

There is no hearing requirement when conducting a progress review under MCR 6.935(B) for a court-committed juvenile, unless the court orders a more restrictive placement or treatment plan. MCR 6.935(D). If the court orders a more physically restrictive placement for the juvenile or orders more restrictive treatment, it must conduct a hearing under MCR 6.937. MCR 6.935(D).

E. Commitment Review Hearing

1. Required Hearing Before Age 19 for Court-Committed Juveniles

The court must schedule and hold a commitment review hearing as nearly as possible to, but before, the juvenile's 19th birthday, unless adjourned for good cause. MCL 769.1b(1) and MCL 769.1b(2); MCR 6.937(A); *In re Juvenile Commitment Costs*, 240 Mich App 420, 430 (2000).

The court must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or is waived under MCR 6.905(C). MCL 769.1b(3); MCR 6.937(A)(2).

Before the court continues jurisdiction over the juvenile until he or she reaches 21 years of age, the prosecutor must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. MCL 769.1b(1); MCR 6.937(A)(4); *In re Juvenile Commitment Costs*, 240 Mich App at 430-431. In making the determination, the court must consider the following factors listed in MCL 769.1b(1) and MCR 6.937(A)(4):

- The extent and nature of the juvenile's participation in education, counseling, or work programs
- The juvenile's willingness to accept responsibility for prior behavior
- The juvenile's behavior in the current placement
- The prior record and character of the juvenile and physical and mental maturity
- The juvenile's potential for violent conduct as demonstrated by prior behavior

- The recommendations, for the juvenile's release or continued custody, of the state institution or agency charged with the juvenile's care
- Other information the prosecuting attorney or the juvenile may submit

The rules of evidence are inapplicable at a commitment review hearing. MCR 6.937(A)(4).

2. Other Commitment Review Hearings

If the institution, agency, or facility to which the juvenile is committed moves for release, the court may release a juvenile at any time upon a showing by a preponderance of the evidence that the juvenile has been rehabilitated and is not a risk to public safety. MCL 769.1b(2); MCR 6.937(B).

The court must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or the right to counsel has been waived. MCL 769.1b(3); MCR 6.937(B).

The court may move the juvenile to a more restrictive placement or treatment program, after providing notice and an opportunity to be heard. MCR 6.937(B).

The rules of evidence are inapplicable at other commitment review hearings. MCR 6.937(B).

F. Probation Revocation

1. General Procedure

When a juvenile who was placed on juvenile probation and committed to an institution as a state ward is alleged to have violated juvenile probation, the court must follow the probation revocation procedure set out in MCR 6.445(A)–MCR 6.445(F). MCR 6.933(A).

2. Disposition in General

Subject to the requirements in MCR 6.933(B)(1)(b), if the court finds that the juvenile violated juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year in prison, it must revoke the juvenile's probation and order the juvenile committed to the Department of Corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the

probation. MCR 6.933(B)(1)(a). In imposing sentence, the court must grant credit against the sentence as required by law. *Id*.

The court may not revoke probation and impose sentence under MCR 6.933(B)(1) unless the court advised the juvenile, as required by MCR 6.931(F)(2), at the original sentencing, that subsequent conviction of a felony or a misdemeanor punishable by more than one year in prison would result in the revocation of juvenile probation and in the imposition of a sentence of imprisonment. MCR 6.933(B)(1)(b).

If the court finds that the juvenile has violated juvenile probation, other than by being convicted of a felony or misdemeanor punishable by more than one year of imprisonment, the court may order the juvenile committed to the Department of Corrections as provided in MCR 6.933(B)(1), or may continue the juvenile's probation and commitment to state wardship, MCR 6.933(B)(2), and may order any of the following:

- A change of placement, MCR 6.933(B)(2)(a).
- Restitution, MCR 6.933(B)(2)(b).
- Community service, MCR 6.933(B)(2)(c).
- Substance abuse counseling, MCR 6.933(B)(2)(d).
- Mental health counseling, MCR 6.933(B)(2)(e).
- Participation in a vocational-technical education program, MCR 6.933(B)(2)(f).
- Incarceration in a county jail for not more than 30 days, MCR 6.933(B)(2)(g). If the juvenile is under 17 years of age, he or she must be placed separately from adult prisoners, MCR 6.933(B)(2).
- Any other participation or performance considered necessary by the court, MCR 6.933(B)(2)(h).

If the court revokes juvenile probation under MCR 6.933(B)(1), it must receive an updated presentence report and comply with MCR 6.445(G) before imposing a prison sentence on the juvenile. MCR 6.933(B)(3).

3. Disposition Regarding Specific Underlying Offenses

A juvenile who was placed on probation and committed to state wardship for the manufacture, delivery, or possession with the intent to deliver 1,000 grams or more of a controlled substance, MCL 333.7401(2)(a)(*i*), may be resentenced only to a term of years following mandatory probation revocation for commission of a subsequent felony or a misdemeanor punishable by more than one year in prison. MCR 6.933(C)(1).

A juvenile convicted of first-degree murder who violates juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year in prison may only be sentenced to a term of years. MCR 6.933(C)(2). He or she may not be sentenced to nonparolable life in prison. *Id*.

4. Review

A juvenile may appeal as of right the imposition of a sentence of incarceration after a findingthat he or she violated the terms of his or her juvenile probation. MCR 6.933(D).

G. Final Review Hearings

The court must conduct a final review of the juvenile's probation and commitment not less than three months before the end of the juvenile's probation and commitment to state wardship. MCL 769.1b(5); MCR 6.938(A). The court may impose any other sentence provided by law for an adult offender, if it determines at the review hearing that the best interests of the public would be served by doing so. MCL 769.1b(5); MCR 6.938(A). In determining whether the best interests of the public would be served by imposing sentence, the court is required to consider the following criteria listed in MCL 769.1b(1), MCL 769.1b(5), and MCR 6.938(D):

- The extent and nature of the juvenile's participation in education, counseling, or work programs
- The juvenile's willingness to accept responsibility for prior behavior
- The juvenile's behavior in current placement
- The prior record and character of the juvenile and the juvenile's physical and mental maturity
- The juvenile's potential for violent conduct as demonstrated by prior behavior

- The recommendations, for the juvenile's release or continued custody, of the state institution or agency charged with the juvenile's care
- The effect of treatment on the juvenile's rehabilitation
- Whether the juvenile is likely to be dangerous to the public if released
- The best interests of the public welfare and the protection of public security
- Other information the prosecuting attorney or juvenile may submit

The court must appoint an attorney to represent the juvenile if an attorney has not been retained or appointed. MCL 769.1b(3); MCR 6.938(C). If the juvenile or those responsible for the juvenile's support, or both, are financially able to comply, the court has the discretion to assess against the juvenile or those responsible for the juvenile's support, or both, the cost of providing an attorney to the persons to be assessed. MCL 769.1b(3); MCR 6.938(C).

If the court imposes sentence, the juvenile must receive credit for the period of time served on probation and the time during which he or she was committed to state wardship. MCL 769.1b(7); MCR 6.938(E).

H. Standard of Review

A trial court's findings of fact at a juvenile sentencing hearing are reviewed for clear error, and the ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for an abuse of discretion. *People v Brown (Gregory)*, 205 Mich App 503, 504-505 (1994).

6.5 Sentencing a Sexually Delinquent Person

A. Definition

A sexually delinquent person is defined in MCL 750.10a as "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16."

A charge of sexual delinquency may only be brought in conjunction with the following offenses:

- Crime against nature or sodomy, MCL 750.158
- Indecent exposure, MCL 750.335a
- Gross indecency between male persons, MCL 750.338
- Gross indecency between female persons, MCL 750.338a
- Gross indecency between male and female persons, MCL 750.338b

"Conviction of sexual delinquency can be obtained only in conjunction with conviction on the principal charge. Yet, sexual delinquency is a matter of sentencing, unrelated to proof of the original charge." *People v Helzer*, 404 Mich 410, 417 (1978), overruled in part by *People v Breidenbach*, 489 Mich 1 (2011). Each of the above-listed offenses contains language stating that if the person was sexually delinquent at the time of the offense, he or she may be punished by imprisonment for an indeterminate term, and that the minimum term must be one day, and the maximum term must be life in prison. *Helzer*, *supra* at 416-417.

B. Procedure

MCL 767.61a sets out the procedures to be employed concerning a sexually delinquent person:

> "In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person.
>
> ***
>
> "In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35], and before sentencing the accused, shall conduct an examination [in open court] of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony.

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"Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense."

"Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme." *People v Kelly (Robert)*, 186 Mich App 524, 528 (1990). See also *People v Winford*, 404 Mich 400, 404 n 5 (1978) ("the indeterminate penalty for a sexual delinquency conviction [i]s an alternate form of sentencing"). "[T]he alternate sentence is an indeterminate term of one day to life imprisonment." *Kelly (Robert)*, *supra* at 528. A defendant may only be sentenced once upon conviction of the principal charge and the sexual delinquency charge, i.e., the court has the discretion to sentence the defendant under the terms of the principal offense, or under the terms of the sexual delinquency offense, but not both. *Winford*, *supra* at 404 n 5.

Where the trial court chooses to incarcerate a defendant convicted under the sexually delinquent person statute, the mandatory indeterminate sentence is one day to life in prison. *People v Butler (James)*, 465 Mich 940, 941 (2001) (sentence of 2 to 20 years in prison vacated because it violated the requirements of the indecent exposure statute, MCL 750.335a, and the sexually delinquent person statute, MCL 750.10a).

A person convicted of sexual delinquency and a corresponding Class A felony offense must be sentenced to a minimum term of imprisonment falling within the appropriate sentencing guidelines range. See, e.g., *People v Buehler*, 477 Mich 18, 24 (2007). The sexual delinquency crimes listed in MCL 777.16q (MCL 750.335a, MCL 750.338, MCL 750.338a, and MCL 750.338b) are subject to the mandatory sentencing guidelines, and because they are Class A felonies for which the minimum possible sentence range is 21 to 35 months, a sentence of probation constitutes a downward departure for which the trial court must state a substantial and compelling reason. *Buehler*, *supra* at 26 (discussing indecent exposure statute, MCL 750.335a, where the case was remanded to trial court for

articulation of a substantial and compelling reason for its downward departure of sentencing the defendant to probation, or for sentencing the defendant within the appropriate sentence range).

6.6 Jail Credit

A. Generally[48]

MCL 769.11b states that "[w]henever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he [or she] is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

"[T]he primary purpose of the sentencing credit statute is to equalize, as far as possible, the status of the indigent or lower-income accused with the status of the accused who can afford to post bail." *People v Givans*, 227 Mich App 113, 125 (1997). "Given that the primary purpose of [MCL 769.]11b is to equalize the position of one who cannot post bond with that of a person who is financially able to do so, a showing that presentence confinement was the result of inability to post bond is an essential prerequisite to the award of sentence credit under the statute." *People v Whiteside*, 437 Mich 188, 196 (1991).

B. Alternative Programs

Jail credit is required for time spent in:

- Special Alternative Incarceration (SAI) boot camp. *People v Hite (After Remand)*, 200 Mich App 1, 2, 8 (1993).
- Forensic center. MCL 330.2042.

Jail credit is not required for time spent in:

- Rehabilitative treatment facility. *People v Scott (John)*, 216 Mich App 196, 200-201 (1996).
- Private rehabilitation program. *Whiteside*, 437 Mich at 202.

[48] See the Michigan Judicial Institute's *Criminal Procedure Monograph 8: Felony Sentencing*.

- Tether program. *People v Reynolds (Michael)*, 195 Mich App 182, 183-184 (1992).
- Home confinement. *People v Smith (Michael)*, 195 Mich App 147, 152 (1992).

C. Arrested Parolees

"A defendant on parole, while physically released from the confines of prison, remains in the legal custody of the Department of Corrections. He or she continues to serve out the sentence as originally imposed by the sentencing court. And, if eligible for good time, he or she is entitled to continue to accrue such time as if confined to prison. When a person on parole commits another felony and is arrested and detained, the time of detention continues to accrue toward the fulfillment of the originally imposed sentence because at no time has the convict been released." *People v Johnson (Robert)*, 283 Mich App 303, 310 (2009), citing MCL 791.238(1), MCL 791.238(2), and MCL 791.238(6).

MCL 791.238(2) states that "[a] prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served."

"When a parolee is arrested for a new criminal offense he [or she] is held on a parole detainer until he [or she] is convicted of that offense, and he [or she] is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705 (2004) (the defendant committed a new crime while on parole from a crime committed in a foreign jurisdiction; Court of Appeals affirmed the trial court's denial of the defendant's request for jail credit toward his new Michigan conviction). "A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted." *Seiders*, *supra* at 705. This is because "when a defendant violates parole, the defendant is not serving time in jail because of an inability to pay, or a denial of, bond on the new charge [as required for jail credit by MCL 769.11b]; rather, the defendant is serving time in jail because the defendant is being held on a parole detainer." *People v Filip*, 278 Mich App 635, 641 (2008) (the defendant committed a crime while on parole from a Michigan

crime; Court of Appeals reversed trial court's award of jail credit toward the defendant's new conviction).

"A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he [or she] serves the term imposed for the subsequent offense." *Seiders*, 262 Mich App at 705, citing MCL 768.7a(2).

See also *People v Idziak*, 484 Mich 549, 562 (2009), "reach[ing] essentially the same conclusion as the Court of Appeals did in [*People v*] *Seiders*[, 262 Mich App 702 (2004),] and [*People v*] *Filip*[, 278 Mich App 635 (2008)]—that the jail credit statute does not generally apply to parolees who commit new felonies while on parole—[but] on the basis of a somewhat different analysis." The *Idziak* Court held that "the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his [or her] earlier sentence unless and until discharged by the Parole Board. For that reason, he [or she] remains incarcerated regardless of whether he [or she] would otherwise be eligible for bond before conviction on the new offense." *Idziak*, *supra* at 562. Because the parolee is not being incarcerated due to being denied or unable to furnish bond for the new offense, the jail credit statute, MCL 769.11b, does not apply. *Idziak*, *supra* at 562-563. See also *People v Armisted*, 295 Mich App 32, 49-51 (2011) (MCL 769.11b does not apply when a parolee commits a new felony prior to his or her release from a community residential center).

Parole violators are not eligible for bond pending resolution of parole violation proceedings. MCL 791.238(1); *Filip*, 278 Mich App at 641; *Johnson (Robert)*, 283 Mich App at 308. MCL 769.11b is inapplicable to parole detainees, and it is error to set bond for individuals who have violated parole. *Filip*, *supra* at 642.

Refuting the popular argument of recidivist parolees that time spent awaiting sentence on a new conviction is "dead time," the Court of Appeals explained in *Johnson (Robert)*, 283 Mich App at 312, that regardless of whether parole is revoked or not revoked, time served awaiting a subsequent conviction is credited toward the conviction for which the defendant was on parole. "If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole." *Johnson (Robert)*, *supra* at 311, citing MCL 791.238(5) and MCL 791.234. "If parole is not revoked, the defendant continues to accrue time toward his [or her] ultimate discharge for the conviction upon which he [or she] enjoys parole." *Johnson (Robert)*, *supra* at 311, citing

MCL 791.238(6). "The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation, and the parolee remains at large. After a warrant is issued, '[t]he time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.'" *Johnson (Robert)*, *supra* at 311, quoting MCL 791.238(2).

D. Void Sentences

MCL 769.11a states that "[w]henever any person has been heretofore or hereafter convicted of any crime within [Michigan] and has served any time upon a void sentence, the trial court, in imposing sentence upon conviction or acceptance of a plea of guilty based upon facts arising out of the earlier void conviction, shall in imposing the sentence specifically grant or allow the defendant credit against and by reduction of the statutory maximum by the time already served by such defendant on the sentence imposed for the prior erroneous conviction."

"[W]hen a void sentence is set aside and a new sentence is imposed, any time served with regard to the void sentence must be credited against the sentence then imposed." *People v Lyons (After Remand)*, 222 Mich App 319, 321 (1997). See *People v McDaniel*, 480 Mich 1162 (2008) ("the court was required to grant the defendant credit for time served on the void sentence the defendant was serving . . . [o]n remand, the circuit court shall determine the appropriate amount of credit due and amend the defendant's judgment of sentence to reflect the proper amount of credit for time served").

E. Consecutive Sentences

"Where a consecutive sentence is imposed, a defendant is not entitled to credit for presentence time served that he [or she] was already obliged to serve under a prior sentence." *People v Connor*, 209 Mich App 419, 431 (1995). A term of imprisonment for conviction of an offense committed by a defendant while on parole begins after expiration of the original sentence. *People v Stead*, 270 Mich App 550, 551-552 (2006). Any time the defendant spent in jail awaiting disposition of the later offense is creditable only toward the sentence from which he or she was paroled. *Stead*, *supra* at 552.

F. Sheriff's Disciplinary Credit

"'Good time' and 'disciplinary credit,' as the terms are used in [MCL 800.33], refer[] to the graduated monthly reduction from

sentences being served by prison inmates as set forth in the statute. It is designated to serve as an inducement to good conduct in state penal institutions, and may be earned during the time the prisoner is confined in a penal institution and also while on parole." 2 Gillespie Michigan Criminal Law & Procedure, § 22:161. "Although . . . there is a distinction between good-time credits and disciplinary credits, [the Michigan Supreme Court] use[s] the terms interchangeably to refer to sentence reductions based on MCL 800.33." *People v Fleming*, 428 Mich 408, 422 n 16 (1987). Under MCL 51.282(2), prisoners are entitled to good-time credit if their record shows that there are no violations of the rules and regulations.

"[A] sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation." *People v Resler*, 210 Mich App 24, 28 (1995). In *Resler*, *supra* at 25, the defendant was originally sentenced to five years' probation with the first year in jail, and was awarded sixty days of good-time credit under MCL 51.282(2). After release from jail, the defendant was found guilty of violating the terms of his probation and was sentenced to five to ten years in prison. *Id*. The trial court only allowed the defendant credit for the time he actually served in jail on the original charges. *Id*. The Court of Appeals ruled that the defendant was entitled to good-time credit against his sentence for the probation violation, and ordered that his sentence be amended to reflect the additional credit. *Id*. at 28.

G. No Credit for Sentence Reduction Due to Jail Overcrowding

Where a defendant is sentenced to probation, the terms of which include incarceration in the county jail, and the defendant is later sentenced to prison for a probation violation, he or she is not entitled to credit for any time by which the original incarceration in the county jail was reduced due to overcrowding. *People v Grazhidani*, 277 Mich App 592, 601 (2008). The *Grazhidani* Court stated:

"Obviously the days that defendant did not serve on his sentence because of his early release from the county jail due to the effects of the jail overcrowding act is not time spent 'in jail.' Because we read *Whiteside*[, 437 Mich 188,] as concluding that the Legislature only intended to grant credit for time actually spent 'in jail,' we conclude that defendant is not entitled to credit for time that he otherwise would have spent in jail except for his early release under the jail overcrowding act." *Grazhidani*, 277 Mich App at 599.

H. Credit for Time Served Before Sentence Only If Denied or Unable to Furnish Bond

MCL 769.11b "neither requires nor permits sentence credit in cases . . . where a defendant is released on bond following entry of charges arising from one offense and, pending disposition of those charges, is subsequently incarcerated as a result of charges arising out of an unrelated offense or circumstance and then seeks credit in the former case for that latter period of confinement." *People v Prieskorn*, 424 Mich 327, 340 (1985) (defendant not entitled to sentence credit for time spent incarcerated under sentence for an unrelated offense committed while he was free on bond for the offense for which he sought sentence credit). See also *People v Ovalle*, 222 Mich App 463, 468-469 (1997) (defendant not entitled to sentence credit because his incarceration from the end of his prior sentence to the imposition of a new sentence was not the result of being denied or unable to furnish bond for the new offense).

MCL 769.11b does not require sentence credit "for time spent incarcerated in other jurisdictions, for offenses committed while [a defendant] was free on bond for the offense for which he [or she] seeks such credit, from the time that a detainer or hold either was or could have been entered against him [or her] by authorities in the jurisdiction where the defendant is to be sentenced." *People v Adkins (Kenneth)*, 433 Mich 732, 734 (1989).

See also *People v Patton*, 285 Mich App 229, 239 (2009) (the defendant was "not entitled to sentence credit for time served from the date a detainer could have, or was, entered against him[,]" because his incarceration in a federal penitentiary was not the result of his being denied or unable to furnish bond for the Michigan charge at issue).

I. Credit for Time Erroneously Spent at Liberty

"Generally, when a prisoner is released or discharged from prison by mistake, his or her sentence continues to run while he or she is at liberty and his or her sentence must be credited with that time, unless his or her sentence has been interrupted by a violation of parole or some fault of the prisoner." 24 CJS Criminal Law, Credit for release or discharge by mistake, § 2179. See *People v Levandoski*, 237 Mich App 612, 621 n 5 (1999) (discussing *White v Pearlman*, 42 F2d 788, 789 (CA 10, 1930), which held that the sentence of a prisoner who had erroneously been released continued to run while he was at liberty).

J. Standard of Review

A trial court's award or denial of jail credit is reviewed de novo as a question of law regarding the interpretation of the applicable statutes. See *Filip*, 278 Mich App at 640. An unpreserved sentencing error is reviewed for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 638 (2005).

6.7 Probation Revocation[49]

"[A] judge who sentences a defendant to probation retains jurisdiction over the case in all subsequent proceedings, including revocation of probation." *People v Manser (Mark)*, 172 Mich App 485, 487 (1988). "'The underlying policy is simply to insure that revocation will be considered by the judge who is most acquainted with the matter.'" *Manser (Mark)*, *supra* at 487, quoting *People v Clemons (Alvin)*, 116 Mich App 601, 604 (1981).

"[V]iolation of probation is not a crime, and a ruling that probation has been violated is not a new conviction." *People v Kaczmarek*, 464 Mich 478, 482-483 (2001). "'If a judge finds that a probationer violated his [or her] probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he [or she] was already exposed . . . .'" *Kaczmarek*, *supra* at 483, quoting *People v Johnson (Eddie)*, 191 Mich App 222, 226 (1991). "Instead, revocation of probation simply clears the way for a resentencing on the original offense." *Kaczmarek*, *supra* at 483.

A trial court only has jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment during the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass (Brent)*, 288 Mich App 399, 408-409 (2010).

A. Issuance of Summons or Warrant

"On finding probable cause to believe that a probationer has violated a condition of probation, the court may (1) issue a summons in accordance with MCR 6.103(B) and MCR 6.103(C) for the probationer to appear for arraignment on the alleged violation, or (2) issue a warrant for the arrest of the probationer." MCR 6.445(A). "An arrested probationer must promptly be brought before the court for arraignment on the alleged violation." *Id*.

[49] See the Michigan Judicial Institute's *Criminal Procedure Monograph 7: Probation Revocation*.

B. Arraignment

At the arraignment on the alleged probation violation, the court must take the following actions:

- Ensure that the probationer receives written notice of the alleged violation. MCL 771.4; MCR 6.445(B)(1).
- Advise the probationer that he or she has a right to contest the charge at a hearing. MCL 771.4; MCR 6.445(B)(2)(a).
- Advise the probationer that he or she is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one. MCR 6.445(B)(2)(b). See *People v Belanger*, 227 Mich App 637, 645, 648 (1998) (court not required to comply with waiver of counsel procedure detailed in MCR 6.005(D); the defendant's indication that he was "ready to get it over with" complied with MCR 6.445(B)).
- If requested and appropriate, appoint a lawyer. MCR 6.445(B)(3).
- Determine what form of release, if any, is appropriate. MCR 6.445(B)(4).
- Set a reasonably prompt hearing date within 14 days after the arraignment if the probationer is being held in custody, *or* order the probationer released from custody pending the hearing, *or* if the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, postpone the hearing for the outcome of that prosecution. MCR 6.445(B)(5); MCR 6.445(C).

The probationer may plead guilty to the probation violation at the arraignment. MCR 6.445(F).

C. Hearing

Probation revocation hearings are summary and informal. MCL 771.4. "The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach." *People v Pillar*, 233 Mich App 267, 269 (1998). "However, probationers are afforded certain due process at violation hearings because of the potential for loss of liberty." *Pillar*, *supra* at 269. For example, if there is a sufficient factual basis to raise a bona fide

doubt regarding the defendant's competency to understand the nature of the charges against him or her and to assist counsel, it would be improper to accept a guilty plea to a probation violation. *People v Martin (George H)*, 61 Mich App 102, 108-109 (1975).

At the probation violation hearing, the evidence against the probationer must be disclosed to him or her. MCR 6.445(E)(1). Additionally, the probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. *Id*. A probationer has a due process right to confront witnesses against him or her, unless the hearing officer finds good cause for not allowing confrontation. *People v Breeding*, 284 Mich App 471, 484-485 (2009). However, the constitutional right to confrontation detailed in *Crawford (Michael) v Washington*, 541 US 36 (2004) (Sixth Amendment generally forbids the introduction of out-of-court testimonial statements in a criminal prosecution unless the defendant has had an opportunity to cross-examine the declarant), does not apply to probation revocation proceedings because probation revocation proceedings are not part of a criminal prosecution. *Breeding*, *supra* at 482.

The court may only consider evidence that is relevant to the alleged probation violation. MCR 6.445(E)(1).

The rules of evidence are inapplicable at probation violation hearings, except those pertaining to privileges. MCL 771.4; MCR 6.445(E)(1); MRE 1101(b)(3). Authority exists for the proposition that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings. See *People v Perry (Juan)*, 201 Mich App 347, 349-352 (1993) (trial court did not err in considering illegally seized evidence in revoking the defendant's probation; exclusionary rule does not apply where the police did not know or have reason to know that the defendant was on probation at the time of the illegal search and seizure).

> **Note:** "Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.445(D). See *Belanger*, 227 Mich App at 658 (court's advice to the defendant of his right to be represented by an attorney at a subsequent sentencing hearing conformed with the requirement of MCR 6.445(D)).

The state has the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1).

A probationer has the right to a procedure comprised of:

- a factual determination that he or she is in fact guilty of violating probation; and
- a discretionary determination of whether the violation warrants revocation. *Pillar*, 233 Mich App at 269.

The court is required to make specific findings at the conclusion of the hearing, either: (1) on the record, or (2) in a written opinion made a part of the record. MCR 6.445(E)(2).

"The sentencing court may not revoke the defendant's probation and impose imprisonment on the basis that the defendant has failed to pay restitution as ordered where he [or she] is financially unable to do so." *People v Lemon*, 80 Mich App 737, 744-745 (1978). "Revocation on this basis constitutes a denial of the defendant's constitutional right to equal protection, as his [or her] imprisonment constitutes a discrimination on the basis of economic status." *Lemon*, *supra* at 745 (court's revocation of probation improper when based on the defendant's assumed ability to pay, where the defendant objected to the required restitution payment amount, and the court failed to verify that the defendant was unable to make payment).

"[O]nce a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it. If there is a determination that the probation authorities did not act with reasonable dispatch under all the circumstances, then there is a waiver of the probation violation." *People v Ortman*, 209 Mich App 251, 254 (1995). "[A] lack of prejudice, in and of itself, is [not] sufficient to defeat a defendant's claim that the probation violation must be waived where there is a finding that the authorities did not exercise due diligence." *Ortman*, *supra* at 255-256 (trial court's order denying the defendant's motion to quash, and conviction of probation violation reversed, where the probation authorities did not exercise due diligence in executing the warrant and the probation violation should have been waived).

Generally, the maximum term of probation for a felony is five years. MCL 771.2(1). However, a probationary term is tolled during the time a defendant absconds from probation. *People v Ritter*, 186 Mich App 701, 711 (1991). The court retains jurisdiction "if probation revocation proceedings are commenced within the probation period and are pending when it expires." *Ritter*, *supra* at 706.

D. Plea

The court must take the following steps before accepting a guilty plea to a probation violation[50]:

- Speak directly to the probationer. MCR 6.445(F).
- Receive the probationer's response. MCR 6.445(F).
- Advise the probationer that by pleading guilty, he or she is giving up the right to a contested hearing. MCR 6.445(F)(1).
- Advise the probationer that if he or she is proceeding without legal representation, he or she is giving up the right to a lawyer's assistance as detailed in MCR 6.445(B)(2)(b). MCR 6.445(F)(1).
- Advise the probationer of the maximum possible jail or prison sentence for the offense. MCR 6.445(F)(2).
- Ascertain that the plea is understandingly, voluntarily, and accurately made. MCR 6.445(F)(3).
- Establish factual support for a finding that the probationer is guilty of the alleged violation. MCR 6.445(F)(4). See *People v McCullough (Tyree)*, 462 Mich 857 (2000) (case remanded for further proceedings where trial court did not secure an adequate factual basis to support acceptance of probationer's guilty plea).

Failure to comply "in all respects" with the requirements of MCR 6.445(F) resulted in vacating a court's revocation of probation and sentence. *People v Burbank*, 461 Mich 870 (1999).

- **Committee Tip:** Even though not specifically required by the court rule, it is good practice to place the probationer under oath before accepting the plea. See MCR 6.302(A).

E. Sentencing[51]

The court may enter a disposition of the probationer according to what best serves the public interest. MCL 771.4.

Under MCR 6.445(G), a court may take any of the following actions if it finds that a probationer has committed a probation violation, or if the probationer pleads guilty to a probation violation:

- Continue probation.

[50] A checklist for accepting a guilty plea to an alleged probation violation appears in the Appendix.

[51] A checklist for sentencing a probationer for a violation of probation is included in the Appendix.

- Modify the conditions of probation.
- Extend the period of probation. See *People v Kendall*, 142 Mich App 576, 578, 580 (1985) (trial court did not abuse its discretion in extending probation period—three weeks before the end of the defendant's two-year probation—by six months after the defendant was arrested for driving while license revoked).
- Revoke probation and impose a sentence of incarceration.

The court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. MCL 771.4.

The legislative sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 565 (2005). *Hendrick* applies retroactively. *People v Parker (Charles)*, 267 Mich App 319, 328 (2005).

The court may consider the conduct underlying a probation violation in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines. *Hendrick*, 472 Mich at 562-564 (defendant possessed a handgun while walking on a public street). See also *People v Church*, 475 Mich 865 (2006) ("the acts giving rise to the probation violation may provide a substantial and compelling reason to depart").

The court may consider the probation violation alone—without regard to the specific conduct underlying the violation—in determining whether a substantial and compelling reason exists to depart from the sentencing guidelines. *People v Schaafsma*, 267 Mich App 184, 185-186 (2005) (defendant's probation violation itself was an objective and verifiable factor constituting a substantial and compelling reason to depart from the sentencing guidelines).

"The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B) and [MCR 6.425](E)." MCR 6.445(G). A defendant may not waive preparation of the report; however, at resentencing he or she may waive preparation of an updated report unless the prior report is "manifestly outdated." *People v Hemphill*, 439 Mich 576, 581-582 (1992).

"A sentencing court may not revoke good-time credit that a defendant already has earned while serving a jail sentence as a condition of probation." *People v Resler*, 210 Mich App 24, 28 (1995).

F. Appeal Rights

On the record and immediately after imposing a sentence that involves incarceration, the court must advise the probationer of his or her appellate rights. MCR 6.445(H)(1). If the underlying conviction resulted from a trial, the probationer has an appeal of right. MCR 6.445(H)(1)(a). If the underlying conviction resulted from a guilty or nolo contendere plea, the probationer is entitled to file an application for leave to appeal. MCR 6.445(H)(1)(b).

On the record and immediately after imposing sentence in cases involving a sentence other than incarceration, the court must advise the probationer that he or she is entitled to file an application for leave to appeal. MCR 6.445(H)(2).

6.8 Postappeal Relief

A. Generally

Within the first six months after entry of sentence, a defendant has the right to file other posttrial motions, such as a motion for a new trial, MCR 6.431(A)(4), a motion to withdraw a plea, MCR 6.310(C), and a motion to correct an invalid sentence, MCR 6.429(B)(4). MCR 7.205(F)(4). Thereafter, he or she may only seek trial court relief under MCR 6.500 *et seq*.

MCR 6.500 concerns postappeal relief and sets out the procedure for postappeal proceedings challenging criminal convictions. Bringing a motion for relief from judgment under MCR 6.502 is the only way to challenge convictions in Michigan courts for a defendant who has exhausted the appellate process, i.e., appealed by right or by leave, unsuccessfully sought leave to appeal, or was unable to file an application for leave to appeal to the Court of Appeals because six months passed since the judgment of conviction was entered. MCR 6.501, 1989 Staff Comment. See MCR 7.205(F)(3).

A petition for habeas corpus cannot be used to obtain review of a conviction in Michigan. MCL 600.4310(3) ("[a]n action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of . . . [p]ersons convicted, or in execution, upon legal process, civil or criminal . . ..").

Federal habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 USC 2254.

B. Motion for Relief From Judgment—Preliminary Matters

"A motion for relief from judgment must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge." MCR 6.502(A).

A motion for relief from judgment may only seek relief from one judgment. MCR 6.502(B). Multiple convictions resulting from a single trial or plea proceeding count as a single judgment for purposes of the rule. *Id*.

A motion for relief from judgment may not be noticed for hearing. MCR 6.502(C).

The requirements for a motion for relief from judgment are specified in MCR 6.502(C):

- Must be typed or legibly handwritten.
- Must include a verification by the defendant or defense counsel in compliance with MCR 2.114.
- The combined length of the motion and any memorandum of law in support of the motion may not exceed 50 pages, double-spaced (excluding attachments and exhibits), unless otherwise ordered by the court.
- If the court enters an order increasing the page limit for the motion, the same order must indicate that the page limit for the prosecutor's response (MCR 6.506(A)) is increased by the same amount.
- The defendant may attach to the motion any affidavit, document, or evidence to support the requested relief. MCR 6.502(E).
- Must be substantially in the form approved by the State Court Administrative Office (SCAO).[52]
- Must include the following information:
  - Defendant's name. MCR 6.502(C)(1).
  - The name of the court in which the defendant was convicted and the file number of the defendant's case. MCR 6.502(C)(2).

[52] See SCAO form CC 257, *Motion for Relief from Judgment*, available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc257.pdf.

- The place where the defendant is confined, or the defendant's address if he or she is not confined. MCR 6.502(C)(3).

- The offenses for which the defendant was convicted and sentenced. MCR 6.502(C)(4).

- The defendant's sentencing date. MCR 6.502(C)(5).

- The manner in which the defendant was convicted (jury trial, bench trial, guilty plea, guilty but mentally ill plea, nolo contendere plea). MCR 6.502(C)(6).

- The type of sentence imposed (probation, fine, and/or imprisonment), the sentence length, and whether the defendant is currently serving the sentence. MCR 6.502(C)(7).

- The name of the judge who presided at trial and imposed sentence. MCR 6.502(C)(8).

- The court, title, and file number of any proceedings (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed. MCR 6.502(C)(9).

- The name of each attorney who represented the defendant at any time after arrest, and the stage of the case at which each attorney represented the defendant. MCR 6.502(C)(10).

- The relief requested. MCR 6.502(C)(11).

- The grounds for the relief requested. MCR 6.502(C)(12).

- The facts supporting each ground for relief requested, stated in summary form. MCR 6.502(C)(13).

- Whether any of the grounds for the relief requested were raised earlier; if so, at what stage of the case, and, if not, the reasons why they were not raised. MCR 6.502(C)(14).

- Whether the defendant requests appointed counsel, and, if so, information necessary for the

court to determine whether the defendant is entitled to appointed counsel. MCR 6.502(C)(15).

If a motion for relief from judgment is not submitted on a form approved by SCAO, or does not substantially comply with the requirements listed in MCR 6.502(C), the court must direct that it be returned to the defendant with a statement of the reasons for its return, or adjudicate the motion under the provisions of MCR 6.500. MCR 6.502(D).

The court may allow a defendant to amend or supplement a motion for relief from judgment at any time. MCR 6.502(F).

"Under MCR 6.502(G)(1), a criminal defendant may file one motion for relief from judgment after August 1, 1995, notwithstanding the defendant's having filed one or more such motions before that date." *Ambrose v Recorder's Court Judge*, 459 Mich 884 (1998). A second or subsequent motion for relief from judgment may be filed regarding a conviction, if the motion raises a claim of newly discovered evidence, or a retroactive change in the law. MCR 6.502(G)(2).

A defendant seeking relief under MCR 6.500 *et seq*. is required to file a motion and a copy of the motion with the clerk of the court in which he or she was convicted and sentenced. MCR 6.503(A)(1). After receiving the motion, the clerk must file it under the same number as the original conviction. MCR 6.503(A)(2). The defendant is required to serve a copy of the motion and notice of its filing on the prosecuting attorney. MCR 6.503(B). The filing and service of the motion does not require a response by the prosecutor unless ordered by the court. *Id*.

A motion for relief from judgment must be presented to the judge to whom the case was assigned at the time of the defendant's conviction. MCR 6.504(A). If that judge is unavailable, the motion must be assigned to another judge according to the court's case reassignment procedure. *Id*. The chief judge is permitted to reassign cases to correct docket control problems arising from the requirements of MCR 6.504(A). *Id*.

The court is required to promptly examine a motion for relief from judgment, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. MCR 6.504(B)(1). The court is permitted to request from the prosecutor copies of transcripts, briefs, or other records. *Id*.

If it plainly appears from the face of the materials that the defendant is not entitled to relief, the court is required to deny the motion without directing further proceedings. MCR 6.504(B)(2). The order

must include a concise statement of the reasons for the denial. *Id*. The court is allowed to dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds. *Id*. If the motion is summarily dismissed, the defendant has 21 days in which to move for reconsideration. MCR 6.504(B)(3).

If the court does not dismiss the motion for relief from judgment in its entirety, the court must order the prosecuting attorney to file a response as provided in MCR 6.506. MCR 6.504(B)(4). If the court does not dismiss the motion, it may direct the parties to expand the record by including any additional materials (including letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court) it deems relevant to the decision on the merits of the motion. MCR 6.507(A). If a party submits items to expand the record, the party is required to serve copies of the items on the opposing party, and the court must give the opposing party an opportunity to admit or deny the correctness of the items. MCR 6.507(B). The court may require any item expanding the record to be authenticated. MCR 6.507(C).

If the rules in MCR 6.500 *et seq*. do not prescribe the applicable procedure, the court may proceed in any lawful manner, and may apply the rules applicable to civil or criminal proceedings, as it deems appropriate. MCR 6.508(A).

The court must determine whether an evidentiary hearing is required after reviewing the motion, response, and the record (and the expanded record, if any). MCR 6.508(B).

If the court decides that an evidentiary hearing is not required, it may rule on the motion or give the parties an opportunity for oral argument. MCR 6.508(B).

If the court decides that an evidentiary hearing is required, it must schedule and conduct the hearing as promptly as practicable.

MCR 6.508(C). The rules of evidence (other than those with respect to privilege) are inapplicable. *Id*. The court is required to assure that a verbatim record of the hearing is made. *Id*.

C. Right to Counsel

The court may appoint counsel for the defendant at any time during the proceedings for a motion for relief from judgment, if the defendant has requested counsel and the court has determined that the defendant is indigent. MCR 6.505(A). If the court directs that oral argument or an evidentiary hearing be held, counsel must be appointed. *Id*. If counsel is appointed, he or she is entitled to 56 days

(or longer, on a showing that a necessary transcript or record is not available to counsel) to amend or supplement the motion for relief from judgment. MCR 6.505(B).

Because a defendant does not have the right to counsel in proceedings under MCR 6.500 *et seq*., he or she cannot claim constitutionally ineffective assistance of counsel in postconviction proceedings. *People v Walters (David)*, 463 Mich 717, 718, 721 (2001).

D. Motion for Relief From Judgment—Decision

The defendant has the burden of establishing that he or she is entitled to the relief requested. MCR 6.508(D). Under MCR 6.508(D), the court may not grant relief under four circumstances.

- The court may not grant relief when the defendant seeks relief from a judgment of conviction and sentence that is still subject to challenge on appeal under MCR 7.200 or MCR 7.300. MCR 6.508(D)(1).

- The court may not grant relief when the defendant alleges grounds for relief that were decided against the defendant in a prior appeal or proceeding under MCR 6.500 *et seq*., unless the defendant establishes that a retroactive change in the law has undermined the earlier decision. MCR 6.508(D)(2).

- The court may not grant relief when the defendant alleges grounds for relief (other than jurisdictional defects, *People v Carpentier*, 446 Mich 19, 23 (1994)) that could have been raised on appeal from the conviction and sentence, or in an earlier motion for relief from judgment, unless the defendant demonstrates good cause for failure to raise those grounds on appeal *and* actual prejudice from the alleged irregularities.

- The court may not grant relief in the case of a challenge to the sentence, unless the sentence is invalid. MCR 6.508(D)(3)(b)(*iv*).

The defendant must show good cause for failure to raise those grounds on appeal or in the earlier motion, MCR 6.508(D)(3)(a). A defendant must "show good cause for failure to raise a claim in an appeal if one is filed, or in a prior motion if one is filed, or in both if both are filed." *People v Clark (Paul)*, 274 Mich App 248, 251, 253 (2007).

A defendant is required to fulfill the good cause requirement regardless of whether he or she filed a prior motion *in propria persona* or with representation. *Paul Clark*, 274 Mich App at 254.

The good cause requirement may be waived if the court concludes that there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D).

The defendant must show actual prejudice from the alleged irregularities that support the claim for relief, MCR 6.508(D)(3)(b). Actual prejudice means:

- In a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(*i*).
- In a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it rendered the plea involuntary to a degree that it would be manifestly unjust to allow the conviction to stand. MCR 6.508(D)(3)(b)(*ii*).
- In any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. MCR 6.508(D)(3)(b)(*iii*).

The court must set out in the record (either orally or in writing) its findings of fact and conclusions of law, and enter an appropriate order disposing of the motion for relief from judgment. MCR 6.508(E).

E. Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681 (2003). A trial court's findings of fact supporting the ruling are reviewed for clear error. *McSwain*, *supra* at 681. A trial court's interpretation of a court rule is a question of law that is reviewed de novo. *Clark (Paul)*, 274 Mich App at 251.

6.9 Setting Aside a Conviction

Subject to the exceptions listed below, MCL 780.621(1) allows a person who is convicted of not more than one offense to file an application with the convicting court for entry of an order setting aside that conviction. Furthermore, "[a] person who is otherwise eligible to file an application

[for the entry of an order setting aside a conviction] is not rendered ineligible by virtue of being convicted of not more than 2 minor offenses in addition to the offense for which the person files an application." MCL 780.621(1). "Minor offense" is defined as "a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 90 days, for which the maximum permissible fine does not exceed $1,000.00, and that is committed by a person who is not more than 21 years of age." MCL 780.621(10)(b). A person may have only one conviction set aside under MCL 780.621 *et seq*. MCL 780.624.

A. Convictions That May Not Be Set Aside

MCL 780.621(2) provides that "[a] person shall not apply to have set aside, and a judge shall not set aside, a conviction for" any of the following:

- a felony for which the maximum punishment is life imprisonment;
- inducing, causing, or allowing child sexually abusive activity for the purpose of producing child sexually abusive material, or arranging for, producing, or financing child sexually abusive activity or material, MCL 750.145c(2);
- distributing, promoting, or financing the distribution or promotion of child sexually abusive material or child sexually abusive activity, MCL 750.145c(3);
- possession of child sexually abusive material, MCL 750.145c(4);
- use of the internet or a computer to make a prohibited communication, MCL 750.145d;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- an attempt to commit any of the above offenses; or
- a traffic offense, which is defined in MCL 780.621a(b) as "a a violation of the Michigan [V]ehicle [C]ode, [MCL 257.1 *et seq*.], or a local ordinance substantially corresponding to that act, which violation involves the operation of a vehicle and at the time of the violation is a felony or misdemeanor."

B. Procedure for Application

"An application [to set aside a conviction] shall not be filed until at least 5 years following imposition of the sentence for the conviction that the applicant seeks to set aside or 5 years following completion of any term of imprisonment for that conviction, whichever occurs later." MCL 780.621(3).

MCL 780.621(4) provides:

> "The application is invalid unless it contains the following information and is signed under oath by the person whose conviction is to be set aside:
>
> > "(a) The full name and current address of the applicant.
> >
> > "(b) A certified record of the conviction that is to be set aside.
> >
> > "(c) A statement that the applicant has not been convicted of an offense other than the conviction sought to be set aside as a result of this application, and not more than 2 minor offenses, if applicable.
> >
> > "(d) A statement as to whether the applicant has previously filed an application to set aside this or any other conviction and, if so, the disposition of the application.
> >
> > "(e) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.
> >
> > "(f) A consent to the use of the nonpublic record created under [MCL 780.623][53] to the extent authorized by [MCL 780.623]."

C. Submission of Application to State Police

The applicant must submit a copy of the application, a $50.00 application fee, and two complete sets of fingerprints to the Department of State Police. MCL 780.621(5); MCL 780.621(6). MCL 780.621(5) further provides:

[53] MCL 780.623 requires the Department of State Police to retain a nonpublic record regarding a conviction that is set aside.

> "The department of state police shall compare [the submitted] fingerprints with the records of the department, including the nonpublic record created under [MCL 780.623],[54] and shall forward a complete set of fingerprints to the federal bureau of investigation for a comparison with the records available to that agency. The department of state police shall report to the court in which the application is filed the information contained in the department's records with respect to any pending charges against the applicant, any record of conviction of the applicant, and the setting aside of any conviction of the applicant and shall report to the court any similar information obtained from the federal bureau of investigation. The court shall not act upon the application until the department of state police reports the information required by [MCL 780.621(5)] to the court."

D. Submission of Application to the Attorney General and Prosecuting Attorney

A copy of the application must be served upon the attorney general and upon the office of the prosecuting attorney who prosecuted the crime. MCL 780.621(7). The attorney general and the prosecuting attorney must have the opportunity to contest the application. *Id*.

If the conviction was for an "assaultive crime" or "serious misdemeanor,"[55] the prosecuting attorney must give the victim of that offense written notice, by first-class mail to his or her last known address, of the application pursuant to MCL 780.772a and MCL 780.827a of the Crime Victim's Rights Act.[56] MCL 780.621(7). The victim has a right to appear at any proceeding concerning the setting aside of the conviction and to make a written or oral statement. *Id*.

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[54] However, MCL 712A.18e(14) permits a person whose adjudication is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the Michigan Freedom of Information Act, MCL 15.234.

[55] "Assaultive crime," as that term is used in MCL 780.621(7), is defined in MCL 770.9a(3). See MCL 780.772a. See MCL 780.811(1)(a) for the applicable definition of "serious misdemeanor."

[56] See the Michigan Judicial Institute's *Crime Victim Rights Manual* for a thorough discussion of a victim's rights regarding notification.

E. Court Action on the Application

"Upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper." MCL 780.621(8).

MCL 780.621(9) provides:

> "If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right."

The nature of the offense, standing alone, is insufficient to warrant denial of an application to set aside a conviction; rather, the court must balance the circumstances and behavior of the offender and the public welfare. *People v Rosen*, 201 Mich App 621, 622-624 (1993).

F. Effect of Order

Except as provided in MCL 780.622(2)-(6) and MCL 780.623,[57] after entry of an order setting aside a conviction, "the applicant, for purposes of the law, shall be considered not to have been previously convicted[.]" MCL 780.622(1). MCL 780.622(2)-(6) provide:

> "(2) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.
>
> "(3) If the conviction set aside . . . is for a listed offense as defined in section 2 of the sex offenders registration act [SORA], [MCL 28.722,] the applicant is considered to have been convicted of that offense for purposes of the sex offenders registration act.[58]
>
> "(4) [MCL 780.621 *et seq*.] does not affect the right of the applicant to rely upon the conviction to bar subsequent proceedings for the same offense.

[57] MCL 780.623 requires the Department of State Police to maintain a nonpublic record regarding a conviction that is set aside.

[58] For a detailed discussion of the SORA, see Chapter 11 of the Michigan Judicial Institute's *Sexual Assault Benchbook*.

> "(5) [MCL 780.621 *et seq*.] does not affect the right of a victim of a crime to prosecute or defend a civil action for damages.
>
> "(6) [MCL 780.621 *et seq*.] does not create a right to commence an action for damages for incarceration under the sentence that the applicant served before the conviction is set aside pursuant to [MCL 780.621 *et seq*.]." MCL 780.622(2)-(6).

G. Access to Records of Convictions That Have Been Set Aside

"Upon the entry of an order [setting aside a conviction], the court shall send a copy of the order to the arresting agency and the department of state police." MCL 780.623(1).

MCL 780.623(2) provides:

> "The department of state police shall retain a nonpublic record of the order setting aside a conviction and of the record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. Except as provided in [MCL 780.623(3)],[59] this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:
>
> > "(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
> >
> > "(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to [MCL 780.621 *et seq*.].
> >
> > "(c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.[60]

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[59] MCL 780.623(3) permits a person whose conviction is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the Michigan Freedom of Information Act, MCL 15.234.

[60] See *People v Smith (Ricky)*, 437 Mich 293, 302-304 (1991).

> "(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.
>
> "(e) Consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency.
>
> "(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act [(SORA), MCL 28.721 *et seq*.] has violated that act, or for use in a prosecution for violating that act.[61]"

The nonpublic record is exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. MCL 780.623(4).[62]

MCL 780.623(5) states that, "[e]xcept as provided in [MCL 780.623(2) (governing the nonpublic record retained by the Department of State Police)], a person, other than the applicant, who knows or should have known that a conviction was set aside . . . and who divulges, uses, or publishes information concerning a conviction set aside . . . is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both."

H. Standard of Review

Assuming the statutory requirements are met, the decision on an expungement motion is reviewed for an abuse of discretion. *People v Link*, 225 Mich App 211, 216 (1997).

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[61] For a detailed discussion of the SORA, see Chapter 11 of the Michigan Judicial Institute's *Sexual Assault Benchbook*.

[62] However, MCL 780.623(3) permits a person whose conviction is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the FOIA, MCL 15.234.

Chapter 7: Appeals & Opinions

7.1 Appeals from District Court to Circuit Court 7-1
7.2 Appeals from Parole Board Decisions 7-14
7.3 Standard of Review 7-19
7.4 Basis for Parties' Positions 7-21
7.5 Precedent 7-22
7.6 Doctrines of Collateral Estoppel, Res Judicata, and Law of the Case 7-24
7.7 Statutory Construction and Interpretation 7-26
7.8 Remand 7-29
7.9 Establishing a Record for Review 7-30
7.10 Oral Opinions 7-33
7.11 Written Opinions 7-34

7.1 Appeals from District Court to Circuit Court[1]

The rules in MCR 7.101 *et seq*. govern the procedure for appealing to the circuit court. MCR 7.101(A).[2] The rules set out in MCR subchapter 7.101 "do not restrict or enlarge the appellate jurisdiction of the circuit court." MCR 7.101(B).

[1] **Note** that this subsection contains information relevant only to *criminal* appeals to the circuit court. See Section 7.2 for more information on appeals from the Michigan Parole Board. See the Michigan Judicial Institute's *Circuit Court Benchbook: Civil Proceedings*, Chapter 9, for discussion of appeals to circuit court in civil cases, including appeals from the probate court and from agencies.

[2] Effective May 1, 2012, ADM 2010-19 replaced subchapter 7.100 of the Michigan Court Rules to provide detailed rules regarding appeals to the circuit court and to renumber existing rules. The new rules "reflect a total rewrite of the rules relating to appeals to circuit court, and are modeled on the rules of the Court of Appeals." Staff Comment to ADM 2010-19.

A. Jurisdiction

The district court has jurisdiction over misdemeanors punishable by a fine, or imprisonment not exceeding 1 year, or both; ordinance violations punishable by a fine or imprisonment; arraignments, fixing bail, and accepting bonds; and preliminary examinations in all felony cases, as well as misdemeanor cases not cognizable by the district court. MCL 600.8311.

"The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from . . . a final judgment or final order[3] of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere[.]" MCR 7.103(A)(1).

"The circuit court may grant leave to appeal from[] a judgment or order of a trial court when[:]

> "(a) no appeal of right exists, or
>
> "(b) an appeal of right could have been taken but was not timely filed[.]" MCR 7.103(B)(1).

Additionally, the circuit court may grant leave to appeal from "a decision of the Michigan Parole Board to grant parole." MCR 7.103(B)(5).[4]

Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted. MCR 7.107. "The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by MCR 7.208(C) through (I)." MCR 7.107.

B. Venue

"Appeals from the district court shall be to the circuit court in the county in which the judgment is rendered." MCL 600.8342. See also MCL 770.3(2) ("An appeal from an interlocutory judgment or order in a felony, misdemeanor, or ordinance violation may be taken, in the manner provided by court rules, by application for leave to appeal to the same court of which a final judgment in that case would be appealable as a matter of right[.]").

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[3] In a criminal case, a final judgment or final order means an order of dismissal; the original sentence imposed following conviction; a sentence imposed following the grant of a motion for resentencing; a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; or a sentence imposed following probation revocation. MCR 7.202(6)(b); see MCR 7.102(8).

[4] See Section 7.2 for discussion of appeals from the Michigan Parole Board.

"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)." MCR 7.118(D)(4).[5]

C. Stay of Proceedings and Bond

A motion for bond or a stay pending appeal must be decided by the trial court[6] before it may be filed in the circuit court. MCR 7.108(A)(1). "The motion must include a copy of the trial court's opinion and order and a copy of the transcript of the hearing, unless its production has been waived." *Id*. "Except as otherwise provided by rule or law, the circuit court may amend the amount of bond, order an additional or different bond and set the amount, . . . require different or additional sureties[,] . . . remand a bond matter to the trial court[,] . . . grant a stay of proceedings in the trial court[,] or stay the effect or enforcement of any judgment or order of a trial court on terms the circuit court deems just." MCR 7.108(A)(2).

"A criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and its amount are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases." MCR 7.108(C)(1).

If the trial court grants a bond, "the defendant must promise in writing:

> "(a) to prosecute the appeal to decision;
>
> "(b) if the sentence is one of incarceration, to surrender immediately to the county sheriff or as otherwise directed, if the judgment of sentence is affirmed on appeal or if the appeal is dismissed;
>
> "(c) if the sentence is other than one of incarceration, to perform and comply with the judgment of sentence if it is affirmed on appeal or if the appeal is dismissed;
>
> "(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;
>
> "(e) to remain in Michigan unless the court gives written approval to leave;

[5] See Section 7.2 for discussion of appeals from the Michigan Parole Board.

[6] "[T]rial court[,]" in a criminal case, means the district or municipal court from which the appeal is taken. MCR 7.102(9).

> "(f) to notify the trial court clerk in writing of a change of address; and
>
> "(g) to comply with any other conditions imposed by law or the court." MCR 7.108(C)(2).

If a bond is to be filed after conviction, the defendant must give notice to the prosecuting attorney of the time and place the bond will be filed. MCR 7.108(C)(3). "The bond is subject to the objection procedure provided in MCR 3.604." MCR 7.108(C)(3).

D. Appeal of Right

In a misdemeanor or ordinance violation case tried in municipal or district court, an aggrieved party generally has a right of appeal from a final order or judgment (except for an order or a judgment based on a plea of guilty or nolo contendere) to the circuit court in the county in which the misdemeanor or ordinance violation was committed. MCL 770.3(1)(b); MCR 7.103(A)(1).

1. Timing

"The time limit for an appeal of right is jurisdictional." MCR 7.104(A). An appeal of right must be taken within:

> "(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or
>
> "(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was filed within:
>
> > "(a) the initial 21-day period, or
> >
> > "(b) further time the trial court or agency may have allowed during that 21-day period." MCR 7.104(A)(1)-(2).

However, if a criminal defendant requests appointment of counsel within 21 days after entry of the judgment of sentence, "an appeal of right must be taken within 21 days after entry of an order:

> "(a) appointing or denying the appointment of an attorney, or

> "(b) denying a timely filed motion described in [MCR 7.104(A)](2)." MCR 7.104(A)(3).

2. Manner of Filing

For jurisdiction to vest with the circuit court, an appellant in a criminal case must timely file:

- the claim, which must be signed by the appellant or the appellant's attorney;[7] and
- the filing fee, unless the appellant is indigent. MCR 7.104(B)-(C).

In addition, an appellant must "file the following documents with the claim of appeal:"

- a copy of the judgment, order, or decision appealed;
- an indication that the transcript has been ordered or that there is nothing to be transcribed;
- a true copy of the bond, if a bond has been filed;
- proof that money, property, or documents have been delivered or deposited as required by law;
- a copy of the register of actions, if any;
- proof that the appeal fee of the trial court has been tendered;
- anything else required by law to be filed; and
- proof that all parties, the trial court, and any other person entitled to notice of the appeal have been served. MCR 7.104(D).

MCR 7.104(E) requires the appellant to timely serve on the trial court from which the appeal is taken:

- a copy of the claim of appeal;
- any fee required by law;
- any bond required by law; and

[7] See MCR 7.104(C)(1)-(2) for additional requirements regarding the form and content of the claim of appeal.

- an indication that the transcript has been ordered and payment made or secured, unless there is nothing to be transcribed.

An appellee must file an appearance in the circuit court within 14 days after being served with the claim of appeal. MCR 7.104(F). "An appellee who does not file an appearance is not entitled to notice of further proceedings." *Id*.

E. Appeal By Leave

All appeals from final orders and judgments based on guilty or nolo contendere pleas are by application for leave to appeal. MCL 770.3(1)(d). Additionally, a party may apply for leave to appeal to the circuit court from an interlocutory judgment or order in a felony, misdemeanor, or ordinance violation case. MCL 770.3(2).[8] MCR 7.103(B)(1) provides that a circuit court may grant leave to appeal from a judgment or order if no appeal of right exists or the time for taking an appeal of right has expired. MCR 7.103(B)(5) additionally provides that the circuit court may grant leave to appeal from a decision of the Michigan Parole Board to grant parole.[9]

1. Timing

"An application for leave to appeal must be filed with the clerk of the circuit court within:

> "(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or
>
> "(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision if the motion was filed within:
>
> > "(a) the initial 21-day period, or
> >
> > "(b) such further time as the trial court or agency may have allowed during that 21-day period." MCR 7.105(A)(1)-(2).

Additionally, if a defendant who has pleaded guilty or nolo contendere requests appointment of counsel within 21 days

[8] Either a criminal defendant or the prosecution may raise an issue related to an interlocutory decision in an appeal of right from a final decision. *People v Torres (Gavino)*, 452 Mich 43, 59 (1996).

[9] See Section 7.2 for discussion of appeals from the Michigan Parole Board.

after entry of the judgment or sentence, "an application must be filed within 21 days after entry of an order:

> "(a) appointing or denying the appointment of an attorney, or
>
> "(b) denying a timely filed motion described in [MCR 7.105(A)](2)." MCR 7.105(A)(3).

When an appeal of right or an application for leave has not been timely filed, an appellant may file a late application, following the procedures for filing an application for leave, accompanied by a statement of facts explaining the delay. MCR 7.105(F)(1). "The answer may challenge the claimed reasons for the delay[, and t]he circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application." *Id*. A late application may not be filed more than six months after entry of the order, judgment, or decision appealed or an order denying a motion for a new trial, for rehearing or reconsideration, to withdraw a plea, or for other relief from the judgment, order, or decision, if the motion was timely filed. MCR 7.105(F)(2).

2. Manner of Filing

To apply for leave to appeal, MCR 7.105(B) requires an appellant in a criminal case to file:

- a signed application for leave to appeal;[10]
- a copy of the judgment, order, or decision appealed and the opinion or findings of the trial court;
- a copy of the register of actions;
- unless waived by stipulation of the parties or by trial court order, a copy of the relevant transcript or portion of transcript,[11] or an indication that a transcript has been ordered or that there is nothing to be transcribed;
- proof that all parties and the trial court have been served[12]; and

[10] See MCR 7.105(B)(1)(a)-(d) for additional requirements regarding the content of the application.

[11] See MCR 7.105(B)(5), identifying specific transcripts required, depending on the nature of the appeal.

[12] "If service cannot be reasonably accomplished, the appellant may ask the circuit court to prescribe service under MCR 2.107(E)[.]" MCR 7.105(B)(6).

- the appeal fee, unless the appellant is indigent.

3. Answer

Within 21 days of service of the application, a signed answer, and proof of service of the answer, may be filed. MCR 7.105(C).

4. Decision on Application

The circuit court decides the application without oral argument, unless it otherwise directs. MCR 7.105(D)(1). Absent good cause, the decision must be made within 35 days of the filing date. MCR 7.105(D)(2).

The court may grant or deny leave to appeal or grant other relief, and it must promptly serve a copy of the order on the parties and the trial court. MCR 7.105(D)(3).

If the application is granted, further proceedings are governed by MCR 7.104, except that:

- the appellant need not file a claim of appeal. MCR 7.105(D)(4)(a);
- within seven days after the order granting leave is entered, the appellant must file the documents required by MCR 7.104(D) and make service on the trial court as required by MCR 7.104(E); and
- an appellee may file a cross appeal claim within 14 days after the court serves the order granting leave to appeal. MCR 7.105(D)(4).

"Unless otherwise ordered, the appeal is limited to the issues raised in the application." MCR 7.105(D)(5).

5. Immediate Consideration

"When an appellant requires a decision on an application in fewer than 35 days, the appellant must file a motion for immediate consideration concisely stating why an immediate decision is required." MCR 7.105(E).

F. Cross Appeal

Any appellee may file a cross appeal when an appeal of right is filed or when the circuit court grants leave to appeal. MCR 7.106(A)(1).

1. Timing

A cross appeal must be filed within 14 days after the cross appellant is served with the claim of appeal or after the order granting leave to appeal is entered. MCR 7.106(B); see also MCR 7.105(D)(4)(c). A party seeking leave to file a cross appeal after that time must proceed under MCR 7.105(F) (governing late appeals; see Section 7.1(G)). MCR 7.106(F).

2. Manner of Filing

"To file a cross appeal, the cross appellant must file:

> "(1) a claim of cross appeal in the form required by MCR 7.104(C);
>
> "(2) any required fee;
>
> "(3) a copy of the judgment, order, or decision from which the cross appeal is taken; and
>
> "(4) proof that a copy of the claim of cross appeal was served on all parties." MCR 7.106(C).

A cross appellant must also must file the documents required by MCR 7.104(D) and make service on the trial court as required by MCR 7.104(E), unless doing so would duplicate the appellant's filing of the same document. MCR 7.106(D). The cross appellant need not order a transcript or file a court reporter's certificate unless the initial appeal is dismissed. *Id*.

3. Initial Appeal Dismissed

"If the initial appeal is dismissed, the cross appeal may continue." MCR 7.106(E). Within 14 days after the order dismissing the initial appeal, the cross appellant must file either the certificate of the court reporter or recorder if there is a transcript to be produced, or a statement indicating that there is nothing to be transcribed. *Id*.

G. Late Appeals

When an appeal of right or an application for leave has not been timely filed, an appellant may file a late application, following the procedures for filing an application for leave, accompanied by a statement of facts explaining the delay. MCR 7.105(F)(1). "The answer may challenge the claimed reasons for the delay[, and t]he circuit court may consider the length of

and the reasons for the delay in deciding whether to grant the application." *Id*. A late application may not be filed more than six months after entry of the order, judgment, or decision appealed or an order denying a motion for a new trial, for rehearing or reconsideration, to withdraw a plea, or for other relief from the judgment, order, or decision, if the motion was timely filed. MCR 7.105(F)(2).

H. Record on Appeal

"Appeals from the district court shall be on a written transcript of the record made in the district court or on a record settled and agreed to by the parties and approved by the court." MCL 600.8341. See also MCR 7.109(A) ("Appeals to the circuit court are heard on the original record.").

"[T]he record consists of the original papers filed in [the lower] court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." MCR 7.210(A)(1); see MCR 7.109(A)(1). The record must include the substance of any excluded evidence or the transcript of proceedings excluding it. MCR 7.109(A)(3). The parties may stipulate in writing regarding any matters relevant to the record "if the stipulation is made a part of the record and sent to the circuit court." MCR 7.109(A)(4).

The appellant must serve a copy of the entire record on appeal on each appellee within 14 days after the transcript (or, if no transcript will be filed, the transcript substitute) is filed with the trial court. MCR 7.109(F).[13] The trial court must promptly send the record to the circuit court, along with a certificate identifying the name of the case, listing the papers included, and indicating that the required fees have been paid and any required bond has been filed. MCR 7.109(G)(1).[14] Weapons, drugs, or money are not be sent unless requested by the circuit court, and the trial court may order the removal of any exhibits from the record. *Id*. The circuit court must send written notice to the parties when it receives the filed record. MCR 7.109(G)(3). If a motion is filed before the complete record on appeal is sent to the circuit court, the trial court must, on request, send the circuit court the documents needed to decide the motion. MCR 7.109(E).

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[13] See MCR 7.109(B)-(D) for detailed rules regarding the filing of the transcript, the duties of the court reporter or recorder, exhibits, and the reproduction of records.

[14] See MCR 7.109(G)(1)(a)-(f) and MCR 7.109(G)(2) for additional rules regarding the contents of the transmitted record and transcripts. See MCR 7.109(H) for rules regarding the return of the record.

I. Motions

1. Generally

"Motion practice in a circuit court appeal is governed by MCR 2.119. Motions may include special motions identified in MCR 7.211(C).[15] Absent good cause, the court shall decide motions within 28 days after the hearing date." MCR 7.110.

2. Motions for Rehearing or Reconsideration

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People v Walters (Jayne)*, 266 Mich App 341, 349 (2005). Motions for reconsideration are governed by MCR 2.119(F). MCR 7.114(D).

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Walters (Jayne)*, 266 Mich App at 350. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters (Jayne)*, *supra* at 350.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Walters (Jayne)*, 266 Mich App at 352. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Walters (Jayne)*, *supra* at 352-353.

J. Briefs

"Within 28 days after the circuit court provides written notice under MCR 7.109(G)(3) that the record on appeal is filed with the circuit court, the appellant must file a brief conforming to MCR 7.212(C) and serve it on all other parties to the appeal." MCR 7.111(A)(1)(a). The time may be extended by stipulation or by the circuit court, but the filing of a motion to extend the time does not stay the time for filing a brief. *Id*. If an appellant fails to timely file a brief, the appeal may be considered abandoned and the appeal dismissed on 14

[15] "Special motions" under MCR 7.211(C) include motions to remand, to dismiss, and to affirm; confessions of error by the prosecutor; and requests for damages or other disciplinary action for bringing vexatious proceedings.

days' notice to the parties. MCR 7.111(A)(1)(b). The filing of a conforming brief after notice is sent does not preclude dismissal unless the appellant provides a reasonable excuse for the late filing. *Id*.

An appellee may file a brief and must do so within 21 days after being served with the appellant's brief. MCR 7.111(A)(2).

Timing for briefs in cross appeals is the same as for direct appeals. MCR 7.111(A)(3).

All briefs must conform to MCR 7.212(B) (governing length and form of briefs); the appellant's brief must also conform to MCR 7.212(C), and the appellee's brief must also conform to MCR 7.212(D). MCR 7.111(A)(2); MCR 7.111(B). "If, on its own initiative or on a party's motion, the circuit court concludes that a brief does not substantially comply with the requirements in [MCR 7.111], it may order the party filing the brief to correct the deficiencies within a specified time or it may strike the nonconforming brief." MCR 7.111(D).

A party is entitled to oral argument if it has filed a timely brief with "ORAL ARGUMENT REQUESTED" in capital letters or boldface type on the title page of the brief. MCR 7.111(C). When a party makes a request in accord with MCR 7.111(C), the court must schedule oral argument "unless it concludes that the briefs and record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument." MCR 7.114(A). Any party failing to timely file and serve a brief forfeits oral argument, although the court may grant a motion to reinstate oral argument for good cause shown. MCR 7.111(A)(5).

K. Dismissal

1. Involuntary

"If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days after service of the notice." MCR 7.113(A)(1). The appeal may be reinstated if, within 14 days of the involuntary dismissal, the appellant shows mistake, inadvertence, or excusable neglect. MCR 7.113(A)(2).

2. Voluntary

If the parties file a signed stipulation agreeing to dismiss the appeal or the appellant files an unopposed motion to withdraw the appeal, the circuit court must enter an order of dismissal. MCR 7.113(B).

3. Notice

Immediately on its entry, a copy of an order dismissing an appeal must be sent to the parties and the trial court. MCR 7.113(C).

L. Decision and Judgment

The circuit court must decide the appeal by either an oral or a written opinion and issue an order. MCR 7.114(B). "The court's order is its judgment." *Id*.

A judgment is effective:

- after expiration of the period for filing in the Court of Appeals a timely application for leave to appeal;
- after the Court of Appeals decides a case for which an application for leave is filed; or
- after a time period otherwise ordered by the circuit court or the Court of Appeals. MCR 7.114(C).

Enforcement of the judgment is to be obtained in the trial court after the record is returned as provided in MCR 7.109(H). MCR 7.114(C).

M. Miscellaneous Relief

"In addition to its general appellate powers, the circuit court may grant relief as provided in MCR 7.216 [(authorizing the Court of Appeals to grant various forms of relief, including permitting amendments or additions to the transcript or record, remanding to the trial court, drawing inferences of fact, granting a new trial, or dismissing an appeal or the original proceeding)]." MCR 7.112.

N. Assessment of Costs

MCR 7.115(A) provides that "the prevailing party in a civil case" is generally entitled to costs. However, a criminal defendant is not entitled to an assessment of costs against the prosecution as a "prevailing party" in a successful appeal to a circuit court. *People v*

Rapp, 293 Mich App 159, 166-167 (2011). Former MCR 7.101(O) permitted the taxing of costs "as provided in MCR 2.625," but neither former MCR 7101(O) nor MCR 2.625 is applicable to criminal matters; furthermore, MCL 600.2441 "specifically provides for the taxation of costs [only] in *civil* matters." *Rapp*, *supra* at 166-167. Thus, recognizing "the broad statutory discretion granted the prosecution in its charging decisions[,]" the *Rapp* Court held that the circuit court had improperly assessed costs against the prosecution following the reversal of the defendant's misdemeanor conviction. *Id*. at 167.

7.2 Appeals from Parole Board Decisions

A. Grounds for Grant of Parole

"[A] prisoner's release on parole is discretionary with the parole board." MCL 791.234(11). "'A prisoner has no constitutionally protected or inherent right to parole, only a hope or expectation of it.'" *People v Mack*, 265 Mich App 122, 129 (2005), quoting *Morales v Parole Bd*, 260 Mich App 29, 48 (2003).

"The Legislature has entrusted the decision whether to grant [] parole to the Parole Board." *In re Parole of Johnson (Kenneth)*, 219 Mich App 595, 596 (1996). The board must have "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a). A parole board panel must consider Department of Corrections parole guidelines when deciding whether to grant parole. MCL 791.233e(5). However, the parole board must provide, in writing, substantial and compelling reasons for departing from the parole guidelines to grant parole to a prisoner who has a low probability of parole, as determined under the parole guidelines. MCL 791.233e(6).

A three-member parole board panel, when deciding a prisoner's eligibility for parole, need not meet in collegial discussion before reaching a decision; the panel may circulate a parole applicant's file from one member to another until a decision by at least a majority of the members is reached. *In re Parole of Franciosi*, 231 Mich App 607, 616-617 (1998).

B. Procedure for Appeal from Grant of Parole

Judicial review of the denial of parole by the Michigan Parole Board ("parole board" or "board") is unavailable to Michigan prisoners absent circumstances giving rise to a complaint for habeas corpus or

a writ of mandamus to compel compliance with a statutory duty. *Morales*, 260 Mich App at 39-42, 52. See also *Jackson (Paul) v Jamrog*, 411 F3d 615, 618, 621 (CA 6, 2005) ("Michigan law [does not] authorize[] state court review of parole board decisions denying parole[]"; however, "state inmates wrongfully denied parole on a basis recognized as illegal . . . have access to the courts to seek relief through state habeas actions and mandamus[]").

However, "[t]he action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted." MCL 791.234(11). There is no appeal of right from a parole board decision. MCR 7.118(B); see MCR 7.103(B)(5). Only the prosecutor or a victim may apply for leave to appeal. MCR 7.118(D)(1)(a). Generally, the prisoner will be the appellee; however, the parole board may move to intervene as an appellee. MCR 7.118(D)(1)(c).

MCR 7.118 governs appeals to the circuit court from the parole board. MCR 7.118(A). Unless provided otherwise in MCR 7.118, the rules set out in MCR 7.101—MCR 7.115 apply. MCR 7.118(A).[16]

1. Application for Leave to Appeal

a. 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)." MCR 7.118(D)(4).

b. 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." MCR 7.118(D)(2).

A late application for leave to appeal may be filed under MCR 7.105(F). MCR 7.118(E).

[16] See Section 7.1 for discussion of MCR 7.101—MCR 7.115 as generally applicable to criminal appeals to the circuit court. Note, however, that Section 7.1 does not include discussion of the rules that apply only to appeals from agencies. See the Michigan Judicial Institute's *Circuit Court Benchbook: Civil Proceedings*, Chapter 9, for discussion of these rules.

c. Manner of Filing

"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." MCR 7.118(D)(3).[17]

d. Access to Reports or Guidelines

The prosecutor, the victim, and the prisoner are entitled, upon request, to receive applicable reports and parole guidelines. MCR 7.118(C).

e. Response

The prisoner must be notified, in a form approved by SCAO,[18] that he or she may respond to the application for leave to appeal through retained counsel or in propria persona. MCR 7.118(D)(3)(b)(*i*).

2. Stay of Order of Parole

An order of parole issued under MCL 791.236 must not be executed until 28 days after the notice of action has been mailed. MCR 7.118(F)(1).

"If an order [of parole] 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." MCR 7.118(F)(2). The prisoner must be notified, in a form approved by SCAO,[19] of this possibility. MCR 7.118(D)(3)(b)(*ii*).

3. Decision to Grant Leave to Appeal

The circuit court must either make its determination whether to grant leave within 28 days after the application is filed, or enter an order to produce the prisoner for a show cause

[17] See MCR 7.118(D)(3)(a)-(c) for detailed rules regarding service on the parole board, the victim, the prosecutor, and the prisoner.

[18] See SCAO Form CC 404, "Notice to Prisoner on Application for Leave to Appeal Decision of Parole Board[,]" which was promulgated under former MCR 7.104(D)(2).

[19] See SCAO Form CC 404, "Notice to Prisoner on Application for Leave to Appeal Decision of Parole Board[,]" which was promulgated under former MCR 7.104(D)(2).

hearing to determine whether to release the prisoner on parole pending disposition of the appeal. MCR 7.118(G)(1)-(2).

4. Procedure After Granting Leave to Appeal

"If leave to appeal is granted, MCR 7.105(D)(4) [(generally governing the circuit court's decision on an application for leave to appeal)] applies[,]" together with additional rules specifically governing the record and briefs in parole board appeals. MCR 7.118(H).[20]

a. 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." MCR 7.118(H)(3).

See also *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153 (1995) ("[the parole board's] discretion . . . is not unfettered but . . . is circumscribed by the many requirements of the [applicable statutes][]").

b. Remand to the Parole Board

The circuit court, on its own motion or a party's motion, may remand the matter to the parole board for an explanation of its decision. MCR 7.118(H)(4). "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." MCR 7.118(H)(4)(a). "The time for filing briefs on appeal under [MCR 7.118](G)(2) is tolled while the matter is pending on remand." MCR 7.118(H)(4)(b).

[20] See MCR 7.118(H)(1) for rules governing the record on appeal from a parole board decision. See MCR 7.118(H)(2) for rules that, in addition to the general rules set out in MCR 7.111, govern briefs on appeal from a parole board decision.

5. Parole Board Responsibility After Reversal or Remand

"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." MCR 7.118(J)(1).

"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." MCR 7.118(J)(2).

6. Costs

"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." MCR 7.118(H)(1)(c).

7. Appeal from Circuit Court to 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." MCR 7.118(I).

MCR 7.118(J)(3) provides that an appeal to the Court of Appeals does not affect the parole board's jurisdiction to review the matter upon reversal or remand or to provide for a hearing as set out in MCR 7.118(J)(1)-(2).

C. Appeal From Parole Revocation

"After a prisoner is released on parole, the prisoner's parole order is subject to revocation at the discretion of the parole board for cause . . . ." MCL 791.240a(1). Because a parole revocation "is not part of a criminal prosecution . . . the full panoply of rights due a defendant in such a proceeding does not apply . . . ." *Morrisey v Brewer*, 408 US 471, 480 (1972). In Michigan, Chapter 6 of the Administrative Procedures Act (APA), MCL 24.301 to MCL 24.306, which provides for judicial review of contested cases, applies to Department of Corrections parole revocation hearings. *Penn v Dep't of Corrections*, 100 Mich App 532, 540 (1980). If the Department of Corrections fails to comply with the timelines for revocation proceedings, the proper remedy is a complaint for an order of mandamus. *Jones (James) v Dep't of Corrections*, 468 Mich 646, 658 (2003); *Callison v Dep't of Corrections*, 56 Mich App 260, 264-265 (1974).

A petition for review of a parole revocation decision must be filed in the circuit court within 60 days of the parole revocation. MCL 24.303—MCL 24.304. However, the APA is not the only avenue of judicial review available to an accused parolee. *Triplett v Deputy Warden*, 142 Mich App 774, 779 (1985). If an accused parolee fails to seek relief in the circuit court within the 60-day APA time limit, he or she may still file an action for habeas corpus. *Triplett*, *supra* at 779; MCR 3.303.

7.3 Standard of Review

A. Generally

The standard of review reflects the level of deference an appellate court gives to a decision of the lower court.

The standard of review is one of the initial concerns in deciding any appeal. See MCR 7.212(C)(7). Generally, the standard of review on appeal will be de novo for questions of law, clearly erroneous for determinations of fact, and abuse of discretion for application of the law to the facts.

B. De Novo

Questions of law are reviewed de novo. *People v Sierb*, 456 Mich 519, 522 (1998). Examples of questions of law include the interpretation of statutes, constitutional provisions, *People v Meconi*, 277 Mich App 651, 659 (2008), and court rules. *People v Clark (Paul)*, 274 Mich App 248, 251 (2007).

C. Clear Error

A lower court's findings of fact are reviewed for clear error. MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses before it." *Id*. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473 (2006).

D. Abuse of Discretion

"At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). "An

abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock*, *supra* at 269.

E. What Standard of Review Should Be Employed?

"[T]he standard for reviewing error on appeal depends upon two factors: first, whether the error is constitutional or nonconstitutional, and second, whether the error is preserved or forfeited." *People v Carines*, 460 Mich 750, 773 (1999). Forfeiture is the failure to timely assert a right. *Carines*, *supra* at 762 n 7. Waiver is the intentional relinquishment or abandonment of a known right. *Id*.

1. Preserved/constitutional

"If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *Carines*, 460 Mich at 774, citing *People v Anderson (James) (After Remand)*, 446 Mich 392 (1994). "'A constitutional error is harmless if "[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'" *People v Shepherd*, 472 Mich 343, 347 (2005), quoting *People v Mass*, 464 Mich 615, 640 n 29 (2001), quoting *Neder v United States*, 527 US 1, 19 (1999). If the error is structural, automatic reversal is required. *Anderson (James)*, *supra* at 404-405. Structural errors include "the total deprivation of the right to trial counsel, an impartial judge, excluding grand jury members who are the same race as [the] defendant, denial of the right to self-representation, denial of the right to a public trial, and a constitutionally improper reasonable doubt instruction." *Id*. at 405.

2. Preserved/nonconstitutional

"The defendant has the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *Carines*, 460 Mich at 774, quoting *People v Lukity*, 460 Mich 484 (1999). See MCL 769.26 ("[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice"). See also MCR 2.613(A) ("[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or

omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice"); MRE 103(a).

3. Forfeited/constitutional

"The defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, 460 Mich at 774, citing *United States v Olano*, 507 US 725 (1993), and *People v Grant (Andre)*, 445 Mich 535 (1994).

4. Forfeited/nonconstitutional

"The defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, 460 Mich at 774, citing *Olano*, 507 US 725, and *Grant (Andre)*, 445 Mich 535. See also MRE 103(d) ("[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court").

F. Right Result—Wrong Reason

The reviewing court need not reverse a lower court's ruling if the lower court reached the correct result, albeit for the wrong reason. *People v McLaughlin*, 258 Mich App 635, 652 n 7 (2003).

7.4 Basis for Parties' Positions

A. Party Must State Basis For Claim

"'A party may not merely state a position and then leave it to [the reviewing court] to discover and rationalize the basis for the claim.'" *People v Milstead*, 250 Mich App 391, 408 n 8 (2002), quoting *People v Mackle*, 241 Mich App 583, 604 n 4 (2000).

B. Party Must Provide Record Supporting Claim

"It is the appellant's obligation to secure the complete transcript of all proceedings in the lower court unless production of the full transcript is excused by order of the trial court or by stipulation of the parties. [The Michigan] Court [of Appeals] limits its review to the record provided on appeal and will not consider any alleged evidence or testimony that is not supported by the record presented to the Court for review." *Admiral Ins v Columbia Cas Ins*, 194 Mich App 300, 305 (1992).

7.5 Precedent

A. Michigan Supreme Court

A Supreme Court decision is controlling if it is the decision of a majority of the justices who were sitting on the case. *Negri v Slotkin*, 397 Mich 105, 110 (1976). "'Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation . . . .'" *People v Gahan*, 456 Mich 264, 274 (1997), quoting *Negri*, *supra* at 109.

Michigan Supreme Court orders that "include a decision with an understandable rationale establish binding precedent." *People v Giovannini*, 271 Mich App 409, 414 (2006).

B. Michigan Court of Appeals

"A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." *Id*.

"An unpublished opinion [of the Court of Appeals] is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." MCR 7.215(J)(1).

C. Circuit Court

A circuit court is not bound by the decision of another circuit court. *People v Hunt*, 171 Mich App 174, 180 (1988).

D. United States Supreme Court

"[S]tate courts are bound by United States Supreme Court decisions construing federal law . . . ." *People v Gillam*, 479 Mich 253, 261 (2007).

E. Sixth Circuit Court of Appeals

State courts are not bound by the decisions of lower federal courts construing federal law, and Michigan courts are free to follow or reject their authority. *Gillam*, 479 Mich at 261. See *People v James (Derrick)*, 267 Mich App 675, 680 n 1 (2005) ("[w]e acknowledge the contrary holding of the United States Court of Appeals for the Sixth Circuit . . . [h]owever, we are not bound to follow decisions of federal courts of appeals . . . and we find the Sixth Circuit's analysis unconvincing").

F. Attorney General

An attorney general's opinion is not binding authority. *People v Kildow*, 99 Mich App 446, 449 (1980); however, it can constitute persuasive authority. *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 398 (2008).

G. Dicta

"Obiter dicta are defined as '[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand . . . .'" *People v Tierney*, 266 Mich App 687, 713 (2005), quoting *Hett v Duffy*, 346 Mich 456, 461 (1956), overruled on other grounds *Weller v Mancha*, 353 Mich 189, 194 (1958). "[O]biter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis." *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4 (1999).

H. Retroactivity of Judicial Decisions

"The general rule in Michigan is that judicial decisions are given complete retroactive effect." *People v Houlihan*, 474 Mich 958, 959 (2005). "Prospective application is given only to decisions that overrule clear and uncontradicted case[]law." *Houlihan*, *supra* at 959.

Moreover, "cases that properly interpret statutes, even if prior caselaw had held differently, 'restore[] legitimacy to the law' and, thus, are 'not a declaration of a new rule, but . . . a vindication of controlling legal authority[.]'" *Richard v Schneiderman & Sherman, PC*, 294 Mich App 37, 40 (2011), quoting *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 222 (2007).

"With respect to criminal matters, both the United States Supreme Court and the Michigan Supreme Court consider three factors to determine whether a law should be applied retroactively or prospectively: '(1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect on the administration of justice.'" *People v Parker (Charles)*, 267 Mich App 319, 326 (2005), quoting *Lincoln v Gen Motors Corp*, 231 Mich App 262, 309 (1998). "Before applying these factors . . . 'the decision in question must satisfy a threshold criterion: namely, that the decision clearly establish[es] a new principle of law[.]'" *Parker (Charles)*, *supra* at 326-327, quoting *Lincoln*, *supra* at 310. Prospective application of a holding is appropriate when it decides an issue of first impression and the resolution of the issue was not clearly foreshadowed, or when it overrules settled precedent. *Parker (Charles)*, *supra* at 327.

"In *Teague v Lane*, 489 US 288 (1989), the United States Supreme Court set forth the federal standard for determining whether a rule regarding criminal procedure should be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 388 (2008). "*Teague* established the 'general rule' that 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" *Maxson (Mark)*, *supra* at 388, quoting *Teague*, *supra* at 310.

There are two exceptions to the general rule: "a new rule should be applied retroactively 'if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . and if it requires the observance of those procedures that are implicit in the concept of ordered liberty.'" *Maxson (Mark)*, *supra* at 388 (citations and internal quotation omitted).

7.6 Doctrines of Collateral Estoppel, Res Judicata, and Law of the Case

A. Collateral Estoppel

Collateral estoppel refers to "issue preclusion," and "precludes relitigation of an issue in a subsequent, different cause of action

between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v Gates (Gregory)*, 434 Mich 146, 154 n 7 (1990). "[I]n the body of case law applying this principle the vast majority of cases involve the applicability of collateral estoppel where there are two civil proceedings. Cases involving 'cross-over estoppel,' where an issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare." *Gates (Gregory)*, *supra* at 155.

"In order for collateral estoppel to operate as a bar to a subsequent prosecution, the jury in the earlier [] proceeding must necessarily have determined that [the] defendant was not guilty of the [crime] charged in the prosecutor's complaint." *Gates (Gregory)*, 434 Mich at 158.

"Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally." *Gates (Gregory)*, 434 Mich at 158. "The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel." *Gates (Gregory)*, *supra* at 158. "The verdict in the first proceeding need not explicitly have addressed the issue to be precluded, however. The fact that a verdict is a general verdict may make the determination of what issues have been decided problematic, but it does not automatically bar the application of collateral estoppel." *Id*., citing *Ashe v Swenson*, 397 US 436, 444 (1970). In *Gates (Gregory)*, *supra* at 150-151, 165, the Michigan Supreme Court held that because the defendant's guilt or innocence was not necessarily determined by a jury verdict of "no jurisdiction" in a child protective proceeding, the doctrine of collateral estoppel did not preclude the subsequent criminal prosecution of the defendant for criminal sexual conduct.

B. Res Judicata

Res judicata refers to "'claims preclusion,' which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action." *Gates (Gregory)*, 434 Mich at 154 n 7. "[D]ismissal of a prosecution at a preliminary examination raises no bar under res judicata . . . to a subsequent prosecution." *People v Hayden*, 205 Mich App 412, 414 (1994).

C. Law of the Case

The law of the case doctrine "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or

subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340 (1994). While the law of the case doctrine generally applies without regard to whether a prior determination was correct, "in criminal cases, a trial court retains the power to grant a new trial at any time where 'justice has not been done.'" *Herrera*, *supra* at 340, quoting MCL 770.1. "[I]n criminal cases the law of the case doctrine does not automatically doom the defendant's arguments or automatically render them frivolous and worthy of sanctions." *Herrera*, *supra* at 340-341.

"Under Michigan law, a court can consider itself bound by a decision rendered in the denial of a leave to appeal as law of the case where the denial of the leave to appeal came on the merits of the case." *Lawrence v 48th Dist Ct*, 460 F3d 475, 479 (CA 6, 2009).

7.7 Statutory Construction and Interpretation

A. Generally

General rules of statutory construction are contained within the Michigan Compiled Laws. MCL 8.3 provides that "[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature." MCL 8.5 provides for severability of a portion of an act found to be invalid by a court.

The Michigan Penal Code contains its own rule of construction. MCL 750.2 states that "[t]he rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

The Michigan Court of Appeals has set out the following guiding principles of statutory construction:

> "Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *People v Tombs*, 472 Mich 446, 451 (2005) (opinion by Kelly, J.); *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id*. at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id*. We must consider both the plain meaning of the critical words or phrases as well as their placement and

> purpose in the statutory scheme. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162 (2004). 'The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.' *Shinholster*, *supra* at 549 (citation omitted). If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Tombs*, *supra* at 451; *Shinholster*, *supra* at 549. 'A necessary corollary of these principles is that 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 (Lisa) v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). Statutory language, unambiguous on its face, can be rendered ambiguous through its interaction with and relationship to other statutes. *People v Valentin*, 457 Mich 1, 6 (1998). If statutory provisions can be construed in a manner that avoids conflict, then that construction should control the analysis. See *People v Webb*, 458 Mich 265, 274 (1998). 'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.'" *Macomb Co Prosecutor v Murphy (Sherri)*, 464 Mich 149, 159-160 (2001). *People v Hill (Brian)*, 269 Mich App 505, 514-515 (2006).

"Where [statutory] terms are undefined, [courts] may consult the dictionary to discern their meaning." *People v Caban*, 275 Mich App 419, 422 (2007).

"As a general rule of statutory construction, when two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." *People v Houston (JT Jr)*, 237 Mich App 707, 714 (1999).

"Generally, if a court rule conflicts with a statute, the court rule governs when the matter pertains to practice and procedure." *People v Watkins*, 277 Mich App 358, 363 (2007). "However, to the extent that the statute, as applied, addresses an issue of substantive law, the statute prevails." *Watkins*, *supra* at 363-364.

B. Statutory Challenges

Statutes are presumed to be constitutional and must be construed as constitutional unless it is readily apparent that they are unconstitutional. *People v Rogers*, 249 Mich App 77, 94 (2001).

"Generally, a criminal defendant may not defend on the basis that the charging statute is vague or overbroad where the defendant's conduct is fairly within the constitutional scope of the statute." *Rogers*, *supra* at 95. "In determining whether a statute is unconstitutionally vague or overbroad, a reviewing court should consider the entire text of the statute and any judicial constructions of the statute." *Id*. at 94.

1. Void for Vagueness

A statute may be challenged for vagueness on the following three grounds:

> (1) that it is overbroad and impinges on First Amendment freedoms;
>
> (2) that it does not provide fair notice of the proscribed conduct; or
>
> (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *Hill (Brian)*, 269 Mich App at 524.

"To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute cannot use terms that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application. For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Sands*, 261 Mich App 158, 161 (2004) (internal citations omitted).

2. Overbroad

> "Facial overbreadth challenges to statutes have been entertained where a statute (1) attempts to regulate by its terms only spoken words; (2) attempts to regulate the time, place, and manner of expressive conduct, or (3) requires official approval by local functionaries with standardless, discretionary power.
>
> ***
>
> "A statute may be saved from being found to be facially invalid on overbreadth grounds where it

has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed." *Rogers*, 249 Mich App at 95-96.

C. Retroactivity of Statutes

"The intent of the Legislature governs the determination whether a statute is to be applied prospectively or retroactively. [*Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001)]. A statute is presumed to operate prospectively 'unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect.' *People v Russo*, 439 Mich 584, 594 (1992). Stated differently, a statute is '"presumed to operate prospectively unless [a] contrary intent is clearly manifested."' *Lynch*, *supra* at 583, quoting *Franks (Larry) v White Pine Copper Division*, 422 Mich 636, 671 (1985); see also *People v Doxey*, 263 Mich App 115, 121 (2004) ('"[A]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent."') (citation omitted). However, an exception to this general rule is recognized if a statute is remedial or procedural in nature. *Russo*, *supra* at 594; *People v Link*, 225 Mich App 211, 214-215 (1997). A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy and neither creates nor destroys existing rights. *Saylor v Kingsley Area Emergency Ambulance Service*, 238 Mich App 592, 598 (1999); *Link*, *supra* at 214-215. A statute that affects or creates substantive rights is not remedial, and is not given retroactive effect, absent clear indication of legislative intent otherwise. *Lynch*, *supra* at 585." *People v Conyer*, 281 Mich App 526, 529 (2008).

D. Standard of Review

Issues of statutory interpretation are reviewed de novo. *People v Babcock*, 469 Mich 247, 253 (2003).

7.8 Remand

A. Authority to Remand

The Court of Appeals is not required to grant every motion to remand. *People v Hernandez (Mario)*, 443 Mich 1, 3 (1993), abrogated on other grounds *People v Mitchell (Charlie)*, 454 Mich 145 (1997). The remand procedure is only available when the issue meets the requirements set out in MCR 7.211(C):

"Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show: (*i*) that the issue is one that is of record and that must be initially decided by the trial court; or (*ii*) that development of a factual record is required for appellate consideration of the issue." MCR 7.211(C)(1)(a).

B. Process Upon Remand

"On remand, the trial court may consider and decide any matters left open by the appellate court, and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." *People v Kennedy*, 384 Mich 339, 343 (1979).

7.9 Establishing a Record for Review

A. Bench Trial

"In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1).

"Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Findings of fact are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Legg*, 197 Mich App 131, 134-135 (1992).

In a bench trial, while it is unnecessary for "[t]he court [to] make specific findings of fact regarding each element of the [charged] crime, *Legg*, 197 Mich App at 134, the court's opinion should "manifest[] a finding" that a criminal defendant committed the charged crime. *People v Davis (Melvin)*, 146 Mich App 537, 550-551 (1985). "A trial judge may not go outside the record in hearing a case . . . [and] can assume no greater prerogatives than if a jury were impaneled to determine the facts." *People v Grable*, 57 Mich App 184, 186 (1974). A trial judge's findings and verdict must be consistent; waiver breaks (in a bench trial, a trial judge acquitting a defendant of a charge despite being convinced of guilt beyond a reasonable doubt as to that charge as a reward for waiving a jury trial), are impermissible. *People v Ellis (Tyrone)*, 468 Mich 25, 26-28 (2003).

"[N]either party to a criminal case may effectively waive the requirement that the trial court find the facts specially and state separately its conclusions of law . . . ." *People v Smith (Keith)*, 101 Mich App 110, 117 (1980).

"The court may state the findings and conclusions on the record or include them in a written opinion." MCR 2.517(A)(3).

> **Committee Tip:** Knowing the applicable law makes finding the relevant facts easier. Consider ordering counsel to provide proposed findings of fact and conclusions of law before the trial. Utilize the jury instructions for the conclusions of law. It is also useful to state what is *not* at issue.

B. Required Findings of Fact/Conclusions of Law

"Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4).

Specific rules that impose a "finding" requirement include, but are not limited to:

- **Joint representation of criminal defendants**—MCR 6.005(F)(3) ("[t]he court may not permit the joint representation unless [it] finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding").

- **Directed verdict of acquittal**—MCR 6.419(E) ("[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal").

- **Motion for a new trial**—MCR 6.431(B) ("[t]he court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record").

- **Probation revocation hearings**—MCR 6.445(E)(2) ("[a]t the conclusion of the hearing the court must make findings in accordance with MCR 6.403").

Other instances in which fact-finding is necessary include, but are not limited to:

- **Impeachment by evidence of conviction of crime**—MRE 609(b) ("[t]he court must articulate, on the record, the analysis of each factor").

- **Testimony by experts**—MRE 702 ("[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, a witness qualified as an expert . . . may testify . . . ."). Trial judges are required to act as gatekeepers and must exclude unreliable expert testimony. Staff Comment to 2004 Amendment to MRE 702.

- **Deviating from the Legislative Sentencing Guidelines**—MCL 769.34(3) ("[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure"); *People v Babcock*, 469 Mich 247, 272 (2003).

- ***Batson***[21] **challenges**—*People v Bell (Marlon)*, 473 Mich 275, 300 (2005) ("trial courts are well advised to articulate and thoroughly analyze each of the three steps set forth in *Batson* . . . in determining whether peremptory challenges were improperly exercised").

- ***Walker* hearings**—*People v Walker (Lee)*, 374 Mich 331, 338 (1965) ("the trial judge, on the basis of [a] separate hearing and record made, determines [whether the defendant's] confession was . . . voluntarily given")[22].

- ***Wade***[23] **hearings**—*People v Kachar*, 400 Mich 78, 97 (1977) ("the trial court must state on the record the reasons for determining whether the prosecution has established by clear and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by the illegal confrontation").

- ***Ginther* hearings**—*People v Ginther*, 390 Mich 436, 441-442 (1973) ("[w]hen a defendant asserts that his [or her] assigned lawyer is not adequate or diligent or . . . that his [or her] lawyer is disinterested, the judge should hear [the] claim and, if there is a factual dispute, take testimony and state his [or her] findings and conclusion")[24].

- **Entrapment hearings**—*People v Juillet*, 439 Mich 34, 61 (1991) ("when the defense of entrapment is raised, the trial court must conduct an evidentiary hearing outside the

---

[21] *Batson v Kentucky*, 476 US 79 (1986). See Section 5.4(C) for more information on *Batson*.

[22] See Section 3.14(C) for more information on *Walker* hearings.

[23] *United States v Wade (Billy)*, 388 US 218 (1967). See Section 3.15(G) for more information on in-court identification.

[24] See Section 5.18(B) for more information on *Ginther* hearings.

presence of the jury . . . [and] must make specific findings of fact on the entrapment issue")[25].

C. On Remand

> "The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:
>
> ***
>
> "(5) remand the case to allow additional evidence to be taken[.]" MCR 7.216(A)(5).

"The Supreme Court may, at any time, in addition to its general powers[,] enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require[.]" MCR 7.316(A)(7). See *People v Thompson (Jerry)*, 431 Mich 853, 854 (1988) (Supreme Court remanded case to circuit court for a hearing on the defendant's *Batson* claim).

Committee Tip:

Be sure to answer the questions presented in remand orders.

7.10 Oral Opinions

- The facts of the case as found by the judge should be articulated on the record. It is useful to state what facts are not in dispute.
- The issue(s) in the case should be clearly stated by the judge.
- The appropriate standard of review should be enunciated by the judge as the standard used in reaching the decision.
- Any "off-the-record" agreements between the judge and the parties affecting the decision must be delineated on the record.

[25] See Section 3.6(C) for more information on entrapment hearings.

- The final decision should be clearly stated for the record. Judges must avoid any ambiguity as to the final conclusion, or they risk confusing the appellate court, which will likely result in a remand.

Stating the decision on the record as detailed above helps assure that:

- Litigants and attorneys know the basis of the decision.
- The public has confidence in the fairness of the proceeding and the logic sustaining the ruling.
- The appellate court has an adequate statement of all the pertinent facts and reasoning surrounding the trial judge's decision, allowing it to grant the trial court the high level of deference deserved in fact-finding matters.

7.11 Written Opinions

A. Generally

The best opinion is clear, concise, and written in the active voice. This style has been termed the "agent/action" style. This writing style adopts the mandates of the plain language movement. Each sentence assigns responsibility, defines action, and states its consequences. In the following example, the second sentence illustrates the characteristics of the agent/action style.

1. There was aggression in appellant Jones's pursuit of appellee Smith.

2.. Appellant Jones pursued appellee Smith aggressively.

Avoid footnotes, personalizing the argument, and the passive voice. Write to the inevitable conclusion.

B. Specifically

Opinion writing involves four basic steps: research, oral argument, planning the opinion, and writing the opinion.

1. Research

Become familiar with the case by reading the briefs and the case file. Determine whether the briefs appear to accurately state the applicable law. Do any additional research necessary after reading the briefs. The judge and the law clerk should

discuss the proposed opinion, examining the structure, rationale, and the result.

2. Oral Argument

A final decision should not be made before oral argument because occasionally the attorneys bring up new issues or information that affects the course of the opinion. However, a rough draft of the opinion can usually be drafted before oral argument.

3. Planning the Opinion

Each type of opinion follows a different format. Develop an outline for the opinion being drafted and have a clear idea of where information will fit into the outline. Determine what issues will be decided. If the case turns on a procedural issue, do not plan an opinion addressing gratuitous substantive issues. However, if the result would be the same, stating so makes the opinion even stronger.

Also, consider your audience and the aim of the opinion. Is the decision primarily for the attorneys, or will another court or administrative agency be looking to the opinion for guidance?

4. Writing the Opinion

Committee Tip:

Good briefing tends to lead to good opinions. Bad briefing makes drafting an opinion more difficult. As a result, drafting an opinion based on bad briefing tends to lead to a poorly written opinion. It may be best to write "from scratch" rather than working from poorly researched, thought out, or written briefs.

An opinion consists of the following parts, which may or may not be labeled.

Introduction: An opening section used to establish the identity of the parties; state how the case came about; identify the dominant issue; and state the court's resolution of the issue. Starting the opinion in this manner has two advantages: (1) the relevance of the facts that follow is immediately apparent, and

(2) the opinion is naturally focused on the crucial issues in the case and is built on that foundation.

Statement of Facts: The statement should identify the who, what, where, when, why, and how of the case in chronological order. It should include all facts relevant to the outcome of the decision in clear, concise language. Avoid quotations, excerpts from pleadings, and citations. The statement of facts constitutes the facts as found by the court. Facts included in the written opinion should be vital and accurate. It is useful to state what facts are not in dispute. Including only essential facts saves the appellate court time and allows it to quickly become familiar with the case. Erroneous "facts" undermine the credibility of the trial court even if the errors are not outcome-determinative.

Issue(s): Sometimes it will be helpful to include a separate section that states the issue(s) being addressed by the court. If used, the statement of the issue(s) should be clear and concise. It is useful to state the issues that are not being argued. Discuss and dispense with multiple issues in order of importance/ difficulty. Do not raise or discuss issues that do not exist. Recognize the arguments of the losing party, but do not grant them undeserved attention.

Standard of Review: This section should clearly state the standard the court is applying to the facts in the decision. Citations are a vital part of this section of the opinion.

Discussion (Analysis or Conclusions of Law): This section should start with a concise statement or paragraph setting out the law applicable to the issue at hand. If there is more than one issue, a statement of the applicable law should immediately precede the discussion. Use citations, but avoid string citations and lengthy quotations. After stating the applicable law, apply the law to the facts as stated in the statement of facts, ending with your conclusion.

Conclusion: Succinctly restate a conclusion that includes the reasons for the decision. The restatement is particularly important if multiple issues were addressed in the opinion.

Order: A phrase ordering the decision is a necessary end to the opinion. A typical example is: "It is so ordered."

Appendix: Checklists and Scripts

Chapter 2: Preliminary Proceedings

Felony Arraignment Script 3

Attorney Waiver Script 5

Waiver of Right to Attorney 7

Chapter 4: Pleas

Felony Plea Script / Checklist 9

Chapter 5: Trial and Posttrial Proceedings

Jury Waiver in Criminal Case 13

Bench Trial Decision Checklist 15

Trial Outline—Criminal Case 17

Voir Dire Questions for the Court in Criminal Case 20

Final Instructions Checklist—Criminal 21

Verdict Checklist 23

Chapter 6: Sentencing and Post-Sentencing

Felony Sentencing Script / Checklist 25

Felony Probation Violation—Arraignment Checklist 29

Felony Probation Violation—Plea Checklist 31

Felony Probation Violation—Contested Hearing Checklist 33

Felony Probation Violation—Sentencing Checklist 35

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Chapter 2: Preliminary Proceedings

Felony Arraignment Script

MCL 767.37

MCR 6.005, MCR 6.104(E), MCR 6.113(B)

Are you _____ ?

Have you been given a copy of the information? (Unless waived by the defendant, the court must either state to the defendant the substance of the charge contained in the information, or require the information to be read to the defendant).

You are charged with _____ (state the nature of the offense charged, the maximum possible prison sentence and any mandatory minimum sentence required by law).

(If defendant is not represented): You are entitled to a lawyer's assistance at all subsequent court proceedings. (Advise of the risk involved in self-representation).

Do you want a lawyer? You have the opportunity to consult with a retained lawyer. If you want a lawyer and are financially unable to retain one, you have the opportunity to consult with an appointed lawyer which the court will appoint at public expense.

If the defendant is not represented by a lawyer, must advise:

You have the right to remain silent.

Anything you say orally or in writing can be used against you in court.

You have the right to have a lawyer present during any questioning you consent to.

If you do not have the money to hire a lawyer, the Court will appoint a lawyer to represent you.

You have a right to have a lawyer represent you at all subsequent court proceedings.

If the defendant has waived legal representation, the court must advise the defendant of the pleading options.

If the defendant offers a plea other than not guilty, the court must proceed under MCR 6.300. Otherwise, the court must enter a plea of not guilty on the record.

(Consider bond).

(Schedule next date if appropriate).

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Attorney Waiver Script

MCR 6.005

QUESTIONING THE DEFENDANT:

Do you understand that you are entitled to a lawyer's assistance at all subsequent court proceedings?

Do you understand that if you want a lawyer and are financially unable to retain one, one will be appointed for you at public expense?

If the defendant wants to waive the right to be represented by a lawyer, the court must advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation AND give the defendant the opportunity to consult with a retained lawyer or the opportunity to consult with an appointed lawyer if the defendant is indigent.

Question the defendant, at a minimum, on the following to determine the waiver is unequivocal and that he or she understands the risks of self-representation, MCR 6.005(D)(1):

a. The defendant's educational background;
b. Have they represented themselves before;
c. Why do they wish to represent themselves; and,
d. Elaborate on risks of self-representation:
    (1) Elements of offense.
    (2) Rules of procedure.
    (3) Rules of evidence.
    (4) Jury selection and instructions.
    (5) Preservation of issues for appeal.
    (6) Self-representation is almost always unwise.
    (7) He or she will receive no special treatment and can receive no help from the judge.
    (8) The prosecutor is an experienced trial lawyer who is unlikely to give the defendant any special consideration.
    (9) He or she will receive no special help from the court staff and will be expected to follow the same requirements that apply to practicing lawyers.

Ask the prosecuting attorney if the court has complied with MCR 6.005. While not required, this may be advisable.

DETERMINATION:

a. The waiver is knowingly, intelligently, and voluntarily made;

b. The waiver is unequivocal;

c. The defendant understands the disadvantages of self-representation; and self representation will not disrupt, unduly inconvenience, or burden the court.

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Waiver of Right to Attorney

WAIVER OF RIGHT TO ATTORNEY AND ACKNOWLEDGMENT OF DANGERS OF SELF-REPRESENTATION	CASE NO.

Court Address Court Telephone No.

THE PEOPLE OF THE STATE OF MICHIGAN	V	DEFENDANT

I have been accused of a crime and I have read or have had read to me the charge or charges. The judge has told me the nature of the charges and that there may be lesser included offenses, defenses, or mitigating circumstances about which I should know. I understand the maximum possible sentence.

I know I have the right to a lawyer and the right to be my own lawyer. I understand the court will appoint a lawyer for me at public expense if I cannot afford one. The judge has warned me that it is dangerous and unwise to be my own lawyer, because I will be held to the same standards of law and procedure as a lawyer and will not get any special treatment from the court. The judge has warned me that I may hurt my own case and that the State has an experienced lawyer. I understand I have the right to consult with a lawyer that I hire or the court appoints. I understand the risks of being my own lawyer.

The judge has warned me that a lawyer has skills and expertise that I do not have in preparing for and conducting a criminal defense. The court has told me that I will have to abide by the same rules in court as lawyers do. Even if I make mistakes, I will be given no special privileges or benefits, and the judge will not help me. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor I will face in this case, I will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what is appropriate direct and cross-examination of witnesses, what motions I must make and when to make

them during the trial to permit me to make posttrial motions and protect my rights on appeal, and what constitutes appropriate closing argument to the jury.

I have _____ years of education. I read English and am mentally sound.
I am ☐ very ☐ somewhat ☐ not familiar with the rules of evidence and procedure.

DESPITE THE WARNINGS I HAVE BEEN GIVEN, I DO NOT WANT TO HIRE A LAWYER OR HAVE ONE APPOINTED FOR ME. I DO NOT WANT STANDBY COUNSEL. I WANT TO BE MY OWN LAWYER. I HAVE NO DOUBT ABOUT MY DECISION.

Dated: _____ _____Signature of Defendant

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Chapter 4: Pleas

Felony Plea Script / Checklist

MCL 768.35
MCR 6.302

SWEAR THE DEFENDANT(S).

Are you _____?

Is Mr./Ms. _____ your lawyer?

Have you had a full and complete opportunity to consult with your lawyer about this case before coming into court today?

(To the prosecutor): Is there a plea agreement?

(To the defense attorney(s)): Is that the plea agreement? (Make sure to also waive reading of the Information, if there is a plea at the time of arraignment.)

(To the defendant(s)): Did you hear and understand the plea agreement placed on the record by the lawyers?

Is this what you have agreed to do?

Do you ask that I accept the plea agreement?

(Address any *Cobbs* agreement. Confirm that the sentence discussions were initiated by one of the parties, and identify the party. Confirm that the other party was present for the discussions or agreed that they could occur. Confirm the maximum sentence agreed to by the court based on the preliminary evaluation of the case. Confirm that the defendant may withdraw the plea if the court decides to impose a sentence greater than that agreed upon.)

Are you presently on probation or parole? (If the answer is "yes," determine why and explain that this may have an impact on the probation or parole status and may also affect the possible sentence.)

You are charged with _____ (the court is not obliged to explain the elements of the offense, or possible defenses).

This felony carries a maximum possible prison sentence of _____. (Also state mandatory minimum sentence if required.)

(Explain the plea agreement to the defendant. In possible probation cases, may want to explain the possibility of up to one year in the county jail as a condition of probation.)

(To the defendant(s)): With all of this in mind how do you plead to the charge?

If your plea is accepted, you will not have a trial of any kind, and so you are giving up rights you would have had at a trial, including the right:

To be tried by a jury;
To be presumed innocent until proved guilty;
To have the prosecutor prove beyond a reasonable doubt that you are guilty;
To have the witnesses against you appear at the trial;
To question the witnesses against you;
To have the court order any witnesses you have for your defense to appear at the trial;
To remain silent during the trial;
To not have that silence used against you; and
To testify at the trial if you want to testify.

Do you understand each of these rights?

Do you understand that if I accept your plea, you will be giving up every one of these rights?

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and the Court of Appeals would decide whether to hear your case. Do you understand that?

[Alternatively, if the court is using SCAO form CC 291, *Advice of Rights (Circuit Court Plea)*, available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc291.pdf, ask the defendant:

Have you read and do you understand the form explaining the rights you would have had at trial that you are giving up by pleading guilty (or no contest)?

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Do you understand you are giving up every one of the rights described in that form if I accept your plea?]

There are some claims you will be giving up if I accept your plea. You will give up any claim that your plea was the result of promises or threats that I am not told about today and also give up any claim that it was not your own choice to plead guilty (or no contest). Do you understand that?

Do you understand that I am not bound to follow the sentence disposition or recommendation agreed to by the prosecutor (unless I have agreed to it) and if I choose not to follow it, you will be allowed to withdraw from the plea agreement?

(For no contest plea) Do you understand that for the purposes of sentencing, I will be treating you as though you were found guilty of this offense?

Other than what we have said in court today, has anyone promised you anything if you plead guilty (or no contest)?

Has anyone threatened you to get you to plead guilty (or no contest)?

Is it your own choice to plead guilty (or no contest) to this offense(s)?

Are you pleading guilty because you are, in fact, guilty? (if guilty plea)

On or about _____ (date) in the _____ of _____ , County of _____, did you (elements of offense)? (or, for elements of the offense, have the defendant describe what he or she did which leads him or her to believe he or she is guilty.)

No contest plea. A no contest plea requires the court's consent. If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must state why a plea of nolo contendere is appropriate, and hold a hearing which can be done at that time, to establish support for a finding that the defendant is guilty of the offense. Ordinarily the attorneys will stipulate to the use of the police report or the transcript of the preliminary examination. It may also be a good idea to obtain the defendant's consent to this process.

Counsel, do you feel that the elements of the offense(s) charged have been fully covered by the defendant's statement of the facts?

Counsel, are either of you aware of any promises, threats, or inducements related to the defendant's plea other than those already disclosed on the record?

Counsel, has the court fully complied with MCR 6.302(B), (C), and (D)?

(To the defendant): Once again, how do you wish to plead?

The court believes that the defendant's plea is understanding, voluntary, and accurate. The court is also satisfied there is a factual basis to support a finding that you are guilty of the offense(s) charged. Therefore, the court (choose one):

a.Accepts the agreement without having considered the presentence report.

b.Takes the plea agreement under advisement.

c.Accepts the agreement after having considered the presentence report. (In which case the court must sentence the defendant to the sentence agreed to or recommended by the prosecutor.)

d.Rejects the agreement.

(Address bond).

Sentencing in this case will take place on _____.

Address compliance with MCR 1.110, financial obligations due at sentencing.

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Chapter 5: Trial and Posttrial Proceedings

Jury Waiver in Criminal Case

MCL 763.3
MCR 6.401 and 6.402

SWEAR THE DEFENDANT:

Advise the defendant of his or her constitutional right to a jury trial;

Address the defendant personally and ascertain whether:

(1)Defendant understands his/her right to have a jury trial;

(2)Defendant has consulted with his/her attorney (or had an opportunity to consult with an attorney);

(3)Defendant is voluntarily giving up his/her right to a jury trial and choosing to be tried by the court. Ask:

- Has anyone promised you anything to get you to waive a jury trial?

- Has anyone threatened you to get you to waive a jury trial?

- Is it your free choice to waive a jury trial in this case?

Note: MCL 763.3 provides language for a written waiver form, which has been incorporated into SCAO form MC 260, *Waiver of Trial by Jury and Election to be Tried Without Jury*, available at http://courts.michigan.gov/scao/courtforms/generalcriminal/mc260.pdf. A written waiver is not required by the court rule, MCR 6.402, which supersedes the statute. 1989 Staff Comment to MCR 6.402. However, it is good practice to use a written waiver.

OBTAIN CONSENT OF THE PROSECUTOR:

The statute and MCR 6.401 require the consent of the prosecutor and the approval of the court.

MAKE A RECORD OF PRIOR INVOLVEMENT:

Make a record of the court's prior involvement with the case and consider disqualification if the court is too familiar with the file. MCR 2.003. Consider obtaining express approval of parties to proceed if the court has had prior involvement. The case should be reassigned if the court has significant information regarding the case which would not be in evidence during the trial, such as defendant's failure of a lie detector test.

FIND:

Defendant has: (1) been arraigned; or (2) has waived an arraignment on the information; or (3) in a court where arraignment on the information has been eliminated under MCR 6.113(E), the defendant has otherwise been provided with a copy of the information.

Defendant has been properly advised of the right to a jury trial;

Defendant has had an opportunity to consult with counsel; and,

The waiver has occurred in open court as required by law.

The waiver has been made knowingly, voluntarily, and intelligently.

ACCEPT WAIVER.

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Bench Trial Decision Checklist

MCL 600.2101; MCL 768.29
MCR 6.403

DECISION:

Generally. "When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." MCR 6.403. See also *People v Robert Jackson*, 390 Mich 621, 627 (1973).

DECISION CHECKLIST:

Statement of Case;

Issues;

Applicable statutes, if any;

Applicable jury instructions (including elements of the offense in a criminal case);

Burden of proof;

Any presumptions which may apply;

Analysis;

Findings of fact ("Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law." *People v Kemp*, 202 Mich App 318, 322 (1993). "[A] trial judge sitting as the trier of fact may not enter an inconsistent verdict." *People v Walker*, 461 Mich 908 (1999));

Conclusions of law; and

Direct entry of the appropriate judgment.

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Trial Outline—Criminal Case

1. Have the case called for trial.

2. Before beginning voir dire, give prospective jurors appropriate preliminary instructions and swear them. MCR 6.412(B).

3. Voir dire prospective jurors. MCR 6.412(C).

4. Swear jury. MCR 6.412(F).

5. Ascertain whether any party wishes to invoke the rule to exclude witnesses scheduled to testify in the case from the courtroom. MRE 615.

6. Prosecutor makes opening statement. MCR 2.513(C).

7. Defense counsel makes opening statement (unless reserved). MCR 2.513(C).

8. Prosecutor calls witnesses.

9. Prosecutor rests.

10. Motion for directed verdict of acquittal. MCR 6.419.

11. Defense counsel makes opening statement if he or she has been permitted to reserve. MCR 2.513(C).

12. Defense counsel calls witnesses for the defense.

13. Defense rests.

14. Prosecutor rebuttal.

15. Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel of its proposed action on the requests before their closing arguments. MCR 2.512(A); see also MCR 2.513(N)(1).

16. Closing arguments by prosecution, closing argument by defense, rebuttal by prosecution. MCR 2.513(L).

17. If desired, fairly and impartially sum up the evidence without commenting on witness credibility and without stating a conclusion on the ultimate issue of fact; instruct the jury that it must determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. MCR 2.513(M).

18. Instruct the jury; advise that the jury may submit any written questions about the instructions that arise during deliberations; invite the jury to ask any questions about the instructions before retiring to deliberate; and provide a written copy of the instructions to take into the jury room. MCR 2.513(N).

19. Excuse and thank alternate juror(s). MCR 6.411.

20. Swear bailiff. MCL 768.16.

21. Instruct the jury to go to the jury room and commence its deliberations, allowing the jurors to take into the jury room their notes and final instructions; may also allow jurors to take the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence. MCR 2.513(O).

22. As applicable, have the clerk give the reference document, exhibits and verdict forms to the jury.

23. Recess court during the jury deliberations.

24. Before responding to any communications from the jury, consult with counsel on the record. MCR 2.513(N).

25. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide either for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.

26. When the jury has agreed on a verdict, reconvene court and take the verdict. MCR 6.420(A). Have foreperson read verdict. Compare verdict form to assure consistent with verdict.

27. Before the jury is discharged, the court on its own initiative may (or on the motion of a party must) poll each juror in open court as to whether the verdict announced is his or her verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury. MCR 6.420(D). The court is required to cut off polling as soon as disagreement is disclosed due to its potentially coercive effect. The court should not question the jury to determine where it stands numerically.

28. Accept verdict.

29. Thank and discharge the jury. Retrieve exhibits and address according to MCR 2.518(B).

30. If the verdict is "not guilty," discharge defendant.

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31. If defendant has been found guilty, determine whether defendant should be committed to custody and schedule sentence.

32. Adjourn or recess court.

SOURCE: Benchbook for U.S. District Court Judges.

Voir Dire Questions for the Court in Criminal Case

Know anything about the case?

Personal concerns, commitments, or problems that would interfere?

Prior jury service? Type of case and result?

Ever been a witness in a case?

Ever been a party in a case?

Have they or a close relative or friend ever been a victim of crime?

Have they or a close relative or friend ever been accused of a crime?

Are they, or family, or friends involved in law enforcement?

Are they, or family, or friends involved in criminal defense?

Possible bias because of race, gender, or other reasons?

Member of any advocacy groups?

Able to sit in judgment of another person or persons?

[Can they be fair and impartial?]

[Elaborate on burden of proof?]

[Elaborate on any special claims or defenses?]

[Elaborate on right to remain silent?]

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Final Instructions Checklist—Criminal

Explain how jury instructions are assembled. Parties request. Court ultimately selects.

Outline sections.
Introduction.
Evidence.
Elements of offense.
Deliberations.

Mark jury instructions as court's exhibit.

Read jury instructions.

Review and read verdict form.

Excuse juror(s).

Swear bailiff.

Bailiff takes:

Exhibits.
Jury instructions.
Verdict form.

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Verdict Checklist

Confirm jury has reached verdict.

Have foreperson stand.

Read verdict - judicial aide or judge inquires.

Have bailiff take verdict form.

Confirm verdict form consistent with verdict announced.

Confirm unanimous verdict.

Poll?

Accept verdict.

Dismiss jury.

Preserve jury questions and any written jury instructions.

Destroy juror notes.

Direct entry of judgment.

Set sentencing if conviction.

Address bond.

Attorneys take exhibits and sign for them.

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Chapter 6: Sentencing and Post-Sentencing

Felony Sentencing Script / Checklist

MCL 769.1 *et seq*.
MCL 771.14
MCR 6.425(D), (E) and (F)

Are you _____?

Is _____ your attorney?

Do you realize you may be sent to prison for up to _____ years or fined up to _____ dollars or both?

Are you ready to be sentenced today?

Counsel, I have scored the sentencing guidelines in this case as _____, resulting in a guidelines range of _____ to _____. Are there any objections to that scoring? MCR 6.425(D). (Is it stipulated that the scoring is correct?)

(Ask defendant, defense counsel, and prosecutor) Have you had an opportunity to read and discuss the presentence report? MCR 6.425(E)(1)(a).

(Ask defense counsel and prosecutor) Are there any corrections, additions, or deletions to be made in the presentence report? MCR 6.425(E)(1)(b) and (2). Corrections are governed by MCL 771.14(6) and MCR 6.425(E)(1)(b) and (2). Direct presentence report be retyped if significant changes are made.

(Ask defendant, defense counsel, prosecutor, and victim(s)) Are there any circumstances you believe I should consider in imposing sentence? MCR 6.425(E)(1)(c).

Note: While the trial judge need not specifically ask the defendant if he/she has anything to say on his/her own behalf before sentencing, a direct question to the defendant is the best course of action. See *People v Petit*, 466 Mich 624, 628 (2002).

State the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled. MCR 6.425(E)(1)(d).

(For prison sentence): "It is the sentence of the court that you, _____, shall serve a term with the Michigan Department of Corrections of not less than ____ years (not more than 2/3 of maximum) and not more than ____years (maximum sentence), from and including this date, with credit for ____ days served. You are committed (or remanded) to the custody of the sheriff."

If the sentence imposed is not within the guidelines range, articulate substantial and compelling reasons justifying that specific departure. MCR 6.425(E)(1)(e). Advise the defendant if the sentence is a departure above the guidelines and that defendant can appeal the departure. MCL 769.34(7).

Cover whether sentence is concurrent or consecutive. MCL 769.1h. Sentences must be concurrent absent statutory authority for consecutive sentences. *People v Sawyer*, 410 Mich 531, 534 (1981).

Order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate. MCR 6.425(E)(1)(f); MCL 780.766(2).

Cover other financial obligations, such as: minimum state costs [MCL 769.1j], crime victims fee [MCL 780.766a], attorney fees [MCL 769.1k (no indigency determination necessary until imposition of the fee is enforced, *People v Jackson (Harvey)*, 483 Mich 271 (2009))], and court costs [MCL 769.1k].

Advice concerning the right to appeal/appointment of counsel. MCR 6.425(F).

(If conviction following a trial) You are entitled to appellate review of your conviction and sentence. If you are financially unable to retain a lawyer, the court will appoint a lawyer to represent you on appeal. The request for a lawyer must be made within 42 days after sentencing. Here is a request form containing an instruction informing you that it must be completed and returned to the court within 42 days after sentencing if you want the court to appoint a lawyer. (If the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines) You may seek appellate review of the sentence by right on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

(If conviction following a plea) You have a right to ask the Court of Appeals to review this case and to ask for a lawyer for that purpose at public expense, if you cannot afford one. The request for a lawyer must be made within 42 days after sentencing. Here is a request form containing an instruction informing you that it must be completed and returned to

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the court within 42 days after sentencing if you want the court to appoint a lawyer. (If the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines) You may seek appellate review of the sentence by application on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

Entertain motion by prosecutor to dismiss other counsel or cases.

Cancel bond.

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Felony Probation Violation—Arraignment Checklist

☐ 1. Ensure probationer receives written notice of alleged violation(s). Determine whether probationer has been given notice sufficiently in advance of the proceedings to afford a reasonable opportunity to prepare.

☐ 2. Advise probationer of the right to a contested hearing on the charges.

☐ 3. Advise probationer that he or she has the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.

☐ 4. If probationer is unrepresented and indigent, appoint counsel. If probationer is not indigent, allow probationer a reasonable opportunity to obtain counsel if necessary.

☐ 5. Advise a probationer in custody that if the revocation hearing does not take place within 14 days after arraignment, he or she is to be released from custody pending the hearing.

☐ 6. Advise probationer of the maximum possible jail or prison sentence that may be imposed if the probationer is found guilty.

☐ 7. Ask probationer how he or she pleads:
- ☐ stand mute
- ☐ not guilty
- ☐ no contest
- ☐ guilty

☐ 8. If probationer stands mute or pleads not guilty, set a reasonably prompt hearing date.
- ☐ If probationer is in custody, the hearing should be set within 14 days of arraignment or the probationer must be released; or
- ☐ Court may delay revocation proceedings to await the outcome of related criminal proceedings.

☐ 9. Set or deny bail.

☐ 10. If probationer pleads guilty, move to step 7 in Felony Probation Violation – Plea Checklist.

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Felony Probation Violation—Plea Checklist

☐ 1. Advise probationer that by pleading guilty he or she is giving up the right to a contested hearing.

☐ 2. Readvise probationer of the right to counsel and the right to appointed counsel if probationer is indigent.

☐ 3. If probationer is unrepresented, advise probationer that by pleading guilty he or she is giving up the right to counsel.

- ☐ Ask probationer to affirm that he or she does not want an attorney's assistance.

☐ 4. Readvise probationer of the alleged probation violation(s).

☐ 5. Readvise probationer of the maximum possible jail or prison sentence for the offense that led to probation.

☐ 6. Ask probationer how he or she pleads:

- ☐ guilty
- ☐ no contest

Begin here if guilty plea immediately follows arraignment.

☐ 7. Establish on the record factual support for finding that the probationer is guilty of a charged violation.

☐ 8. Determine and state for the record that the plea is understandingly, voluntarily, and accurately made.

☐ 9. Accept or reject the plea.

☐ 10. If plea is accepted, schedule a date for sentencing or proceed to sentencing if in possession of an updated presentence report.

- ☐ Unless it is certain that a prison sentence will not be imposed, refer probationer to probation department for preparation of updated presentence report.

☐ 11. Set, continue, or deny bail, as appropriate.

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Felony Probation Violation—Contested Hearing Checklist

- ☐ 1. If probationer is not represented by counsel, readvise probationer of the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.
  - ☐ Ask probationer to affirm that he or she does not want an attorney's assistance; or
  - ☐ If counsel is requested, adjourn hearing and appoint counsel.
- ☐ 2. Hold revocation hearing at which:
  - ☐ The rules of evidence other than those with respect to privileges do not apply.
  - ☐ The court may consider only evidence that is relevant to an alleged violation.
  - ☐ All evidence against probationer is disclosed to probationer.
  - ☐ Probationer has right to appear, present evidence, and cross-examine witnesses.
  - ☐ The state must establish a probation violation by a preponderance of the evidence.
- ☐ 3. Make findings of fact.
- ☐ 4. On the record or in a written opinion made a part of the record, state separately the conclusions of law as to whether the charged violation(s) has/have or has/have not been established by a preponderance of the evidence, and direct entry of the appropriate judgment.
- ☐ 5. If the court finds that the probationer violated his or her probation, schedule a date for sentencing or proceed to sentencing if in possession of an updated presentence report.
  - ☐ Unless it is certain that a prison sentence will not be imposed, refer probationer to probation department for preparation of an updated presentence report.
- ☐ 6. Set, continue, or deny bail, as appropriate.

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Felony Probation Violation—Sentencing Checklist

☐ 1. If probationer is not represented by counsel, readvise probationer of the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.

- ☐ Ask probationer to affirm that he or she does not want an attorney's assistance; or
- ☐ If counsel is requested, adjourn hearing and appoint counsel.

Begin here if sentencing immediately follows guilty plea.

☐ 2. If there is a presentence information report, give probationer, defense attorney, and prosecutor a reasonable opportunity to read and discuss the report.

- ☐ A prison sentence may not be imposed without an updated presentence information report and compliance with the court rule governing sentencing.

☐ 3. Give the parties a reasonable opportunity to explain or challenge information in the presentence report.

☐ 4. If information in the report is challenged, apply a "preponderance of the evidence" standard and make a finding regarding the issue, or state that the challenged information will not be considered.

- ☐ Correct or delete challenged information, if appropriate; and
- ☐ Provide defense attorney an opportunity to review the corrected report before it is sent to the Department of Corrections.

☐ 5. Give the probationer, defense attorney, prosecutor, and victim, if present, an opportunity to make a statement.

☐ 6. Continue, modify, extend, or revoke probation.

- ☐ If probation is revoked, impose sentence, stating minimum and maximum sentence.
- ☐ If sentence is not within the guidelines range, articulate the substantial and compelling reasons justifying that departure.

☐ 7. Grant credit for time served.

☐ 8. If a sentence of incarceration is imposed, advise probationer that he or she has:

- ☐ The right to appeal if the underlying conviction occurred as a result of a trial: or
- ☐ The right to file an application for leave to appeal if the underlying conviction resulted from a guilty or nolo contendere plea.

☐ 9. If a sentence of incarceration is not imposed, advise the probationer that he or she has the right to file an application for leave to appeal.

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Subject Matter Index

A

Access to court proceedings
gag orders 1-6
limits on 1-5
media 1-5
standard of review 1-10
Access to court records
files 1-6
limits on 1-8
Adjournment 3-56
factors to consider 3-56
Alibi
jury instruction 3-18
notice 3-15
failure to provide 3-16
impeachment with 3-17
standard of review 3-18
witness
cross examination of 3-17
Appeals
district court to circuit court
appeal by leave 7-6
jurisdiction 7-2
motions for rehearing or reconsideration 7-11
venue 7-2
from parole board decisions 7-14
appeal from parole revocation 7-18
grounds for grant of parole 7-14
Arraignment 2-51
Arrest 2-3
delay between crime and arrest 2-4
delay between warrantless arrest and arraignment 2-5
outside jurisdiction 2-6
probable cause 2-3
standard of review 2-6
Attorney-client privilege

waiver of 5-119
Attorneys
duty to the client 1-20
duty to the court 1-19
motion to disqualify 1-20
removal of counsel 2-29
standard of review 1-21
substitution of counsel 2-27
waiver of counsel 2-33
withdrawal of assigned appellate counsel 2-29
withdrawal of counsel 2-27
good cause 2-28
procedure 2-28
standard of review 2-28

B

Bill of particulars 3-7

C

Change of venue
standard of review 3-42
timing of motion 3-42
Closing argument
permissible content of 5-33
remarks involving defendant's failure to testify 5-35
remarks involving failure to produce corroborating witnesses 5-36
Collateral estoppel 7-24
Competence 3-18
determination 3-18
commitment for treatment 3-24
dismissal 3-24
general test 3-19
hearing 3-22
juveniles 3-20
order for examination 3-21
standard of review 3-25
statements to examiner 3-25
raising the issue of 3-20
Confession
inadmissible
illegal arrest 3-69
unlawful detention 3-69
unreasonable prearraignment delay 3-70
violation of the right to counsel 3-70
violaton of the right against self-incrimination 3-71
intelligent 3-64

knowing 3-64
use of improper 3-78
voluntary 3-64
Confrontation
codefendant or coconspirator testimony 5-64
defendant's right of 5-50
special arrangements to accommodate compelling interests 5-66
standard of review 5-68
unavailable witnesses 5-54
Contempt of court
alternative sanctions 1-26
civil contempt 1-23
criminal contempt 1-24
direct contempt 1-22
indirect contempt 1-22
punishment 1-25
right to counsel 1-24
standard of review 1-27
Continuance
standard of review 3-57
Conviction
setting aside
standard of review 6-97
Corpus delicti rule 3-62
Counsel
right to
during identification procedures 3-86
Court-appointed counsel 1-11
reimbursement of fees 1-12
reinstatement of fees 1-12
standard of review 1-13

D

Defendant's conduct and appearance at trial
absence
standard of review 5-47
clothing 5-42
disruptive conduct 5-46
gagging 5-46
handcuffs/shackles 5-43
Defendant's right against self-incrimination 5-48
Defendant's right to testify 5-48
medication 5-48
Defendants conduct and appearance at trial
absence 5-47
Detainer 3-53
Diminished capacity 3-26

Directed verdict 5-69
double jeopardy implications of 5-70
standard of review 5-72
test 5-69
Discovery
discretionary disclosure 3-4
mandatory disclosure 3-2
standard of review 3-8
Disqualification of judge
burden of proof 1-18
grounds for disqualification 1-13
motion to disqualify 1-17
standard of review 1-19
state bar ethics committee 1-18
Double jeopardy
Blockburger 3-157, 3-158, 3-160
implications of directed verdict 5-70
mulitple prosecutions for the same offense 3-158
multiple punishments for the same offense 3-160
personal protection orders (PPOs) 3-158
same elements test 3-158
separate sovereign rule 3-159
standard of review 3-164
successive state and federal prosecutions 3-159

E

Entrapment
by estoppel 3-34
hearing 3-32
standard of review 3-35
test for 3-32
Evidence
insufficient 5-110
newly discovered 5-109
Evidentiary hearing 3-37
Evidentiary hearing See Walker hearing
Ex parte communications 1-9
Expert witness
appointment of for indigent defendant 3-10

G

Ginther hearing 5-118
Grand jury 2-36
citizen 2-36
discovery 2-39
multicounty 2-37

oath 2-38
one person 2-36
right to counsel 2-38
rule of evidence 2-38
Guilty but mentally ill
by plea 3-30
by trier of fact 3-29

H

Habitual offenders 6-19
Holmes Youthful Trainee Act (HYTA) 6-53

I

Identification
in-court
independent basis for 3-90
pretrial motion to suppress 3-89
standard of review 3-91
Incompetence
motions during defendant's 3-24
Indictment 2-47
Indigence
appointment of counsel 2-26
court-appointed counsel 2-26
reinstatement of fees 2-26
standard of review 2-27
waiver of fees 2-26
Ineffective assistance of counsel 5-112
appellate standard 5-120
evidentiary (Ginther) hearing 5-118
guilty or nolo contendere plea 4-17
plea negotiations 4-24
pleas 5-119
standard of review 5-121
waiver of attorney-client privilege 5-119
Information 2-47
Information or indictment
amendments 2-48
content 2-47
standard of review 2-51
Insanity
acquittal by reason of 3-30
defense 3-26
experts 3-26
jury instruction 3-27
notice 3-26

reports 3-26
test 3-28

J

Jail credit
alternative programs 6-73
arrested parolees 6-74
consecutive sentences 6-76
denied/unable to furnish bond 6-78
good time credit 6-76
jail overcrowding 6-77
sheriff's disciplinary credit 6-76
standard of review 6-79
time erroneously spent at liberty 6-78
void sentences 6-76
Joinder
multiple defendants 3-44
of counts
multiple defendants 2-50
single defendant 2-49
single defendant 3-43
standard of review 3-46
Judge
questions or comments by 5-38
Jury
anonymous 5-21
deadlocked 5-94
hung 5-89
polling 5-97
questions 5-39
reconvening 5-98
reference document 5-38
selection 5-8
identity of jurors 5-10
number of jurors 5-9
sequestration 5-21
Jury deliberations
communication with the jury
administrative 5-85
housekeeping 5-85
substantive 5-84
hung jury 5-89
requests to clarify instructions 5-89
separation of the jury 5-83
standard of review 5-94
Jury instructions 5-72
cognate lesser included offenses 5-80

 Michigan Judicial Institute © 2012

content 5-74
lesser included misdemeanors 5-80
necessarily included lesser offenses 5-75
standard of review 5-81

L

Law of the case 7-25
Lineup
defendant's request for a 3-88
evaluating suggestiveness of 3-85
photo 3-87
voice identification 3-88

M

Miranda
assertion of rights 3-79
public safety exception 3-78
waiver of rights 3-80
Mistrial 5-99
attachment of jeopardy 5-99
juror conduct 5-102
standard of review 5-103
Motion for reconsideration 3-91
Motion for rehearing 3-91
Motion for relief from judgment 6-86
decision 6-90
right to counsel 6-89
standard of review 6-91
Motion to dismiss 3-40
Motion to suppress defendant's statement
admissibility 3-61
standard of review 3-83
Motion to suppress defendants statement 3-61
Motion to suppress evidence
burden 3-58
disposition 3-60
evidentiary hearing 3-59
standard of review 3-61
timing 3-58
Multiple representation 2-25

N

New trial
grounds for
insufficient evidence 5-110

jury misconduct 5-105
misconduct involving the parties, witnesses, or attorneys 5-107
newly discovered evidence 5-109
standard of review 5-111

O

Oaths or affirmations
bailiff before deliberation 5-25
interpreter 5-26
juror oath before voir dire 5-23
juror oath following selection 5-24
witness 5-25
Opening statement 5-29
dismissal 5-30
mistrial 5-30
prejudicial or inflammatory remarks 5-29
Overbroad 7-28

P

People v Rosen, 201 Mich App 621 (1993) 6-95
Personal protection orders (PPOs)
multiple punishments 1-29
obtaining 1-27
sentencing 1-29
terminating 1-27
Plea
collateral attack of earlier 4-28
defective
remedy for 4-5
felony
use of 4-4
guilty
appealing a 4-17
motion to withdraw based on ineffective assistance of counsel 4-14
withdrawal of after sentencing 4-13
withdrawal of before acceptance 4-9
withdrawal of before sentencing 4-9
guilty but mentally ill See Guilty but mentally ill
insanity
not guilty by reason of See Insanitynot guilty by reason of
negotiations 4-19
ineffective assistance of counsel 4-24
nolo contendere 4-3
requirements
accurate 4-3
understanding 4-1

voluntary 4-2
sentence agreements and recommendations 4-19
Cobbs 4-20
Killebrew 4-19
violation of by court 4-23
violation of by defendant 4-22
violation of by prosecutor 4-21
standard of review 4-6, 4-19
vacation
effect of 4-17
withdrawal
effect of 4-17
withdrawn
inadmissibility of 4-17
Polygraph 5-111
reference to 5-100
Postappeal relief
motion for relief from judgment 6-86
decision 6-90
right to counsel 6-89
standard of review 6-91
Precedent
attorney general 7-23
circuit court 7-23
dicta 7-23
Michigan Court of Appeals 7-22
Michigan Supreme Court 7-22
retroactivity 7-23
Sixth Circuit Court of Appeals 7-23
United States Supreme Court 7-23
Preliminary examination
bindover 2-41
review of 2-46
discharge of defendant 2-46
motion to remand for 2-47
standard of review 2-47
Pretrial Conference 3-36
Pretrial motions
disposition 3-38
form 3-35
standard of review 3-40
timing 3-35
Pretrial release
conditional release 2-8
custody hearing 2-13
denial of 2-11
forfeiture and discharge of bond 2-14
money bail 2-9

personal recognizance 2-8
rationale for decision 2-12
revocation upon conviction 2-20
standard of review 2-21
Privilege
communications
insanity defense 3-29
waiver of 3-29
Probable cause
to arrest 2-3
Probation revocation 6-79
appeal rights 6-85
arraignment 6-80
hearing 6-80
issuance of summons or warrant 6-79
plea 6-82
sentencing 6-83
Prosecutorial misconduct
closing argument 5-33
comment on defendant's failure to testify 5-35
improper vouching 5-34
opening statement 5-29
standard of review 5-37

R

Rape shield law 3-11
evidence of victim's past sexual conduct 3-13
notice 3-11
failure to provide 3-12
timing 3-11
Record
of proceedings 1-1
Record for review
bench trial 7-30
conclusions of law 7-31
findings of fact 7-31
on remand 7-33
Release
pending appeal 2-20
Remand 7-29
authority to 7-29
process upon 7-30
Res judicata 7-25
Retrial 5-99
Retroactivity 7-23
Retroactivity of statutes 7-29
Right to counsel 2-22

actual imprisonment 2-23
constitutional rights 2-22
counsel of choice 2-24
standard of review 2-24
waiver of counsel 2-29
requirements 2-33
self-representation 2-29
right to counsel
constitutional rights 2-22

S

Search and seizure 3-92
airport 3-113
automobile searches
containers located in 3-109
containers/personal effects 3-112
incident to arrest 3-110
probable cause to search 3-108
standing 3-106
border crossings 3-113
dwelling searches
knock and talk 3-102
no-knock entry 3-103
standing 3-100
warrantless entry 3-103
exclusion
attenuation 3-154
good faith 3-151
independent source 3-151
inevitable discovery 3-149
occurrence of 3-93
parolee 3-114
prison 3-115
probable cause 3-149
probationer 3-114
roadblocks/checkpoints 3-115
school 3-113
standard of review 3-156
standing 3-96
statutory violations 3-155
Self-representation
advice at subsequent proceedings 2-34
right of 2-29
standard of review 2-35
standby counsel 2-35
Sentencing
allocution 6-16

concurrent 6-18
conditional sentences 6-58
consecutive 6-18
correction and appeal of 6-42
deferred adjudication of guilt
Holmes youthful trainee act 6-53
delayed sentence 6-50
delayed/deferred/diversionary sentences
standard of review 6-59
fines and costs 6-32
costs of a court appointed attorney 6-35
costs of emergency response and prosecution 6-33
costs of prosecution authorized by penal statutes 6-34
crime victims rights costs 6-36
minimum state costs 6-35
guidelines 6-6
departure from 6-9
offense variables (OVs) 6-6
prior record variables (PRVs) 6-6
habitual offenders 6-19, 6-45
calculating the sentence 6-48
notice required 6-45
proof of prior convictions 6-46
standard of review 6-49
imposition 6-17
jail sentence 6-27
judgment 6-41
reissuance of 6-41
juvenile 6-59
automatic waiver cases 6-60
final review hearings 6-69
hearing 6-61
postjudgment procedure 6-63
retention of jurisdiction 6-65
standard of review 6-70
mandatory sentences 6-58
maximum sentence 6-18
minimum sentence 6-18
presentence report 6-1
probation 6-27
restitution 6-37
civil agreement 6-39
cost of labor 6-39
insurance company 6-39
sexually delinquent person 6-70
definition 6-70
standard of review 6-15, 6-44
suspended sentences 6-58

Speedy trial
180 day rule 3-50
length of delay 3-47
recognizance release 3-48
right to a 3-46
standard of review 3-55
speedy trial
delay 3-46
right to 3-46
Standard of review
abuse of discretion 1-29, 7-20
clear error 7-19
de novo 7-19
forfeited/constitutional 7-21
forfeited/nonconstitutional 7-21
preserved/constitutional 7-20
preserved/nonconstitutional 7-20
right result-wrong reason 7-21
what standard to use 7-20
Statutory challenges 7-27
overbroad 7-28
retroactivity 7-29
void for vagueness 7-28
Statutory construction 7-26
Statutory interpretation
standard of review 7-29
Stipulations 5-28
Subpoena 5-27
duces tecum 5-27
motion to quash 5-28

T

Trial
bench 5-5
decision 5-7
disqualification 5-5
evidentiary issues 5-6
motion for acquittal 5-6
pretrial motions 5-6
standard of review 5-8
closed 1-3
interim commentary 5-30
jury
right to a 5-1
standard of review 5-4
waiver of 5-2
open 1-3

V

Verdict 5-94
inconsistent 5-96
meeting with jury after 5-98
several counts 5-96
unanimity requirement 5-94
Voice
demonstration 3-89
identification lineup 3-88
identification of defendant's 3-88
Void for vagueness 7-28
Voir dire 5-10
alternate jurors 5-19
challenges for cause 5-12
discrimination during 5-15
juror oath following selection 5-24
peremptory challenges 5-14
removal of a juror at trial 5-19
standard of review 5-22
substitution of a judge after 5-20
substitution of a juror at trial 5-19

W

Waiver of counsel—*see* Right to counsel
Warrant 2-1
exceptions
border searches 3-142
consent 3-139
exigent circumstances 3-125
hot pursuit 3-125
inspections 3-142
inventory search 3-131
knock and talk 3-146
open fields 3-145
plain feel 3-138
plain smell 3-139
plain view 3-143
protective sweep 3-145
search incident to arrest 3-131
Terry stop 3-132
traffic stop 3-134
search 3-115
anticipatory 3-123
description 3-120
execution 3-123
Franks hearing 3-117

pen register 3-124
probable cause 3-116
standard of review 3-124
Witness
examination
cross 5-31
direct 5-30
recross 5-32
redirect 5-32
expert
appointment of for indigent defendant 3-10
location 3-9
material witness 3-9
production 3-9

Tables of Authority

Cases
Michigan Statutes
Michigan Court Rules
Michigan Rules of Evidence
Michigan Rules of Professional Conduct
Michigan Criminal Jury Instructions
United States Code
Constitutional Authority

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Cases

A

Abela v Gen Motors Corp, 469 Mich 603 (2004) 4-13, 4-16
Abela v Martin (William), 380 F3d 915 (CA 6, 2004) 3-65
Adair v State of Michigan, 474 Mich 1027 (2006) 1-15
Admiral Ins v Columbia Cas Ins, 194 Mich App 300 (1992) 7-22
Akrawi v Booker, 572 F3d 252 (CA 6, 2009) 3-4
Alabama v Shelton, 535 US 654 (2002) 2-23
Ambrose v Recorder's Court Judge, 459 Mich 884 (1998) 6-88
Anders v California, 386 US 738 (1967) 2-29
Argersinger v Hamlin, 407 US 25 (1972) 1-24
Arizona v Gant, 556 US 332 (2009) 3-105, 3-110, 3-111, 3-112, 3-153
Arizona v Hicks (James), 480 US 321 (1987) 3-144
Arizona v Johnson (Lemon), 555 US 323 (2009) 3-106, 3-107, 3-136
Arizona v Youngblood, 488 US 51 (1988) 5-108
Ashe v Swenson, 397 US 436 (1970) 3-157
Attorney Gen v Michigan Pub Svc Comm, 243 Mich App 487 (2000) 1-19
Avery v Prelesnik, 548 F3d 434 (CA 6, 2008) 5-113
Avink v SMG, 282 Mich App 110 (2008) 1-21

B

Bageris v Brandon Twp, 264 Mich App 156 (2004) 7-27
Barber v Page, 390 US 719 (1968) 5-54
Barker v Wingo, 407 US 514 (1972) 3-46
Batson v Kentucky, 476 US 79 (1986) 5-15, 7-32
Bell v Bell, 512 F3d 223 (CA 6, 2008) 3-4
Berghuis v Smith (Diapolis), 559 US ___ (2010) 5-9, 5-15
Berghuis v Thompkins, 560 US ___ (2010) 3-81
Blakely v Washington, 542 US 296 (2004) 6-7
Blockburger v United States, 284 US 299 (1932) 3-157
Boccarossa v Dep't of Transportation, 190 Mich App 313 (1991) 5-28
Bond v United States, 529 US 334 (2000) 3-138
Bourjaily v United States, 483 US 171 (1987) 3-38
Bourne v Curtin, 666 F 3d 411 (CA 6, 2012) 1-10
Bourne v Curtin, 666 F3d 411 (CA 6, 2012) 2-23, 5-85, 5-88
Boykin v Alabama, 395 US 238 (1969) 4-5
Brady v Maryland, 373 US 83 (1963) 3-3, 3-6
Brandt v Brandt, 250 Mich App 68 (2002) 1-27, 1-29

Brendlin v California, 551 US 249 (2008) 3-107
Brenner v Kolk, 226 Mich App 149 (1997) 1-26
Brewer v Williams (Robert), 430 US 387 (1977) 3-71
Brigham City, Utah v Stuart, 547 US 398 (2006) 3-127
Brown (Delbert) v State of Alaska, 372 P2d 785 (Alas, 1962) 3-93
Brown (Michael) v Smith (David), 551 F3d 424 (CA 6, 2008) 5-113
Brown (Nathaniel) v Ohio, 432 US 161 (1977) 3-157
Brown (Richard) v Illinois, 422 US 590 (1975) 3-64
Bruton v United States, 391 US 123 (1968) 5-64, 5-68
Bullcoming v New Mexico, 564 US ___ (2011) 5-59, 5-60
Bumper v North Carolina, 391 US 543 (1968) 3-142

C

Cain v Dep't of Corrections, 451 Mich 470 (1996) 1-13, 1-18, 1-19
California v Acevedo, 500 US 565 (1991) 3-109, 3-112
Callison v Dep't of Corrections, 56 Mich App 260 (1974) 7-19
Camara v Municipal Court, 387 US 523 (1967) 3-143
Caperton v AT Massey Coal Co, Inc, 556 US 868 (2009) 1-14, 1-16
Carroll v United States, 267 US 132 (1925) 3-106
Castaneda v Partida, 430 US 482 (1977) 2-37
Chambers (Frank) v Maroney, 399 US 42 (1970) 3-106
Chimel v California, 395 US 752 (1969) 3-112
Coleman v Alabama, 399 US 1 (1970) 2-22
Colorado v Bertine, 479 US 367 (1987) 3-112
Colorado v Connelly, 479 US 157 (1986) 3-68, 3-71, 3-80
Coolidge v New Hampshire, 403 US 443 (1971) 3-58, 3-95
Coomer v Yukins, 533 F3d 477 (CA 6, 2008) 3-72
Cooper v Oklahoma, 517 US 348 (1996) 3-18
Couch v Booker, 632 F3d 241 (CA 6, 2011) 5-114
Crampton v Dep't of State, 395 Mich 347 (1975) 1-16
Crawford (Michael) v Washington, 541 US 36 (2004) 5-54, 6-81
Cristini v McKee, 526 F3d 888 (CA 6, 2008) 5-35
Culombe v Connecticut, 367 US 568 (1961) 3-68
Cuyler v Sullivan, 446 US 335 (1980) 2-25
Czuprynski v Bay Circuit Judge, 166 Mich App 118 (1988) 1-17, 1-19

D

Daoud v Davis, 618 F3d 525 (CA 6, 2010) 3-68
Davis (Adrian) v Washington, 547 US 813 (2006) 5-56
Davis (Harriet), 442 Mich 1 (1993) 3-130
Davis (Robert) v United States, 512 US 452 (1994) 3-65, 3-79
Davis v United States, 564 US ___ (2011) 3-105, 3-111, 3-154
Davis v Washington, 547 US 813 (2006) 5-56
Deal v Deal, 197 Mich App 739 (1993) 1-27
Deck v Missouri, 544 US 622 (2005) 5-43
DeGeorge v Warheit, 276 Mich App 587 (2007) 1-21
Delaware v Fensterer, 474 US 15 (1985) 5-50

 Michigan Judicial Institute © 2012

Detroit Free Press v Macomb Circuit Judge, 405 Mich 544 (1979) 1-4
Dickerson v United States, 530 US 428 (2000) 3-71
Donkers v Kovach, 277 Mich App 366 (2007) 5-25
Drope v Missouri, 420 US 162 (1975) 3-20
Duncan (Christopher) v State of Michigan, 284 Mich App 246 (2009) 2-23
Duncan (Gary) v Louisiana, 391 US 145 (1968) 5-8
Dunn v United States, 284 US 390 (1932) 5-96
Dusky v United States, 362 US 402 (1960) 3-19

E

Edwards v Arizona, 451 US 477 (1981) 3-65, 3-79
Ellison v Balinski, 625 F3d 953 (CA 6, 2010) 3-124
eople v Cohen (Clarence), 294 Mich App 70 (2011) 2-4
Escobedo v Illinois, 378 US 478 (1964) 3-70
Estelle v McGuire, 502 US 62 (1991) 5-72
Evans & Luptak, PLC v Lizza, 251 Mich App 187 (2002) 1-19, 1-20
Ewin v Burnham, 272 Mich App 253 (2006) 5-27

F

Fare v Michael C, 442 US 707 (1979) 3-71
Faretta v California, 422 US 806 (1975) 2-29
Fields v Howes, 617 F3d 813 (CA 6, 2010) 3-76
Fischhaber v Gen Motors Corp, 174 Mich App 450 (1988) 1-17
Florence v Board of Chosen Freeholders of County of Burlington, 566 US ___ (2012) 3-115, 3-131
Florida v Powell, 559 US ___ (2010) 3-81
Florida v Wells, 495 US 1 (1990) 3-132
Frank W Lynch & Co v Flex Technologies, Inc, 463 Mich 578 (2001) 7-29
Franks (Jerome) v Delaware, 438 US 154 (1978) 3-117

G

Gagnon v Scarpelli, 411 US 778 (1973) 1-25
Georgia v Randolph, 547 US 103 (2006) 3-141
Gideon v Wainwright, 372 US 335 (1963) 2-23
Gilbert v California, 388 US 263 (1967) 5-49
Giles v California, 554 US 353 (2008) 5-63
Godinez v Morin, 509 US 389 (1992) 3-19
Gray (Kevin) v Maryland, 523 US 185 (1998) 5-65
Grievance Administrator v Fieger, 476 Mich 241 (2006) 1-20
Griffin (Eddie) v California, 380 US 609 (1965) 5-35
Griffin (Joseph) v Wisconsin, 483 US 868 (1987) 3-114, 3-140
Grigg v People, 31 Mich 471 (1875) 2-53

H

Halbert v Michigan, 545 US 605 (2005) 4-18
Hardaway v Robinson, 637 F3d 640 (CA 6, 2011) 5-90, 5-93
Herring v United States, 555 US ___ (2009) 3-151
Hill v Lockhart, 474 US 52 (1985) 4-15, 4-24, 5-119
Hodgson v Warren, 622 F3d 591 (CA 6, 2010) 5-114
Homestead Dev Co v Holly Twp, 178 Mich App 239 (1989) 1-26
Horton (Terry) v California, 496 US 128 (1990) 3-143
Howard (Frank) v Bouchard, 405 F3d 459 (CA 6, 2005) 3-84
Howes v Fields, 565 US ___ (2012) 3-66, 3-76
Huddleston v United States, 485 US 681 (1988) 3-59
Hudson (Booker) v Michigan, 547 US 586 (2006) 3-102, 3-156
Hudson (Ted) v Palmer, 468 US 517 (1984) 3-115

I

Illinois v Allen (William), 397 US 337 (1970) 5-43, 5-46, 5-53
Illinois v Caballes, 543 US 405 (2005) 3-94, 3-108
Illinois v Gates (Lance), 462 US 213 (1983) 3-149
Illinois v Rodriguez, 497 US 177 (1990) 3-141
Illinois v Wardlow, 528 US 119 (2000) 3-132
In re Attorney General, 129 Mich App 128 (1983) 3-41, 3-42
In re Carey, 241 Mich App 222 (2000) 3-18
In re Colacasides, 379 Mich 69 (1967) 2-36
In re Collins, 329 Mich 192 (1950) 1-24
In re Contempt of Auto Club Ins Ass'n, 243 Mich App 697 (2000) 1-21, 1-24, 1-25
In re Contempt of Calcutt, 184 Mich App 749 (1990) 1-22, 1-24
In re Contempt of Dougherty, 429 Mich 81 (1987) 1-21, 1-25
In re Contempt of Dudzinski, 257 Mich App 96 (2003) 1-22, 1-27
In re Contempt of McRipley, 204 Mich App 298 (1994) 1-22
In re Contempt of Rapanos, 143 Mich App 483 (1985) 1-24
In re Contempt of Rochlin, 186 Mich App 639 (1990) 1-23
In re Contempt of Scharg, 207 Mich App 438 (1994) 1-22
In re Contempt of United Stationers Supply Co, 239 Mich App 496 (2000) 1-23, 1-25, 1-27
In re Detroit Free Press, 463 Mich 936 (2000) 1-6
In re Disclosure of Juror Names (People v Mitchell), 233 Mich App 604 (1999) 1-7
In re Forfeiture of $176,598, 443 Mich 261 (1993) 3-125
In re Forfeiture of Bail Bond (On Remand), 276 Mich App 482 (2007) 2-16, 2-21
In re Forfeiture of Bail Bond, 209 Mich App 540 (1995) 2-18
In re Forfeiture of Bail Bond, 229 Mich App 724 (1998) 2-18, 2-22
In re Forfeiture of Surety Bond, 208 Mich App 369 (1995) 2-16
In re Jackson (Rebecca), 199 Mich App 22 (1993) 5-27
In re Juror Names, 233 Mich App 604 (1999) 5-10
In re Juvenile Commitment Costs, 240 Mich App 420 (2000) 6-66
In re Kabanuk, ___ Mich App ___ (2012) 1-28
In re Midland Publishing Co, Inc, 420 Mich 148 (1984) 1-5, 1-7
In re Oakland Co Prosecutor, 191 Mich App 113 (1991) 4-14
In re Parole of Franciosi, 231 Mich App 607 (1998) 7-14
In re Parole of Johnson (Kenneth), 219 Mich App 595 (1996) 7-14

 Michigan Judicial Institute © 2012

In re People v Atkins, 444 Mich 737 (1994) 1-7
In re Winship, 397 US 358 (1970) 5-42, 5-72
In re Withdrawal of Attorney, 231 Mich App 504 (1998) 2-29
Indiana v Edwards, 554 US 164 (2008) 2-31
Int'l Union, United Auto, Aerospace and Agricultural Implement Workers of America v Dorsey, 268 Mich App 313 (2005) 1-10
Iowa v Coy, 487 US 1012 (1988) 5-51
Iowa v Tovar, 541 US 77 (2004) 2-33
Ireland v Smith, 214 Mich App 235 (1995) 1-16

J

Jackson (Nathan) v Denno, 378 US 368 (1964) 3-59
Jackson (Paul) v Jamrog, 411 F3d 615 (CA 6, 2005) 7-15
Jaikins v Jaikins, 12 Mich App 115 (1968) 1-21
JDB v North Carolina, 564 US ___ (2011) 3-73
Jenkins v United States, 380 US 445 (1965) 5-93
Jenson v Puste, 290 Mich App 338 (2010) 1-6, 1-9
Jones (Emmett) v Jamrog, 414 F3d 585 (CA 6, 2005) 2-33
Jones (James) v Dep't of Corrections, 468 Mich 646 (2003) 7-18

K

Kampf v Kampf, 237 Mich 377 (1999) 1-27
Kastigar v United States, 406 US 441 (1972) 3-69
Katz v United States, 389 US 347 (1967) 3-94, 3-96
Kenneth Martin v Dep't of Corrections (On Remand), 201 Mich App 331 (1993) 1-13
Kentucky v King, 563 US ___ (2011) 3-126
Knowles v Iowa, 525 US 113 (1998) 3-106
Koss v Dep't of Corrections, 184 Mich App 614 (1990) 1-13
Kyllo v United States, 533 US 27 (2001) 3-94

L

Lafler v Cooper, 566 US ___ (2012) 4-25, 4-26, 4-27, 5-117
Lamkin v Engram, ___ Mich App ___ (2012) 1-28
Langworthy v Dep't of Corrections, 192 Mich App 443 (1992) 1-13, 2-26
Lawrence v 48th Dist Ct, 460 F3d 475 (CA 6, 2009) 7-26
Lego v Twomey, 404 US 477 (1972) 3-78, 3-80
Lewis (Man) v Dep't of Corrections, 232 Mich App 575 (1998) 1-12, 1-13, 2-26
Lincoln v Gen Motors Corp, 231 Mich App 262 (1998) 7-24

M

MacDonald v Ford Motor Co, 117 Mich App 538 (1982) 1-19
Macomb Co Prosecutor v Murphy (Sherri), 464 Mich 149 (2001) 7-27
Maldonado v Ford Motor Co, 476 Mich 372 (2006) 1-26, 1-27
Manson v Braithwaite, 432 US 98 (1977) 3-84

Manson v Brathwaite, 432 US 98 (1977) 3-85
Martinez v California, 528 US 152 (2000) 2-33
Maryland v Craig, 497 US 836 (1990) 5-52, 5-53, 5-68
Maryland v Shatzer, 559 US ___ (2010) 3-66
Mathews v United States, 485 US 58 (1988) 5-72
Mathis v United States, 391 US 1 (1968) 3-76
McKinstry v Valley Obstetrics-Gynecology Clinic, PC, 428 Mich 167 (1987) 3-37
Mead v Batchlor, 435 Mich 480 (1990) 1-25
Medina v California, 505 US 437 (1992) 3-19
Melendez-Diaz v Massachusetts, 557 US 305 (2009) 5-60
Mendoza v Berghuis, 544 F3d 650 (CA 6, 2008) 5-45
Michigan Dep't of State Police v Sitz, 496 US 444 (1990) 3-115
Michigan v Bryant, 562 US ___ (2011) 5-56
Michigan v Fisher (Jeremy), 558 US ___ (2009) 3-128
Michigan v Long (David), 463 US 1032 (1983) 3-105
Michigan v Summers, 452 US 692 (1981) 3-108
Miller (Alan) v Sanilac Co, 606 F3d 240 (CA 6, 2010) 2-3
Miller (Sharee) v Stovall, 608 F3d 913 (CA 6, 2010) 5-62, 5-68
Minnesota v Carter (Wayne), 525 US 83 (1998) 3-100
Minnesota v Dickerson, 508 US 366 (1993) 3-143
Minnesota v Olson, 495 US 91 (1990) 3-100
Miranda v Arizona, 384 US 436 (1966) 2-22, 3-62, 3-66, 3-71, 3-74, 3-80
Missouri v Frye, 566 US ___ (2012) 4-14, 4-15, 4-24, 5-119, 5-120
Missouri v Seibert, 542 US 600 (2004) 3-82
Montejo v Louisiana, 556 US 778 (2009) 2-23
Morales v Parole Bd, 260 Mich App 122 (2005) 7-15
Moran v Burbine, 475 US 412 (1986) 3-64, 3-80, 3-81
Morissette v United States, 342 US 246 (1952) 5-72
Morrisey v Brewer, 408 US 471 (1972) 7-18
Muniz v Smith, 647 F3d 619 (CA 6, 2011) 5-116

N

Nardone v United States, 308 US 338 (1939) 3-58
Nebraska Press Ass'n v Stuart, 427 US 539 (1976) 1-6
Neder v United States, 527 US 1 (1999) 5-74, 7-20
Negri v Slotkin, 397 Mich 105 (1976) 2-35, 7-22
Neil v Biggers, 409 US 188 (1972) 3-84, 3-85
New Jersey v TLO, 469 US 325 (1985) 3-113
New York v Belton, 453 US 454 (1981) 3-105, 3-111, 3-112, 3-153
New York v Quarles, 467 US 649 (1984) 3-78
Nichols v United States, 511 US 738 (1994) 4-29
Nix v Williams (Robert), 467 US 431 (1984) 3-151
North Carolina v Butler (Willie), 441 US 369 (1979) 3-81, 3-82
North Carolina v Pearce, 396 US 711 (1969) 3-157

O

Oakland Co Pros v 52nd Dist Judge, 172 Mich App 557 (1988) 6-58

 Michigan Judicial Institute © 2012

Ohio v Roberts (Herschel), 448 US 56 (1980) 5-54
Ohio v Robinette, 519 US 33 (1996) 3-134
Olden v United States, 224 F3d 561 (CA 6, 2000) 3-44
Oregon v Kennedy, 456 US 667 (1982) 5-99
Ornelas v United States, 517 US 690 (1996) 3-156

P

Padilla v Kentucky, 559 US ___ (2010) 4-13, 4-14, 4-16, 4-24, 5-119
Panetti v Quarterman, 551 US 930 (2007) 5-117
Pate v Robinson, 383 US 375 (1966) 3-18
Patterson v Illinois, 487 US 285 (1988) 3-71
Payne v Arkansas, 356 US 560 (1958) 3-68
Penn v Dep't of Corrections, 100 Mich App 532 (1980) 7-18
Pennsylvania v Labron, 518 US 938 (1996) 3-108
Pennsylvania v Muniz, 496 US 582 (1990) 3-61, 3-89
People v Abraham (Nathaniel), 234 Mich App 640 (1999) 2-42, 3-64
People v Abraham (Nathaniel), 256 Mich App 265 (2003) 3-26, 5-33, 5-110
People v Abrams, 204 Mich App 667 (1994) 4-22
People v Aceval, 282 Mich App 379 (2009) 2-24, 5-108
People v Acevedo, 217 Mich App 393 (1996) 5-95
People v Acosta, 143 Mich App 95 (1985) 4-22
People v Adair, 452 Mich 473 (1996) 3-13
People v Adams (McConnell), 245 Mich App 226 (2001) 5-23
People v Adams (Shawn), 485 Mich 1039 (2010) 3-153
People v Adams (Stephan), 232 Mich App 128 (1998) 2-5
People v Adkins (Kenneth Ray), 452 Mich 702 (1996) 2-31, 2-34
People v Adkins (Kenneth), 433 Mich 732 (1989) 6-78
People v Akins, 259 Mich App 545 (2003) 2-24, 2-29, 3-78
People v Albert, 207 Mich App 73 (1994) 6-16
People v Aldrich, 246 Mich App 101 (2001) 5-72
People v Alexander (After Remand), 207 Mich App 227 (1994) 6-47
People v Allen (Regina), ___ Mich App ___ (2012) 6-37, 6-39, 6-41
People v Anderson (Donny), 398 Mich 361 (1976) 2-30, 2-33
People v Anderson (Franklin), 389 Mich 155 (1973) 3-87
People v Anderson (James) (After Remand), 446 Mich 392 (1994) 5-105, 7-20
People v Anderson (Robert), 209 Mich App 527 (1995) 3-77
People v Anderson (Woodrow), 88 Mich App 513 (1979) 2-45, 3-11
People v Anglin, 6 Mich App 666 (1967) 5-99
People v Anstey, 476 Mich 436 (2006) 3-155, 5-72
People v Antolovich, 207 Mich App 714 (1995) 6-36
People v Antwine, 293 Mich App 192 (2011) 3-96, 3-99
People v Apgar, 264 Mich App 321 (2004) 5-77
People v Arenda, 416 Mich 1 (1982) 5-52
People v Armendarez, 188 Mich App 61 (1991) 3-106
People v Armisted, 295 Mich App 32 (2011) 4-15, 6-75
People v Armstrong (Richard), 490 Mich 281 (2011) 5-116
People v Arquette, 202 Mich App 227 (1993) 1-11, 2-24, 2-26
People v Arroyo, 138 Mich App 246 (1984) 3-64, 3-71
People v Attebury, 463 Mich 662 (2001) 3-78

People v Avant, 235 Mich App 499 (1999) 5-37
People v Babcock, 469 Mich 247 (2003) 1-29, 2-46, 6-10, 7-20, 7-29, 7-32
People v Badour, 167 Mich App 186 (1988) 3-83
People v Bailey, 142 Mich App 571 (1985) 3-28
People v Baker, 103 Mich App 255 (1981) 3-85
People v Baker, 288 Mich App 378 (2010) 3-162
People v Banks, 249 Mich App 247 (2002) 3-7, 3-8, 5-45
People v Barbara, 400 Mich 352 (1977) 5-111
People v Barbarich, 291 Mich App 468 (2011) 3-137
People v Barrera, 451 Mich 261 (1996) 5-68
People v Bauder, 269 Mich App 174 (2005) 5-59, 5-103
People v Baugh, 249 Mich App 125 (2002) 2-36
People v Beasley, 239 Mich App 548 (2000) 5-68
People v Belanger, 227 Mich App 637 (1998) 6-80
People v Bell (Bernice), 276 Mich App 342 (2007) 6-39
People v Bell (Marlon), 473 Mich 275 (2005) 5-19, 7-32
People v Bellanca, 386 Mich 708 (1972) 2-39
People v Bender (Jamieson Todd), 452 Mich 594 (1996) 3-70
People v Bender (Jamieson), 208 Mich App 221 (1994) 3-64
People v Bennett, 116 Mich App 700 (1982) 3-15, 3-17
People v Bennett, 290 Mich App 465 (2010) 2-47
People v Benton, 294 Mich App 191 (2011) 3-15
People v Bergin, 16 Mich App 443 (1969) 5-102
People v Bero, 168 Mich App 545 (1988) 1-17
People v Bettistea, 173 Mich App 106 (1988) 2-49
People v Beuschlein, 245 Mich App 744 (2001) 3-130
People v Bewersdorf, 438 Mich 55 (1991) 6-21
People v Beydoun, 283 Mich App 314 (2009) 3-143
People v Bigge, 297 Mich 58 (1941) 5-102
People v Billings, 283 Mich App 538 (2009) 4-18
People v Biondo, 76 Mich App 155 (1977) 5-33
People v Bisard, 114 Mich App 784 (1982) 2-4
People v Bishop, 117 Mich App 553 (1982) 3-82
People v Black, 103 Mich App 109 (1981) 1-9
People v Blackmon, 280 Mich App 253 (2008) 5-37
People v Blasius, 435 Mich 573 (1990) 3-126
People v Blue, 428 Mich 684 (1987) 4-8
People v Boatman, 273 Mich App 405 (2006) 4-2, 4-13, 6-21
People v Bolduc, 263 Mich App 430 (2004) 3-146
People v Bone, 230 Mich App 699 (1998) 3-14
People v Bonilla-Machado, 489 Mich 412 (2011) 6-21
People v Borchard-Ruhland, 460 Mich 278 (1999) 7-23
People v Bowman, 141 Mich App 390 (1985) 3-24
People v Boyd, 470 Mich 363 (2004) 3-83
People v Boynton, 185 Mich App 669 (1990) 6-51
People v Bozzi, 36 Mich App 15 (1971) 3-89
People v Bradley, 54 Mich App 89 (1974) 2-27
People v Bray, 481 Mich 888 (2008) 2-17
People v Breeding, 284 Mich App 471 (2009) 6-81
People v Breidenbach, 489 Mich 1 (2011) 6-71
People v Britt, 202 Mich App 714 (1993) 6-28

 Michigan Judicial Institute © 2012

People v Brocato, 17 Mich App 277 (1969) 5-101
People v Brown (Craig), 279 Mich App 116 (2008) 3-96, 3-116, 6-34
People v Brown (Gregory), 205 Mich App 503 (1994) 6-70
People v Brown (Lewis), 393 Mich 174 (1974) 6-1
People v Brown (Tommy), 267 Mich App 141 (2005) 5-79
People v Brownfield (After Remand), 216 Mich App 429 (1996) 4-6
People v Brownrigg, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 270303) 3-12
People v Bryant (Ramon), 289 Mich App 260 (2010) 5-9
People v Budzyn, 456 Mich 77 (1997) 5-86, 5-106
People v Buehler, 477 Mich 18 (2007) 6-28, 6-72
People v Buie (Buie I), 285 Mich App 401 (2009) 1-2, 5-52, 5-67
People v Buie (Buie II) (After Remand), 291 Mich App 259 (2011) 1-2, 5-53, 5-67
People v Buie, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 270414) 3-21
People v Bullock, 440 Mich 15 (1991) 3-110
People v Bulmer, 256 Mich App 33 (2003) 3-89
People v Burbank, 461 Mich 870 (1999) 6-83
People v Burhans, 166 Mich App 758 (1988) 5-49
People v Burns, 250 Mich App 436 (2002) 3-63, 3-83
People v Burton, 219 Mich App 278 (1996) 5-66
People v Butler (James), 465 Mich 940 (2001) 6-72
People v Butler (Michael), 193 Mich App 63 (1992) 3-45
People v Caballero, 184 Mich App 636 (1990) 5-113
People v Caban, 275 Mich App 419 (2007) 2-43, 7-27
People v Cadle, 209 Mich App 467 (1995) 3-45
People v Cage, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 273645) 3-21
People v Cain, 238 Mich App 95 (1999) 2-4, 2-6, 3-46, 3-47, 3-48
People v Callon, 256 Mich App 312 (2003) 3-9
People v Canter, 197 Mich App 550 (1992) 5-110
People v Carines, 460 Mich 750 (1999) 5-74, 5-105, 7-20
People v Carnicom, 272 Mich App 614 (2006) 5-5
People v Carpenter, 464 Mich 223 (2001) 3-26
People v Carpentier, 446 Mich 19 (1994) 4-7, 4-28, 6-47, 6-90
People v Carroll, 396 Mich 408 (1976) 3-44
People v Carter (Deborah), 250 Mich App 510 (2002) 3-105
People v Carter (Vincent), 462 Mich 206 (2000) 5-83
People v Cartwright, 454 Mich 550 (1997) 3-99, 3-125
People v Ceteways, 156 Mich App 108 (1986) 2-28
People v Chaaban, 474 Mich 917 (2005) 2-33
People v Chaaban, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2005 (Docket No. 253513) 2-33
People v Chambers (Allan), 195 Mich App 118 (1992) 3-134
People v Chambers (Billy), 277 Mich App 1 (2007) 3-160
People v Chambers (Dwight), 430 Mich 217 (1988) 6-19
People v Champion (Kenneth), 452 Mich 92 (1996) 2-44, 3-132
People v Champion (Michael), 442 Mich 874 (1993) 5-9
People v Chavies, 234 Mich App 274 (1999) 2-38
People v Cheeks, 216 Mich App 470 (1996) 5-38
People v Chilton, 394 Mich 34 (1975) 4-3

People v Chism, 390 Mich 104 (1973) 3-139
People v Chowdhury, 285 Mich App 509 (2009) 3-94, 3-142
People v Cipriano, 431 Mich 315 (1988) 2-5, 3-66
People v Clark (Paul), 274 Mich App 248 (2007) 6-90, 6-91, 7-19
People v Clark (Rajahaan), 463 Mich 459 (2000) 6-19
People v Claypool, 470 Mich 715 (2004) 6-7
People v Clement, 254 Mich App 387 (2002) 2-47
People v Clemons (Keith), 177 Mich App 523 (1989) 5-25
People v Cline, 276 Mich App 634 (2007) 3-42, 6-14
People v Cobbs, 443 Mich 276 (1993) 4-12, 4-19
People v Cocuzza, 413 Mich 78 (1982) 5-5
People v Coddington, 188 Mich App 584 (1991) 2-42
People v Cohen (Clarence), 294 Mich App 70 (2011) 2-44
People v Cole, 349 Mich 175 (1957) 5-32
People v Collins (Charles), 166 Mich 4 (1911) 5-12
People v Collins (Harold), 388 Mich 680 (1972) 3-46, 3-47, 3-48
People v Collins (Richard), 239 Mich App 125 (1999) 3-40, 6-40
People v Colon, 233 Mich App 295 (1999) 3-90
People v Conley (Aaron), 270 Mich App 301 (2006) 3-162, 3-164, 5-46
People v Conley (Charles), unpublished opinion per curiam of the Court of Appeals, issued June 13, 2000 (Docket No. 219741) 6-63
People v Connor, 209 Mich App 419 (1995) 6-76
People v Conte, 421 Mich 704 (1984) 3-69
People v Conyer, 281 Mich App 526 (2008) 7-29
People v Conyers, 194 Mich App 395 (1992) 5-38
People v Cook, 266 Mich App 290 (2005) 3-9
People v Cook, 285 Mich App 420 (2009) 5-4, 5-5
People v Cooks, 446 Mich 503 (1994) 5-94
People v Coones, 216 Mich App 721 (1996) 1-29, 3-159
People v Cornell, 466 Mich 335 (2002) 5-75
People v Corr, 287 Mich App 499 (2010) 3-107, 3-153
People v Corteway, 212 Mich App 442 (1995) 4-15, 4-16
People v Cortez (Burton), 294 Mich App 481 (2011) 3-77
People v Cotton, 191 Mich App 377 (1991) 3-63
People v Couch, 49 Mich App 69 (1973) 5-33
People v Cox, 268 Mich App 440 (2005) 5-37
People v Crall, 444 Mich 463 (1993) 3-32
People v Crawford (Alvin), 115 Mich App 516 (1982) 1-9
People v Crawford (David), 429 Mich 151 (1987) 2-43
People v Crawford (Douglas), 458 Mich 376 (1998) 5-28
People v Crear, 242 Mich App 158 (2000) 2-4, 5-106
People v Cress, 468 Mich 678 (2003) 5-108
People v Crockran, 292 Mich App 253 (2011) 3-70
People v Cross (Clifton), 281 Mich App 737 (2008) 6-40
People v Cross (Everett), 30 Mich App 326 (1971) 1-13
People v Cummings, 84 Mich App 509 (1978) 4-23
People v Cunningham, 215 Mich App 652 (1996) 5-26
People v Custer, 465 Mich 319 (2001) 3-132, 3-156
People v D'Angelo, 401 Mich 167 (1977) 3-31, 3-32
People v Dagwan, 269 Mich App 338 (2005) 3-110, 3-139
People v Daniel (Danny), 462 Mich 1 (2000) 6-11

 Michigan Judicial Institute © 2012

People v Daniel (Hank), 207 Mich App 47 (1994) 3-46, 3-47
People v Daniels (Chris), 39 Mich App 94 (1972) 3-84
People v Daniels (Jerry), 163 Mich App 703 (1987) 5-42
People v Daoud, 462 Mich 621 (2000) 3-67, 3-71, 3-83
People v Daoust, 228 Mich App 1 (1998) 5-11, 5-15
People v Darden, 230 Mich App 597 (1998) 2-51
People v Dash, 216 Mich App 412 (1996) 6-55
People v Davie, 225 Mich App 592 (1997) 3-8
People v Davis (David), 199 Mich App 502 (1993) 5-110
People v Davis (Gevon), 472 Mich 156 (2005) 3-159
People v Davis (Harriet), 442 Mich 1 (1993) 3-103, 3-127
People v Davis (John), 216 Mich App 47 (1996) 5-86
People v Davis (Keith), 277 Mich App 676 (2008) 2-28, 5-79
People v Davis (Leroy), 191 Mich App 29 (1991) 3-82
People v Davis (Marcus) (On Rehearing), 250 Mich App 357 (2002) 5-113
People v Davis (Melvin), 146 Mich App 537 (1985) 3-86, 7-30
People v Davis (Michael), 283 Mich App 737 (2009) 3-51
People v Davis (Thomas), 241 Mich App 697 (2000) 3-84
People v Dean, 103 Mich App 1 (1982) 3-16, 3-17
People v DeClerk, 400 Mich 10 (1977) 5-6
People v DeHaven, 321 Mich 327 (1948) 5-106
People v DeLisle, 202 Mich App 658 (1993) 3-42
People v Dendel (On Second Remand), 289 Mich App 445 (2010) 5-61
People v Dennany, 445 Mich 412 (1994) 2-29, 2-35
People v Depifanio, 192 Mich App 257 (1991) 3-55
People v DeShazo, 469 Mich 1044 (2004) 5-65
People v Dilworth, 291 Mich App 399 (2011) 6-32
People v Dimoski, 286 Mich App 474 (2009) 6-38
People v Dinardo, 280 Mich App 290 (2010) 5-61
People v Dixon (Darrell), 263 Mich App 393 (2004) 3-12, 5-113
People v Dixon (Lamont), 217 Mich App 400 (1996) 5-43
People v Dobek, 274 Mich App 58 (2007) 5-37, 5-81
People v Doss, 406 Mich 90 (1979) 2-46
People v Douglas (Jeffery), ___ Mich App ___ (2012) 4-26, 4-28
People v Dowdy, 211 Mich App 562 (1991) 3-69
People v Doxey, 263 Mich App 115 (2004) 7-29
People v Drohan, 475 Mich 140 (2006) 6-7, 6-18
People v Droste, 160 Mich 66 (1910) 5-107
People v Dunbar, 264 Mich App 240 (2004) 3-133
People v Duncan (Pat), 388 Mich 489 (1972) 2-36
People v Duncan (Timothy), 462 Mich 47 (2000) 5-74
People v Dunn, 446 Mich 409 (1994) 5-43
People v Dupree, 128 Mich App 368 (1983) 5-109
People v Durfee, 215 Mich App 677 (1996) 2-29
People v Dye, 356 Mich 271 (1959) 5-30
People v Earls, 477 Mich 1119 (2007) 2-41
People v Eaton (Charles), 241 Mich App 459 (2000) 3-105
People v Eaton (Clifford), 184 Mich App 649 (1990) 4-7
People v Edmond, 81 Mich App 743 (1978) 2-11
People v Eglar, 19 Mich App 563 (1969) 5-6, 5-41
People v Eisen, ___ Mich App ___ (2012) 5-75, 5-81

People v Elliott (Samuel), ___ Mich App ___ (2012) 3-76, 3-77, 3-80
People v Ellis (Edward), 224 Mich App 752 (1997) 6-46
People v Ellis (Tyrone), 468 Mich 25 (2003) 5-4, 7-30
People v Elston, 462 Mich 751 (2000) 3-7, 5-118
People v Evans (Evans I), 288 Mich App 410 (2010) 5-70
People v Evans (Evans II), 491 Mich 1 (2012) 3-159, 3-160, 5-70
People v Evans, 288 Mich App 410 (2010) 5-71
People v Fackelman, 489 Mich 515 (2011) 5-50, 5-56
People v Fagan (On Remand), 213 Mich App 67 (1995) 2-39
People v Farquharson, 274 Mich App 268 (2007) 2-36, 2-39
People v Farrow, 461 Mich 202 (1999) 3-142
People v Faulkner, 90 Mich App 520 (1979) 3-77
People v Ferguson, 376 Mich 90 (1965) 3-58
People v Fett, 469 Mich 913 (2003) 2-28
People v Fetterley, 229 Mich App 511 (1998) 3-101, 5-94, 6-49
People v Fields (Carl), 450 Mich 94 (1995) 3-16, 5-35
People v Fields (Warren), 448 Mich 58 (1995) 6-12
People v Fike, 228 Mich App 178 (1998) 3-77, 5-115
People v Filip, 278 Mich App 635 (2008) 6-74, 6-79
People v Fleming, 428 Mich 408 (1987) 6-77
People v Fletcher, 260 Mich App 531 (2004) 3-144, 5-22, 5-87
People v Florinchi, 84 Mich App 128 (1978) 3-41
People v Fonville, 291 Mich App 363 (2011) 4-11, 4-16
People v Ford, 262 Mich App 443 (2004) 3-157
People v Forrest, 72 Mich App 266 (1976) 3-47
People v Fortson, 202 Mich App 13 (1993) 2-48
People v Fox (After Remand), 232 Mich App 541 (1998) 5-106
People v France, 436 Mich 138 (1990) 5-84
People v Francisco, 474 Mich 82 (2006) 6-9
People v Frazier (Corey), 270 Mich App 172 (2006) 3-78
People v Frazier (Corey), 478 Mich 231 (2007) 3-62, 3-78, 3-83, 3-84, 5-117
People v Frazier, 485 Mich 1044 (2010) 4-18
People v Freeland, 178 Mich App 761 (1989) 5-81
People v Freeman, 476 Mich 863 (2006) 6-9
People v Frohriep, 247 Mich App 692 (2001) 3-102, 3-147
People v Fultz, 111 Mich App 587 (1981) 3-28
People v Fyda, 288 Mich App 446 (2010) 3-33, 5-33
People v Gadomski, 274 Mich App 174 (2007) 3-97
People v Gahan, 456 Mich 264 (1997) 6-37, 7-22
People v Gaines, 198 Mich App 130 (1993) 4-18
People v Gallego (Luis), 199 Mich App 566 (1993) 3-53
People v Gallego (Luis), 430 Mich 443 (1988) 4-22
People v Galloway, 259 Mich App 634 (2003) 3-93, 3-103, 3-144
People v Gant (Percy), 48 Mich App 5 (1973) 5-36
People v Garcia, 448 Mich 442 (1995) 5-100
People v Gardner, 482 Mich 41 (2008) 6-47
People v Garfield, 166 Mich App 66 (1988) 3-20
People v Garland, 286 Mich App 1 (2009) 3-161, 5-62
People v Garner, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1996 (Docket No. 177271) 5-48
People v Garvie, 148 Mich App 444 (1986) 4-28

 Michigan Judicial Institute © 2012

People v Garvin (Demar), 235 Mich App 90 (1999) 3-123
People v Garvin (Larry), 159 Mich App 38 (1987) 4-23
People v Garwood, 205 Mich App 553 (1994) 3-82
People v Gates (Gregory), 434 Mich 146 (1990) 7-25
People v Gendron, 144 Mich App 509 (1985) 5-31
People v Geno, 261 Mich App 624 (2004) 3-77, 6-11
People v Gentner, Inc, 262 Mich App 363 (2004) 3-58
People v Gibson (On Remand), 90 Mich App 792 (1979) 5-5
People v Gillam, 479 Mich 253 (2007) 3-147, 7-23
People v Gillespie, 42 Mich App 679 (1972) 1-13, 2-27
People v Gilmore, 222 Mich App 442 (1997) 3-5, 3-48
People v Ginther, 390 Mich 436 (1973) 2-27, 5-118, 7-32
People v Gioglio (Gioglio I), 292 Mich App 173 (2011) 5-118
People v Gioglio (Gioglio II), 490 Mich 868 (2011) 5-118
People v Giovannini, 271 Mich App 409 (2006) 6-55, 6-57, 7-22
People v Girard, 269 Mich App 15 (2005) 3-46
People v Givans, 227 Mich App 113 (1997) 6-73
People v Glass (Brent), 288 Mich App 399 (2010) 6-29, 6-79
People v Glass (Willie), 464 Mich 266 (2001) 2-1, 2-36, 2-41
People v Godbold, 230 Mich App 508 (1998) 5-4
People v Goddard (Kenneth), 135 Mich App 128 (1984) 5-32
People v Goforth, 222 Mich App 306 (1997) 3-141
People v Goldston, 470 Mich 523 (2004) 3-119, 3-151
People v Gomer, 206 Mich App 55 (1994) 4-11
People v Gomez, 295 Mich App 411 (2012) 4-13, 4-14, 4-16, 4-24, 5-119
People v Gonyea, 421 Mich 462 (1984) 3-70
People v Gonzalez, 256 Mich App 212 (2003) 5-82
People v Goode, 78 Mich App 781 (1977) 5-15
People v Gow, 203 Mich App 94 (1993) 6-54
People v Grable, 57 Mich App 184 (1974) 7-30
People v Grant (Andre), 445 Mich 535 (1994) 3-27, 7-21
People v Grant (Dennis), 455 Mich 221 (1997) 6-37
People v Grant (William), 470 Mich 477 (2004) 5-112, 5-121
People v Gray (Allen), 457 Mich 107 (1998) 3-85, 3-88, 3-90
People v Gray (Norman), 466 Mich 44 (2002) 3-17
People v Grazhidani, 277 Mich App 592 (2008) 6-77
People v Green (Louis), 131 Mich App 232 (1983) 5-35
People v Green (Rodney), 228 Mich App 684 (1998) 5-37, 6-46
People v Greenfield (On Reconsideration), 271 Mich App 442 (2006) 3-2, 3-4
People v Grove, 455 Mich 439 (1997) 3-36, 4-6
People v Gubachy, 272 Mich App 706 (2006) 6-40
People v Gutierrez, 916 P2d 598 (Colo App, 1995) 5-51
People v Gwinn, 111 Mich App 223 (1981) 3-88
People v Haack, 396 Mich 367 (1976) 4-3
People v Hackett (Charles), 421 Mich 338 (1984) 3-12, 3-13
People v Hackett (William), 460 Mich 202 (1999) 5-35
People v Haggart, 142 Mich App 330 (1985) 5-21
People v Hale, 72 Mich App 484 (1976) 5-5
People v Hall, 435 Mich 599 (1990) 2-43
People v Hamilton, 465 Mich 526 (2002) 2-6
People v Hammond, 84 Mich App 60 (1978) 3-47

People v Hampton, 138 Mich App 235 (1984) 3-85
People v Hana, 447 Mich 325 (1994) 2-50, 3-44, 3-46
People v Hanks, 276 Mich App 91 (2007) 5-21
People v Hannan (After Remand), 200 Mich App 123 (1993) 6-47
People v Hannold, 217 Mich App 382 (1996) 4-23
People v Hannum, 362 Mich 660 (1961) 5-106
People v Harbour, 76 Mich App 552 (1977) 3-8
People v Hardiman, 466 Mich 417 (2002) 5-111
People v Harlan, 129 Mich App 769 (1983) 2-27
People v Harns, 227 Mich App 573 (1998) 6-55
People v Harper (Bernard), 479 Mich 599 (2007) 6-18
People v Harrell, 398 Mich 384 (1976) 5-10
People v Harrington, 258 Mich App 703 (2003) 3-79
People v Harris (Benson), 127 Mich App 538 (1983) 5-32
People v Harris (Derrick), 190 Mich App 652 (1991) 5-48
People v Harris (Isaiah), 261 Mich App 44 (2004) 3-65, 3-91
People v Harris (Karen), 185 Mich App 100 (1990) 3-20
People v Harris (Lamar), 224 Mich App 130 (1997) 4-11
People v Harris (Michael), 148 Mich App 506 (1986) 3-55
People v Harris (Reginald), 80 Mich App 228 (1977) 5-47
People v Harris (Thomas), 201 Mich App 147 (1993) 5-43
People v Harvey (Wayne), 167 Mich App 734 (1988) 3-42
People v Havens, 268 Mich App 15 (2005) 6-11
People v Hawkins, 468 Mich 488 (2003) 3-118, 3-155
People v Hawthorne, 474 Mich 174 (2006) 5-82
People v Hayden, 205 Mich App 412 (1994) 7-25
People v Hayes (Larry), 421 Mich 271 (1984) 3-26
People v Hayes (Phillip), 126 Mich App 721 (1983) 3-88
People v Haynes (Joseph), 256 Mich App 341 (2003) 4-13
People v Haynes (Kermit), 221 Mich App 551 (1997) 4-11
People v Hazzard, 206 Mich App 658 (1994) 6-63
People v Heard, 388 Mich 182 (1972) 5-39
People v Heikkala, 226 Mich 332 (1924) 5-82
People v Heller, 47 Mich App 408 (1973) 3-88
People v Hellstrom, 264 Mich App 187 (2004) 3-149
People v Helzer, 404 Mich 410 (1978) 6-71
People v Hemphill, 439 Mich 576 (1992) 6-1, 6-84
People v Hendershot, 357 Mich 300 (1959) 3-51
People v Henderson, 69 Mich App 418 (1976) 3-89, 5-49
People v Hendrick, 472 Mich 555 (2005) 6-84
People v Hendricks, 446 Mich 435 (1994) 5-75
People v Henry (Darrin), 477 Mich 1123 (2007) 3-96
People v Henry (Rahiem), 248 Mich App 313 (2001) 5-89, 5-98
People v Hernandez (Louis), 84 Mich App 1 (1978) 2-28
People v Hernandez (Mario), 443 Mich 1 (1993) 7-29
People v Herndon, 246 Mich App 371 (2001) 2-6, 3-115
People v Herrera, 204 Mich App 333 (1994) 7-26
People v Herrick, 216 Mich App 594 (1996) 1-20
People v Hesch, 278 Mich App 188 (2008) 5-4
People v Hickey, 103 Mich App 350 (1981) 5-91
People v Hickman, 470 Mich 602 (2004) 3-84, 3-87

 Michigan Judicial Institute © 2012

People v Hicks (Rodney), 259 Mich App 518 (2003) 2-34, 2-35
People v Hicks (Tyrone), 447 Mich 819 (1994) 5-99
People v Higuera, 244 Mich App 429 (2001) 2-1
People v Hill (Brian), 269 Mich App 505 (2006) 7-27, 7-28
People v Hill (ML), 429 Mich 382 (1987) 3-71
People v Hill (Rodney), 433 Mich 464 (1989) 2-42
People v Hill (Thomas), 485 Mich 912 (2009) 2-34
People v Hite (After Remand), 200 Mich App 1 (1993) 6-26, 6-73
People v Hoffman, 205 Mich App 1 (1994) 3-45
People v Holder, 483 Mich 168 (2009) 6-42
People v Holguin, 141 Mich App 268 (1985) 5-48
People v Holliday, 144 Mich App 560 (1985) 5-31
People v Holly, 129 Mich App 405 (1983) 5-107
People v Holoweski, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 278029) 4-6
People v Holtzman, 234 Mich App 166 (1999) 3-6
People v Horn, 279 Mich App 31 (2008) 6-14
People v Horne, 147 Mich App 375 (1985) 2-42
People v Hornsby, 251 Mich App 462 (2002) 3-86, 6-46
People v Horton (Lajamille), 283 Mich App 105 (2009) 3-133
People v Houlihan, 474 Mich 958 (2005) 7-23
People v Houstina, 216 Mich App 70 (1996) 3-145
People v Houston (John), 448 Mich 312 (1995) 5-119
People v Houston (JT Jr), 237 Mich App 707 (1999) 7-27
People v Houston (Yolanda), 179 Mich App 753 (1989) 1-18
People v Houthoofd, 487 Mich 568 (2010) 3-41, 3-43
People v Howard (Connell), 226 Mich App 528 (1997) 3-64, 5-34
People v Howard (Troy), 233 Mich App 52 (1998) 3-102
People v Hubbard (After Remand), 217 Mich App 459 (1996) 5-9, 5-22
People v Huffman, 315 Mich 134 (1946) 5-96
People v Hunt, 171 Mich App 174 (1988) 7-23
People v Hunter, 370 Mich 262 (1963) 5-72
People v Hurst, 396 Mich 1 (1976) 3-45
People v Hyde, 285 Mich App 428 (2009) 3-150
People v Idziak, 484 Mich 549 (2009) 6-75
People v Ingram, 439 Mich 288 (1992) 4-28
People v Ish, 252 Mich App 115 (2002) 3-62
People v Ivers, 459 Mich 320, 324 (1998) 3-14
People v Izarraras-Placante, 246 Mich App 490 (2001) 6-12
People v Jackson (Andre), 292 Mich App 583 (2011) 3-7, 5-50, 5-105
People v Jackson (Andrew), 417 Mich 243 (1983) 4-11
People v Jackson (Damon), 245 Mich App 17 (2001) 3-28
People v Jackson (Dwayne), 203 Mich App 607 (1994) 4-12, 4-15
People v Jackson (Harvey), 483 Mich 271 (2009) 1-12, 6-35, Appx-26
People v Jackson (Joseph), 98 Mich App 735 (1980) 5-38
People v Jackson (Karl), 123 Mich App 423 (1983) 3-145
People v Jackson (Leonard), 487 Mich 783 (2010) 6-8, 6-9, 6-44
People v Jackson (Nicholas), 477 Mich 1019 (2007) 3-14
People v Jackson (Robert), 390 Mich 621 (1973) 3-38, 3-39, 5-7
People v Jackson (Walter), 467 Mich 272 (2002) 3-57
People v Jacobsen, 448 Mich 639 (1995) 3-10

People v James (Derrick), 267 Mich App 675 (2005) 7-23
People v James (William), 272 Mich App 182 (2006) 4-7, 4-18
People v Jansson, 116 Mich App 674 (1982) 5-37
People v Jendrzejewski, 455 Mich 495 (1997) 3-42, 5-13
People v Jenkins (Shawn), 472 Mich 26 (2005) 3-132
People v Jenkins (Steven), 450 Mich 249 (1995) 3-62
People v Johnigan, 265 Mich App 463 (2005) 6-3
People v Johns, 384 Mich 325 (1971) 1-25
People v Johnson (Benny), 245 Mich App 243 (2001) 5-112
People v Johnson (Gary) (On Rehearing), 208 Mich App 137 (1994) 3-39, 5-7
People v Johnson (Henry), 427 Mich 98 (1986) 2-42, 3-8
People v Johnson (James), 202 Mich App 281 (1993) 3-37, 3-90
People v Johnson (Jessie), 466 Mich 491 (2002) 3-32, 3-35
People v Johnson (Ricardo), 197 Mich App 362 (1992) 4-17
People v Johnson (Robert), 283 Mich App 303 (2009) 6-74
People v Johnson (Roger), 382 Mich 632 (1969) 1-20
People v Johnson (Van Ray), 57 Mich App 117 (1974) 2-47
People v Johnson (William), 187 Mich App 621 (1991) 5-95
People v Jones (Alphonzo), 228 Mich App 191 (1998) 3-88
People v Jones (Bennie), 236 Mich App 396 (1999) 3-69
People v Jones (Calvin), 260 Mich App 424 (2004) 3-132
People v Jones (Edward), 168 Mich App 191 (1988) 2-28
People v Jones (Jeffrey), 279 Mich App 86 (2008) 3-61, 3-96
People v Jones (Kyle), 270 Mich App 208 (2006) 5-63
People v Jones (Michael), 182 Mich App 125 (1989) 6-32
People v Jones (Ponce), 424 Mich 893 (1986) 5-79
People v Jordan (Childred), 275 Mich App 659 (2007) 5-59
People v Jordan (Timothy), 149 Mich App 568 (1986) 3-70
People v Juillet, 439 Mich 34 (1991) 3-31, 3-32, 7-32
People v Justice, 454 Mich 334 (1997) 2-44
People v Kachar, 400 Mich 78 (1977) 7-32
People v Kaczmarek, 464 Mich 478 (2001) 6-79
People v Kahley, 277 Mich App 182 (2007) 5-102, 6-11
People v Kaigler, 368 Mich 281 (1962) 3-139
People v Kasben, 158 Mich App 252 (1987) 5-52
People v Kaslowski, 239 Mich App 320 (2000) 3-123
People v Katt, 248 Mich App 282 (2001) 5-89
People v Kaufman, 457 Mich 266 (1998) 3-37, 3-59
People v Kazmierczak, 461 Mich 411 (2000) 3-92, 3-105, 3-139
People v Kean, 204 Mich App 533 (1994) 4-23
People v Keeth, 63 Mich App 589 (1975) 5-86
People v Keller, 479 Mich 467 (2007) 3-119
People v Kelly (Albert), 231 Mich App 627 (1998) 5-33
People v Kelly (Robert), 186 Mich App 524 (1990) 5-113, 5-118, 6-72
People v Kendall, 142 Mich App 576 (1985) 6-84
People v Kennedy, 384 Mich 339 (1979) 7-30
People v Kerridge, 20 Mich App 184 (1969) 5-46
People v Khanani, ___ Mich App ___ (2012) 6-54, 6-55, 6-57, 6-58
People v Kildow, 99 Mich App 446 (1980) 7-23
People v Killebrew, 416 Mich 189 (1982) 4-19, 4-23

 Michigan Judicial Institute © 2012

People v Kimber, unpublished opinion per curiam of the Court of Appeals, issued May 2, 2000 (Docket No. 206358) 5-31
People v King (Genevieve), 271 Mich App 235 (2006) 3-63
People v King (Levurn), 210 Mich App 425 (1995) 5-41
People v Kline, 197 Mich App 165 (1992) 1-3, 5-2
People v Knight, 473 Mich 324 (2005) 5-16, 5-22
People v Konrad, 449 Mich 263 (1995) 3-63
People v Kosters, 175 Mich App 748 (1989) 5-102
People v Kowalski, 489 Mich 488 (2011) 5-74, 5-83
People v Krim, 220 Mich App 314 (1997) 6-23
People v Kruger, 466 Mich 50 (2002) 5-46
People v Krum, 374 Mich 356 (1965) 3-55
People v Krysztopaniec, 170 Mich App 588 (1988) 5-115
People v Kurylczyk, 443 Mich 289 (1993) 3-86, 3-87, 3-88, 3-91
People v Kusowski, 403 Mich 653 (1978) 3-79
People v LaBate, 122 Mich App 644 (1983) 3-60
People v Labelle, 478 Mich 891 (2007) 3-110, 3-141
People v Lacalamita, 286 Mich App 467 (2009) 3-27, 5-33
People v Lanzo Constr Co, 272 Mich App 470 (2006) 7-19
People v Lapworth, 273 Mich App 424 (2006) 3-141
People v LaVearn, 448 Mich 207 (1995) 5-113
People v Lawson, 124 Mich App 371 (1983) 5-50
People v Lawton, 196 Mich App 341 (1992) 3-57, 5-38
People v LeBlanc, 465 Mich 575 (2002) 5-112
People v Lee, 212 Mich App 228 (1995) 5-13
People v Legg, 197 Mich App 131 (1992) 7-30
People v Legrone, 205 Mich App 77 (1994) 5-13
People v Leighty, 161 Mich App 565 (1987) 3-65
People v Lemmon, 456 Mich 625 (1998) 5-104, 5-110
People v Lemon, 80 Mich App 737 (1978) 6-82
People v Lemons, 454 Mich 234 (1997) 6-18
People v Leonard, 224 Mich App 569 (1997) 3-35
People v Leshaj, 249 Mich App 417 (2002) 5-35
People v Lesperance, 147 Mich App 379 (1985) 2-48
People v Lester, 232 Mich App 262 (1998) 3-6
People v Lett, 466 Mich 206 (2002) 5-94
People v Levandoski, 237 Mich App 612 (1999) 6-78
People v Levine (Brian Eric), 231 Mich App 213 (1998) 5-50
People v Levine (Brian), 461 Mich 172 (1999) 3-105
People v Lewis (Curtis), 489 Mich 939 (2011) 6-18
People v Lewis (James), 160 Mich App 20 (1987) 3-69
People v Lewis (On Remand), 287 Mich App 356 (2010) 5-61
People v Lewis, 490 Mich 921 (2011) 5-61
People v Link, 225 Mich App 211 (1997) 6-97, 7-29
People v Lloyd, 284 Mich App 703 (2009) 6-5, 6-33
People v Lobsinger, 64 Mich App 284 (1975) 5-5
People v Lombardo, 216 Mich App 500 (1996) 3-96
People v Long (David Kerk), 419 Mich 636 (1984) 3-131
People v Lonsby, 268 Mich App 375 (2005) 5-59, 5-60, 5-111
People v Lown, 488 Mich 242 (2011) 3-52
People v Lucey, 287 Mich App 267 (2010) 6-14

People v Lueth, 253 Mich App 670 (2002) 3-10, 6-37
People v Lukity, 460 Mich 484 (1999) 5-104
People v Lum Lee, 258 Mich 618 (1932) 5-29
People v Lumley, 154 Mich App 618 (1986) 3-82
People v Luther, 53 Mich App 648 (1974) 5-91
People v Lyons (After Remand), 222 Mich App 319 (1997) 6-76
People v Mack, 265 Mich App 122 (2005) 6-3, 6-49, 7-14
People v Mackey, 121 Mich App 748 (1982) 3-118
People v Mackle, 241 Mich App 583 (2000) 7-22
People v Mahone, 294 Mich App 208 (2011) 5-20
People v Mallory, 421 Mich 229 (1984) 3-69, 5-41
People v Malone, 180 Mich App 347 (1989) 5-94
People v Manning, 243 Mich App 615 (2000) 2-52, 3-70, 3-149
People v Manser (Mark), 172 Mich App 485 (1988) 6-79
People v Marsack, 231 Mich App 364 (1998) 3-87, 3-140
People v Martin (Bobby), 271 Mich App 280 (2006) 3-121
People v Martin (George H), 61 Mich App 102 (1975) 6-81
People v Martin (George Henry III), 257 Mich App 457 (2003) 6-27
People v Martin (Walter), 392 Mich 553 (1974) 5-89
People v Mason, 96 Mich App 47 (1980) 5-20, 5-111
People v Matheson, 70 Mich App 172 (1976) 3-19, 4-4
People v Matish, 384 Mich 568 (1971) 1-23
People v Matuszak, 263 Mich App 42 (2004) 5-115
People v Maxson (John), 163 Mich App 467 (1987) 6-18
People v Maxson (Mark), 482 Mich 385 (2008) 4-7, 4-18, 7-24
People v Maxwell, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909) 5-43
People v Mayhew, 236 Mich App 112 (1999) 1-20
People v McAllister, 241 Mich App 466 (2000) 3-88
People v McBride (Mary Ann), 480 Mich 1047 (2008) 3-83
People v McBride (Mary), 273 Mich App 238 (2006) 3-83
People v McCauley, 287 Mich App 158 (2010) 4-16
People v McCline, 442 Mich 127 (1993) 5-20
People v McCoy, 483 Mich 898 (2009) 4-19
People v McCray (Lorenzo), 245 Mich App 631 (2001) 3-17
People v McCuller, 479 Mich 672 (2007) 6-7
People v McCullough (Tyree), 462 Mich 857 (2000) 6-83
People v McCullum, 201 Mich App 463 (1993) 3-50
People v McDaniel, 480 Mich 1162 (2008) 6-76
People v McDonald (Deandre), 293 Mich App 292 (2011) 5-88
People v McElhaney, 215 Mich App 269 (1996) 3-86
People v McFall, 224 Mich App 403 (1997) 3-9, 5-27
People v McGee (Anthony), 280 Mich App 680 (2008) 3-161
People v McGee (Keangela), 258 Mich App 683 (2003) 2-49, 2-51
People v McGhee (Larry A), 268 Mich App 600 (2005) 5-34, 5-78, 5-112
People v McGhee (Larry Arnold), 255 Mich App 623 (2003) 3-120
People v McGinnis, 402 Mich 343 (1978) 3-17, 3-18
People v McLaughlin, 258 Mich App 635 (2003) 3-47, 5-30, 5-81, 7-21
People v McLeod, 107 Mich App 710 (1981) 5-6
People v McLott, 70 Mich App 524 (1976) 6-51
People v McMillan, 213 Mich App 134 (1995) 5-118

 Michigan Judicial Institute © 2012

People v McNally, unpublished opinion per curiam of the Court of Appeals, February 10, 2005 (Docket No. 252849) 5-29
People v McPherson, 263 Mich App 124 (2004) 5-63
People v McReavy, 436 Mich 197 (1990) 3-79, 3-82
People v McSwain, 259 Mich App 654 (2003) 3-19, 6-91
People v Meadows, 175 Mich App 355 (1989) 2-43
People v Mechura, 205 Mich App 481 (1994) 5-109
People v Meconi, 277 Mich App 651 (2008) 7-19
People v Mehall, 454 Mich 1 (1997) 3-159, 5-69, 5-70, 5-99
People v Merritt, 396 Mich 67 (1976) 3-18
People v Meshell, 265 Mich App 616 (2005) 3-163, 6-79
People v Messenger, 221 Mich App 171 (1997) 5-87, 5-111
People v Mette, 243 Mich App 318 (2000) 3-19
People v Miles, 454 Mich 90 (1997) 6-43
People v Miller (Dwjuan), 411 Mich 321 (1981) 5-19
People v Miller (Michael), 482 Mich 540 (2008) 5-11, 5-106
People v Miller (Willie), 440 Mich 631 (1992) 3-24
People v Mills, 450 Mich 61 (1995) 5-28
People v Milosavleski, 450 Mich 954 (1996) 2-11
People v Milstead, 250 Mich App 391 (2002) 7-22
People v Minier, 100 Mich App 114 (1980) 1-18
People v Mischley, 164 Mich App 478 (1987) 3-38, 5-33, 5-118
People v Missouri (Milton), 100 Mich App 310 (1980) 3-48
People v Mitchell (Donald), 431 Mich 744 (1988) 4-5
People v Mitchell (Shane), 456 Mich 693 (1998) 3-162
People v Mitchell, 454 Mich 145 (1997) 5-112
People v Mixon, 170 Mich App 508 (1988) 1-17
People v Modelski, 164 Mich App 337 (1987) 3-62
People v Monasterski, 105 Mich App 645 (1981) 3-53
People v Montrose, 201 Mich App 378 (1993) 4-9
People v Mooradian, 221 Mich App 316 (1997) 4-2
People v Moore, 468 Mich 573 (2003) 6-43
People v Morgan, 205 Mich App 432 (1994) 6-58
People v Morrow, 214 Mich App 158 (1995) 3-40
People v Morse, 231 Mich App 424 (1998) 3-14
People v Morton, 77 Mich App 240 (1977) 3-85
People v Mosley (Richard), 400 Mich 181 (1977) 3-69
People v Mosly, 259 Mich App 90 (2003) 5-3, 5-5
People v Moss, 70 Mich App 18 (1976) 5-29
People v Mullen, 282 Mich App 14 (2008) 3-118
People v Mungo (On Second Remand), ___ Mich App ___ (2012) 3-112, 3-154
People v Murphy (Bernard) (On Remand), 282 Mich App 571 (2009) 3-89
People v Music, 428 Mich 356 (1987) 6-34
People v Muttscheler, 481 Mich 372 (2008) 6-14
People v Myers, 30 Mich App 409 (1971) 5-29
People v Nard, 78 Mich App 365 (1977) 5-29
People v Nash, 244 Mich App 93 (2000) 5-100
People v Neal, 201 Mich App 650 (1993) 2-46
People v Nelson, 443 Mich 626 (1993) 3-92
People v New, 427 Mich 482 (1986) 4-7, 4-14, 4-17
People v Newton, 179 Mich App 484 (1989) 3-18

People v Nick, 360 Mich 219 (1960) 5-83
People v Nix, 453 Mich 619 (1996) 3-159, 5-70
People v Nixten, 183 Mich App 95 (1990) 4-22
People v Northey, 231 Mich App 568 (1998) 2-43
People v Nowack, 462 Mich 392 (2000) 5-110
People v Nutt, 469 Mich 565 (2004) 3-157, 3-158
People v Nyx (Maurice), 479 Mich 112 (2007) 3-163, 5-76
People v Nyx, 480 Mich 1204 (2007) 3-163
People v Odom, 276 Mich App 407 (2007) 5-37
People v Ohlinger, 438 Mich 477 (1991) 3-103
People v Oliver (Kenneth), 63 Mich App 509 (1975) 3-38
People v Orlewicz, 293 Mich App 96 (2011) 1-4, 3-164
People v Ortiz-Kehoe, 237 Mich App 508 (1999) 5-100
People v Ortman, 209 Mich App 251 (1995) 6-82
People v Oswald, 208 Mich App 444 (1995) 6-29
People v Ovalle, 222 Mich App 463 (1997) 6-78
People v Paille, 383 Mich 621 (1970) 2-42
People v Paquette, 214 Mich App 336 (1995) 5-38
People v Parish, 282 Mich App 106 (2009) 6-43
People v Parker (Charles William III), 275 Mich App 213 (2007) 4-19
People v Parker (Charles), 267 Mich App 319 (2005) 6-84, 7-24
People v Parker (Jeffrey), 84 Mich App 447 (1978) 3-71
People v Patmore, 264 Mich App 139 (2004) 4-12
People v Patton, 285 Mich App 229 (2009) 2-5, 3-46, 3-53, 6-78
People v Payne, 285 Mich App 181 (2009) 2-52, 4-19, 5-42, 5-44, 5-60, 5-114
People v Perez, 469 Mich 415 (2003) 3-10
People v Perkins, 424 Mich 302 (1986) 3-13
People v Perlos, 436 Mich 305 (1990) 3-96
People v Perry (Juan), 201 Mich App 347 (1993) 6-81
People v Perry (Michael), 218 Mich App 520 (1996) 5-36
People v Petit, 466 Mich 624 (2002) 6-16
People v Petrac, 89 Mich App 188 (1979) 5-49
People v Petri, 279 Mich App 407 (2008) 6-10
People v Petty, 469 Mich 108 (2003) 6-59
People v Phillips (Paul), 468 Mich 583 (2003) 3-2, 3-8, 3-11
People v Pickens, 446 Mich 298 (1994) 5-112
People v Pillar, 233 Mich App 267 (1998) 6-80
People v Pipes, 475 Mich 267 (2006) 5-64, 5-68
People v Pizzino, 313 Mich 97 (1945) 5-106
People v Plato, 114 Mich App 126 (1981) 3-61
People v Plumaj, 284 Mich App 645 (2009) 4-5
People v Pointer (Robert), 133 Mich App 313 (1984) 5-38
People v Polk, 123 Mich App 737 (1983) 4-4
People v Porterfield, 166 Mich App 562 (1988) 3-77
People v Portillo, 241 Mich App 540 (2000) 2-25
People v Potrafka, 140 Mich App 749 (1985) 6-4
People v Powe, 469 Mich 1032 (2004) 6-18
People v Powell (Adie), 201 Mich App 516 (1993) 3-119
People v Powell (Paul), 235 Mich App 557 (1999) 3-100
People v Preuss, 436 Mich 714 (1990) 6-48
People v Pribble, 72 Mich App 219 (1976) 5-25

 Michigan Judicial Institute © 2012

People v Price, 214 Mich App 538 (1996) 3-163
People v Prieskorn, 424 Mich 327 (1985) 6-78
People v Quider, 172 Mich 280 (1912) 2-1
People v Rahilly, 247 Mich App 108 (2001) 6-53
People v Ramsey, 385 Mich 221 (1971) 5-6
People v Rapp, ___ Mich App ___ (2011) 7-14
People v Rasmussen, 191 Mich App 721 (1991) 3-97
People v Ratkov (After Remand), 201 Mich App 123 (1993) 6-6
People v Raymond Young, 276 Mich App 446 (2007) 6-11
People v Ream, 481 Mich 223 (2008) 3-161
People v Recorder's Ct Judge, 78 Mich App 576 (1977) 5-30
People v Reed, 198 Mich App 639 (1993) 5-120
People v Reese (Clinton), 466 Mich 440 (2002) 5-76
People v Reese (Richard), 281 Mich App 290 (2008) 3-154
People v Reichenbach, 459 Mich 109 (1998) 4-29
People v Reid, 420 Mich 326 (1984) 3-118
People v Resler, 210 Mich App 24 (1995) 6-77, 6-84
People v Reynolds (Anthony), 93 Mich App 516 (1979) 3-37
People v Reynolds (Michael), 195 Mich App 182 (1992) 6-74
People v Richards (Larry), 205 Mich App 438 (1994) 6-52
People v Richardson (Derrie), 204 Mich App 71 (1994) 3-63
People v Riemersma, 104 Mich App 773 (1981) 5-106
People v Ritter, 186 Mich App 701 (1991) 6-82
People v Robbins, 223 Mich App 355 (1997) 2-47
People v Roberson, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2002 (Docket No. 223791) 5-49
People v Robinson, 203 Mich App 196 (1993) 6-1
People v Rocha, 110 Mich App 1 (1981) 5-101
People v Rodriguez, 251 Mich App 10 (2002) 5-121
People v Rogers, 249 Mich App 77 (2001) 7-27
People v Rohrer, 174 Mich App 732 (1989) 5-106
People v Ronowski, 222 Mich App 58 (1997) 6-37
People v Rose, 289 Mich App 499 (2010) 5-52
People v Roseberry, 465 Mich 713 (2002) 4-29
People v Rosenberg, 477 Mich 1076 (2007) 6-44
People v Ross (Edward), 145 Mich App 483 (1985) 3-47
People v Ross (Kenneth), 181 Mich App 89 (1989) 5-38
People v Roupe, 150 Mich App 469 (1986) 5-13
People v Rouse (Rouse I), 272 Mich App 665 (2006) 5-92
People v Rouse (Rouse II), 477 Mich 1063 (2007) 5-92
People v Russell (Darwin), 266 Mich App 307 (2005) 2-49
People v Russell (Lord), 471 Mich 182 (2004) 2-30
People v Russo, 439 Mich 584 (1992) 3-124, 7-29
People v Ryan (Sean), 295 Mich App 388 (2012) 3-67
People v Ryan (Thomas), 451 Mich 30 (1996) 4-22
People v Saenz, 173 Mich App 405 (1988) 6-51
People v Saffold, 465 Mich 268 (2001) 4-6
People v Salgat, 173 Mich App 742 (1988) 6-50
People v Sammons, 191 Mich App 351 (1991) 5-50
People v Sampson, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket Nos. 239329, 239330) 5-87

People v Sands, 261 Mich App 158 (2004) 7-28
People v Sanger, 222 Mich App 1 (1997) 3-87
People v Savoie, 419 Mich 118 (1984) 4-15
People v Sawyer (Ralph), 410 Mich 531 (1981) 6-18
People v Sawyer (Thomas), 215 Mich App 183 (1996) 5-10
People v Saylor (Barry), 88 Mich App 270 (1979) 6-50
People v Schaafsma, 267 Mich App 184 (2005) 6-11, 6-84
People v Schmitz, 231 Mich App 521 (1998) 5-19
People v Schneider, 132 Mich App 214 (1984) 4-28
People v Schumacher, 276 Mich App 165 (2007) 5-34
People v Scott (John), 216 Mich App 196 (1996) 6-73
People v Seals, 285 Mich App 1 (2009) 2-40
People v Secrest, 413 Mich 521 (1982) 3-144
People v Seibert, 450 Mich 500 (1995) 4-23
People v Seiders, 262 Mich App 702 (2004) 6-74
People v Shabaz, 424 Mich 42 (1985) 3-92, 3-97
People v Shannon, 88 Mich App 138 (1979) 3-17
People v Shepherd, 472 Mich 343 (2005) 7-20
People v Shields, 200 Mich App 554 (1993) 3-38, 5-6
People v Short, 289 Mich App 538 (2010) 3-153
People v Shue, 145 Mich App 64 (1985) 3-53
People v Shuler, 188 Mich App 548 (1991) 4-20
People v Sierb, 456 Mich 519 (1998) 7-19
People v Simon, 189 Mich App 565 (1991) 5-6
People v Sims, 489 Mich 970 (2011) 6-8, 6-9
People v Sinclair (Jody), 247 Mich App 685 (2001) 3-55
People v Sinclair (John), 387 Mich 91 (1972) 3-31
People v Slaughter, 489 Mich 302 (2011) 3-103, 3-130
People v Sloan, 450 Mich 160 (1995) 3-124
People v Slovinski, 166 Mich App 158 (1988) 3-14
People v Smielewski (Timothy Richard), 235 Mich App 196 (1999) 5-95
People v Smielewski (Timothy), 214 Mich App 55 (1995) 2-23
People v Smith (Bobby), 478 Mich 292 (2007) 3-157, 3-160
People v Smith (Diapolis), 463 Mich 199 (2000) 5-9
People v Smith (Gary), 482 Mich 292 (2008) 6-12
People v Smith (Keith), 101 Mich App 110 (1980) 7-31
People v Smith (Kerry), 211 Mich App 233 (1995) 3-39, 5-7, 5-101
People v Smith (Lee), 420 Mich 1 (1984) 3-96
People v Smith (Michael), 195 Mich App 147 (1992) 6-74
People v Smith (Randy), 478 Mich 64 (2007) 5-79
People v Smith (Rhasiaon), 475 Mich 891 (2006) 6-3
People v Smith (Ricky), 437 Mich 293 (1991) 6-96
People v Smith (Steven), 191 Mich App 644 (1991) 3-151
People v Smith (Timothy), 423 Mich 427 (1985) 6-28
People v Snider, 239 Mich App 393 (2000) 5-115
People v Sobczak-Obetts, 463 Mich 687 (2001) 3-123, 3-156
People v Solomon, 82 Mich App 502 (1978) 2-46
People v Solomonson, 261 Mich App 657 (2004) 6-11
People v Sowders, 164 Mich App 36 (1987) 5-23
People v Spangler, 285 Mich App 136 (2009) 5-62
People v Spanke, 254 Mich App 642 (2003) 6-6

 Michigan Judicial Institute © 2012

People v Spann, 250 Mich App 527 (2002) 6-19
People v Spencer, 192 Mich App 146 (1991) 4-13
People v Stacy, 193 Mich App 19 (1992) 3-78
People v Staffney, 187 Mich App 660 (1990) 5-54
People v Stammer, 179 Mich App 432 (1989) 4-14
People v Stanaway, 446 Mich 643 (1994) 5-112
People v Stanley, 207 Mich App 300 (1994) 6-64
People v Stead, 270 Mich App 550 (2006) 6-76
People v Steele (Chester), 429 Mich 13 (1987) 5-80
People v Steele (James), 292 Mich App 308 (2011) 3-74, 3-133
People v Stephan, 241 Mich App 482 (2000) 3-30
People v Sterling, 154 Mich App 223 (1986) 5-38
People v Stevens (Donald), 138 Mich App 438 (1984) 4-4
People v Stevens (Eugene), 460 Mich 626 (1999) 3-149
People v Stevens (James), 461 Mich 655 (2000) 2-39, 4-17
People v Stimage, 202 Mich App 28 (1993) 5-29
People v Stinnett, 163 Mich App 213 (1987) 5-72
People v Stinson, 113 Mich App 719 (1982) 5-107
People v Stone, 269 Mich App 240 (2005) 3-40, 3-55
People v Stoudemire, 429 Mich 262 (1987) 6-48
People v Strand, 213 Mich App 100 (1995) 3-87, 5-105
People v Strawther, 480 Mich 900 (2007) 3-160
People v Strickland, ___ Mich App ___ (2011) 2-28
People v Strickland, 293 Mich App 393 (2011) 2-28
People v Stricklin, 162 Mich App 623 (1987) 3-44
People v Strong, 213 Mich App 107 (1995) 4-12
People v Strutenski, 39 Mich App 72 (1972) 3-7
People v Stumpf, 196 Mich App 218 (1992) 3-117
People v Sturgis, 427 Mich 392 (1986) 3-162
People v Suchy, 143 Mich App 136 (1985) 3-57
People v Sullivan (Charles), 392 Mich 324 (1974) 5-90, 5-93
People v Sullivan (John), 231 Mich App 510 (1998) 3-29
People v Swafford, 483 Mich 1 (2009) 3-53
People v Swan, 394 Mich 451 (1975) 5-47
People v Szalma, 487 Mich 708 (2010) 5-70, 5-71
People v Szymanski, 406 Mich 944 (1979) 2-21
People v Tanner (Hattie Mae), 255 Mich App 369 (2003) 2-4, 2-6
People v Tanner (Hattie), 469 Mich 437 (2003) 3-10
People v Tanner (Richard), 387 Mich 683 (1972) 6-18
People v Tate, 244 Mich App 553 (2001) 5-20
People v Tavernier, ___ Mich App ___ (2012) 3-111
People v Taylor (Eric), 482 Mich 368 (2008) 5-65
People v Taylor (Geracer), 275 Mich App 177 (2007) 5-59, 5-112
People v Taylor (Kelvin), 252 Mich App 519 (2002) 5-38
People v Taylor (Paul), 253 Mich App 399 (2002) 3-104
People v Taylor (Robert), 159 Mich App 468 (1987) 3-7
People v Taylor (Willie), 245 Mich App 293 (2001) 5-4
People v Teasdale, 335 Mich 1, 5 (1952) 6-32
People v Terrell, 289 Mich App 553 (2010) 5-109
People v Tesen, 276 Mich App 134 (2007) 1-20
People v Thomas (Carl), 260 Mich App 450 (2004) 5-108

People v Thomas (Gerry), 447 Mich 390 (1994) 6-18
People v Thomas (James), 438 Mich 448 (1991) 2-46
People v Thomas (William), 1 Mich App 118 (1965) 3-9
People v Thomason, 173 Mich App 812 (1988) 2-53
People v Thompson (Jerry), 431 Mich 853 (1988) 7-33
People v Tierney, 266 Mich App 687 (2005) 2-3, 3-67, 3-82, 3-98, 3-127, 7-23
People v Tobey, 401 Mich 141 (1977) 2-50
People v Toma, 462 Mich 281 (2000) 3-25
People v Tombs, 472 Mich 446 (2005) 7-26
People v Toohey, 438 Mich 265 (1991) 3-112, 3-131
People v Torres (Gavino) (On Remand), 222 Mich App 411 (1997) 5-76
People v Traughber, 432 Mich 208 (1989) 5-8
People v Travis, 443 Mich 668 (1993) 3-16
People v Traylor, 245 Mich App 460 (2001) 2-28, 5-115
People v Trinity, 189 Mich App 19 (1991) 6-54
People v Triplett, 163 Mich App 339 (1987) 5-101
People v Turner (Clarence Duane), 144 Mich App 107 (1985) 3-57, 5-43
People v Turner (Clarence Jr), 181 Mich App 680 (1989) 3-92
People v Turner (Halbert), 92 Mich App 485 (1979) 6-52
People v Twomey, 173 Mich App 247 (1988) 2-42
People v Tyburski (Leonard), 196 Mich App 576 (1992) 5-11
People v Tyrer, 19 Mich App 48 (1969) 5-102
People v Tyson, 423 Mich 357 (1985) 3-78
People v Ulman, 244 Mich App 500 (2001) 3-115
People v Underwood (Lanford), 447 Mich 695 (1994) 3-5
People v Underwood (Michael), 278 Mich App 334 (2008) 6-44
People v Unger, 278 Mich App 210 (2008) 2-49, 3-121, 5-33, 5-40, 6-57
People v Uphaus (On Remand), 278 Mich App 174 (2008) 6-17
People v Upshaw, 172 Mich App 386 (1988) 5-6
People v Valentin, 457 Mich 1 (1998) 7-27
People v Vasquez (After Remand), 461 Mich 235 (1999) 3-150
People v Vaughn (Joseph), 291 Mich App 183 (2010) 1-4, 3-72, 5-113
People v Vaughn (Kevin), 186 Mich App 376 (1990) 5-8
People v Vaughn (Marcus), 409 Mich 463 (1980) 5-7, 5-96
People v Veling, 443 Mich 23 (1993) 6-59
People v Vincent, 455 Mich 110 (1997) 5-72
People v Von Everett, 156 Mich App 615 (1986) 5-107
People v Vonins (After Remand), 203 Mich App 173 (1993) 4-14, 4-17
People v Waclawski, 286 Mich App 634 (2009) 2-3, 3-48, 3-53
People v Wade (Michael), 283 Mich App 462 (2009) 1-15, 5-75, 5-96
People v Wagner, 114 Mich App 541 (1982) 5-4, 5-5
People v Walker (Alonzo), 461 Mich 908 (1999) 5-7, 5-96
People v Walker (Alvin), 273 Mich App 56 (2006). 5-57
People v Walker (Jefforey), 162 Mich App 60 (1987) 5-12
People v Walker (Lee), 374 Mich 331 (1965) 3-60, 3-63, 7-32
People v Walker (Robert), 485 Mich 870 (2009) 6-8
People v Walker (Thomas), 167 Mich App 377 (1988) 5-116
People v Wallace, 284 Mich App 467 (2009) 6-33
People v Walls, 265 Mich App 642 (2005) 5-78
People v Walters (David), 463 Mich 717 (2001) 6-90
People v Walters (Jayne), 266 Mich App 341 (2005) 3-91, 7-11

 Michigan Judicial Institute © 2012

People v Wanty, 189 Mich App 291 (1991) 4-7
People v Ware, 239 Mich App 437 (2000) 6-59
People v Washington (Allan), 468 Mich 667 (2003) 5-23
People v Washington (Sylvester), 489 Mich 871 (2011) 6-18
People v Waters, 118 Mich App 176 (1982) 2-44, 2-46
People v Watkins, 277 Mich App 358 (2007) 7-27
People v Watson, 245 Mich App 572 (2001) 5-29, 5-31, 5-68
People v Weatherford, 132 Mich App 165 (1984) 2-21
People v Weatherspoon, 171 Mich App 549 (1988) 1-20
People v Webb, 458 Mich 265 (1998) 7-27
People v Webbs, 263 Mich App 531 (2004) 3-41, 3-43
People v Weeks, 165 Mich App 362 (1911) 2-53
People v Wells, 103 Mich App 455 (1981) 5-43
People v Wershe, 166 Mich App 602 (1988) 2-21
People v Wess, 235 Mich App 241 (1999) 5-72
People v West (Halton), 159 Mich App 424 (1987) 4-7
People v Whalen, 390 Mich 672 (1973) 3-109
People v Wheeler, 480 Mich 965 (2007) 5-77
People v White (James), 392 Mich 404 (1974) 3-70
People v White (John), 411 Mich 366 (1981) 3-31
People v White (Kadeem), 294 Mich App 622 (2011) 3-75
People v Whitehead, 238 Mich App 1 (1999) 2-6
People v Whiteside, 437 Mich 188 (1991) 6-73, 6-77
People v Whitfield, 461 Mich 441 (2000) 3-117
People v Whyte, 165 Mich App 409 (1988) 3-20
People v Wiejecha, 14 Mich App 486 (1968) 3-59
People v Wilder, 485 Mich 35 (2010) 5-76
People v Wiley, 472 Mich 153 (2005) 6-9, 6-17
People v Williams (Anterio), 244 Mich App 249 (2001) 3-40, 6-16
People v Williams (Avana), 464 Mich 174 (2001) 4-12, 4-20
People v Williams (Carletus), 483 Mich 226 (2009) 2-49
People v Williams (Charles), 386 Mich 565 (1972) 3-57
People v Williams (Cleveland), 475 Mich 245 (2006) 3-51
People v Williams (Joezell I), 265 Mich App 68 (2005) 3-164
People v Williams (Joezell), 475 Mich 101 (2006) 3-163
People v Williams (John L Jr), 422 Mich 381 (1985) 3-63
People v Williams (John Lavell), 472 Mich 308 (2005) 3-108, 3-135
People v Williams (John), 241 Mich App 519 (2000) 5-21, 5-23
People v Williams (Kevin), 244 Mich App 533 (2001) 2-22, 3-89
People v Williams (Louis), 78 Mich App 737 (1977) 5-21
People v Williams (Reginald), 275 Mich App 194 (2007) 3-79
People v Williams (Robert), 294 Mich App 461 (2011) 3-162
People v Williams (Rodney), 470 Mich 634 (2004) 2-32, 2-35
People v Williams (Tyrone), 173 Mich App 312 (1988) 5-44
People v Williams (Walter), 245 Mich App 427 (2001) 6-59
People v Willing, 267 Mich App 208 (2005) 2-32, 3-87
People v Wilson (Albert), 390 Mich 689 (1973) 5-98
People v Wilson (Amir), 454 Mich 421 (1997) 3-158
People v Wilson (Donald), 469 Mich 1018 (2004) 2-47
People v Wilson (Roy), 397 Mich 76 (1976) 3-57
People v Winford, 404 Mich 400 (1978) 6-72

People v Wise, 134 Mich App 82 (1984) 5-33
People v Witherspoon, 257 Mich App 329 (2003) 6-44
People v Wolfe, 440 Mich 508 (1992) 5-111
People v Wolverton, 227 Mich App 72 (1997) 5-29
People v Woods (Art), 172 Mich App 476 (1988) 5-47
People v Woods (Robert), 241 Mich App 545 (2000) 3-34
People v Wright, 432 Mich 84 (1989) 6-49
People v Wybrecht, 222 Mich App 160 (1997) 6-5, 6-42
People v Yacks, 38 Mich App 437 (1972) 3-60
People v Yost (Donna Alice), 278 Mich App 341 (2008) 3-9
People v Yost (Donna), 468 Mich 122 (2003) 2-41
People v Young (Donnie), 21 Mich App 684 (1970) 3-85, 3-86
People v Zahn, 234 Mich App 438 (1999) 3-72, 3-97
People v Zinn, 217 Mich App 340 (1996) 6-46
People v Zuccarini, 172 Mich App 11 (1988) 3-121
Perry v New Hampshire, 565 US ___ (2012) 3-85, 3-86
Pickens v Howes, 549 F3d 377 (CA 6, 2008) 4-14
Pickering v Pickering, 253 Mich App 694 (2002) 1-27
Pobursky v Gee, 249 Mich App 44 (2001) 1-27
Pointer (Bob) v Texas, 380 US 400 (1965) 5-50
Porter v Porter, 285 Mich App 450 (2009) 1-23
Powell v Alabama, 287 US 45 (1932) 5-117
Presley v Georgia, 558 US ___ (2010) 1-4

R

Rakas v Illinois, 439 US 128 (1978) 3-96, 3-99
Remmer v United States, 347 US 227 (1954) 5-107
Renico v Lett, 559 US ___ (2010) 5-94, 5-100
Republican Party of Minn v White, 536 US 765 (2002) 1-15
Rhode Island v Innis, 446 US 291 (1980) 3-74, 3-75
Rice v White, 660 F3d 242 (CA 6, 2011) 5-16, 5-22
Richard v Schneiderman & Sherman, PC, ___ Mich App ___ (2011) 7-24
Richards (Steiney) v Wisconsin, 520 US 385 (1997) 3-103
Richardson (Gloria) v Marsh, 481 US 200 (1987) 5-64
Richmond Newspapers, Inc v Virginia, 448 US 555 (1980) 1-3
Riggins v Nevada, 504 US 127 (1992) 3-18, 5-48
Risk v Lincoln Charter Twp Bd of Trustees, 279 Mich App 389 (2008) 7-23
Rivera v Illinois, 556 US 148 (2009) 5-15
Riverside v McLaughlin, 500 US 44 (1991) 2-5, 3-70
Roberts (Lisa) v Mecosta Co Gen Hosp, 466 Mich 57 (2002) 7-27
Rosencrantz v Lafler, 568 F3d 577 (CA 6, 2009) 5-108
Rothgery v Gillespie Co, Texas, 554 US 191 (2008) 2-23
Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007) 7-24
Ruimveld v Birkett, 404 F3d 1006 (CA 6, 2005) 5-45
Rutledge v United States, 517 US 292 (1996) 3-163
Rymal v Baergen, 262 Mich App 274 (2004) 1-20

 Michigan Judicial Institute © 2012

S

Safford Unified School Dist #1 et al. v Redding, 557 US 364 (2009) 3-113
Samson v California, 547 US 843 (2006) 3-114
Saylor v Kingsley Area Emergency Ambulance Service, 238 Mich App 592 (1999) 7-29
Schlossberg v State Bar Grievance Bd, 388 Mich 389 (1972) 1-19
Schneckloth v Bustamonte, 412 US 218 (1973) 3-140
Schreiber v Moe, 596 F3d 323 (CA 6, 2010) 3-129
Segura v United States, 468 US 796 (1984) 3-151
Sell v United States, 539 US 166 (2003) 3-19
Shaneberger v Jones, 615 F3d 448 (CA 6, 2010) 3-74
Sharrar v Felsing, 128 F3d 810 (CA 3, 1997) 3-147
Sheppard (Samuel) v Maxwell, 384 US 333 (1966) 3-41
Shinholster v Annapolis Hosp, 471 Mich 540 (2004) 7-26
Simmons v United States, 390 US 377 (1968) 3-90
Sitz v Dep't of State Police, 443 Mich 744 (1993) 3-115
Skilling v United States, 561 US ___ (2010) 3-41
Smith (Harold) v Phillips (William), 455 US 209 (1982) 5-107
Smith v Cain, 565 US ___ (2012) 3-6
Snyder v Louisiana, 552 US 472 (2008) 5-17
Spano v New York, 360 US 315 (1959) 3-68
Stack v Boyle, 342 US 1 (1951) 2-6
Stanley v Georgia, 394 US 557 (1969) 3-144
Stovall v Denno, 388 US 293 (1967) 3-85, 3-90
Strickland v Washington, 466 US 668 (1984) 4-15, 4-24, 5-112, 5-116, 5-117, 5-119, 5-120
Sword v Sword, 399 Mich 367 (1976) 1-25

T

Taylor (Billy) v Louisiana, 419 US 522 (1975) 5-8
Taylor (Michael) v Kentucky, 436 US 478 (1978) 5-42
Teague v Lane, 489 US 288 (1989) 7-24
Tennessee v Street, 471 US 409 (1985) 5-63
Terry (John) v Ohio, 392 US 1 (1968) 3-74, 3-92, 3-106, 3-133
Thaler v Haynes, 559 US ___ (2010) 5-18
Thompkins v Berghuis, 547 F3d 572 (CA 6, 2008) 5-115
Thompson (Carl) v Keohane, 516 US 99 (1995) 3-72
Thornton v United States, 541 US 615 (2004) 3-111
Triplett v Deputy Warden, 142 Mich App 774 (1985) 7-19
Truel v City of Dearborn, 291 Mich App 125 (2010) 2-40
Turner v Rogers, 564 US ___ (2011) 1-25

U

Ungar v Sarafite, 376 US 575 (1964) 3-56
United States v Al-Azzawy, 784 F2d 890 (CA 9, 1985) 3-147
United States v Al-Cholan, 610 F3d 945 (CA 6, 2010) 3-34, 3-65
United States v Alpern, 564 F2d 755 (CA 7, 1977) 5-48
United States v Alvarado-Saldivar, 62 F3d 697 (CA 5, 1995) 3-79

United States v Arvizu, 534 US 266 (2002) 3-109
United States v Aukai, 497 F3d 955 (2007) 3-113
United States v Bay, 762 F2d 1314 (CA 9, 1984) 5-48
United States v Booker, 543 US 220 (2005) 6-7
United States v Brignoni-Ponce, 422 US 873 (1975) 3-143
United States v Brown (Dois), 449 F3d 741 (CA 6, 2006) 3-125
United States v Campbell, 732 F2d 1017 (CA 1, 1984) 5-49
United States v Carter, 378 F3d 584 (CA 6, 2004) 3-139
United States v Chadwick, 433 US 1 (1977) 3-104
United States v Colbert, 474 F2d 174 (CA 5, 1973) 3-97
United States v Cronic, 466 US 648 (1984) 5-117
United States v Davis, 577 F3d 660 (CA 6, 2009) 5-54
United States v DeBerry, 487 F2d 448 (CA 2, 1973) 3-113
United States v Dixon (Alvin), 509 US 688 (1993) 3-159
United States v Domenech, 623 F3d 325 (CA 6, 2010) 3-100
United States v Dunavan, 485 F2d 201 (CA 6, 1973) 3-112
United States v Dunn, 480 US 294 (1987) 3-98, 3-145
United States v Frazier (Eric), 213 F3d 409 (CA 7, 2000) 4-22
United States v Frechette, 583 F3d 374 (CA 6, 2009) 3-116
United States v Gaudin, 515 US 506 (1995) 5-72
United States v Gonzalez-Lopez, 548 US 140 (2006) 2-24
United States v Gould, 364 F3d 578 (CA 5, 2004) 3-127
United States v Grubbs, 547 US 90 (2006) 3-123
United States v Haygood, 549 F3d 1049 (CA 6, 2008) 4-10
United States v Henry (Roderick), 545 F3d 367 (CA 6, 2008) 5-34
United States v Hinojosa, 606 F3d 875 (CA 6, 2010) 3-139
United States v Hunyady, 409 F3d 297 (CA 6, 2005) 3-101
United States v Jacobsen, 466 US 109 (1984) 3-94
United States v Jeffers, 342 US 48 (1951) 3-58
United States v Johns, 469 US 478 (1985) 3-110
United States v Johnson (Earl), 581 F3d 320 (CA 6, 2009) 5-65
United States v Jones (Antoine), 565 US ___ (2012) 3-94, 3-96, 3-104
United States v Knights, 534 US 112 (2001) 3-114, 3-140
United States v Lace, 669 F2d 46 (CA 2, 1982) 3-95
United States v Lamb, 575 F2d 1310 (CA 10, 1978) 5-48
United States v Lanier, 636 F3d 228 (CA 6, 2011) 3-100
United States v Lee (James), 274 US 559 (1927) 3-95
United States v Leon, 468 US 897 (1984) 3-119, 3-153
United States v Leone, 823 F2d 246 (CA 8, 1987) 5-49
United States v Long (Richard), 464 F3d 569 (CA 6, 2006) 3-133
United States v Lovasco, 431 US 783 (1977) 2-4
United States v Maceo, 873 F2d 1 (CA , 1989) 5-49
United States v Maez, 872 F2d 1444 (CA 10, 1989) 3-147
United States v Martin (Rickey), 399 F3d 750 (CA 6, 2005) 3-95
United States v Martin Linen Supply Co, 430 US 564 (1977) 3-160
United States v Marxen, 410 F3d 326 (CA 6, 2005) 3-137
United States v Mastromatteo, 538 F3d 535 (CA 6, 2008) 3-117
United States v Matlock, 415 US 164 (1974) 3-140
United States v Moreno, 933 F2d 362 (CA 6, 1991) 5-45
United States v Morgan, 743 F2d 1158 (CA 6, 1984) 3-147, 3-148
United States v Morrison, 449 US 361 (1981) 4-27

 Michigan Judicial Institute © 2012

United States v Nazemian, 948 F2d 522 (CA 9, 1991) 5-51
United States v Olano, 507 US 725 (1993) 7-21
United States v Owens, 484 US 554 (1988) 5-50
United States v Patane, 542 US 630 (2004) 3-62, 3-79
United States v Place, 462 US 696 (1983) 3-95
United States v Pollard, 215 F3d 643 (CA 6, 2000) 3-100
United States v Ramsey, 431 US 606 (1977) 3-113
United States v Robinson, 414 US 218 (1973) 3-131
United States v Ross (Albert Jr), 456 US 798 (1982) 3-108
United States v Salerno, 481 US 739 (1987) 2-6
United States v Salvucci, 448 US 83 (1980) 3-100
United States v Sells, 463 F3d 1148 (CA 10, 2006) 3-122
United States v Smith (Rickey), 526 F3d 306 (CA 6, 2008) 3-114
United States v Studabaker, 578 F3d 423 (CA 6, 2009) 3-159
United States v Talley, 164 F3d 989 (CA 6, 1999) 5-21
United States v Triplett, 828 F2d 1195 (CA 6, 1987) 4-10
United States v Valenzuela, 722 F2d 1431 (CA 9, 1983) 5-48
United States v Ventresca, 380 US 102 (1965) 3-115
United States v Vonn, 535 US 55 (2002) 4-7
United States v Wade (Billy), 388 US 218 (1967) 3-85, 3-89, 7-32
United States v Wells, 211 F3d 988 (CA 6, 2000) 4-22
United States v Williams (David), 544 F3d 683 (CA 6, 2008) 3-119
United States v Wilson (Loren), 719 F2d 1491 (CA 10, 1983) 5-49
United States v Yono, 605 F3d 425 (CA 6, 2010) 5-48

V

VanBuren Charter Twp v Garter Belt, Inc, 258 Mich App 594 (2003) 1-16
Vermont v Brillon, 556 US 81 (2009) 3-47
Victor v Nebraska, 511 US 1 (1994) 5-75
Virgil & Barbara Howe v Detroit Free Press, 440 Mich 203 (1992) 5-119
Virginia v Moore (David), 553 US 164 (2008) 3-131

W

Walker v McQuiggan, 656 F3d 311 (CA 6, 2011) 3-29, 5-117, 5-119
Waller v Georgia, 467 US 39 (1984) 1-4, 5-1
Washington (Jackie) v Texas, 388 US 14 (1967) 3-9, 5-27
Wayne Co Prosecutor v Parole Bd, 210 Mich App 148 (1995) 7-17
Wayne Co Rd Comm'rs v GLS LeasCo, Inc, 394 Mich 126 (1975) 1-20
Welch v Dist Court, 215 Mich App 253 (1996) 1-18
Wheat v United States, 486 US 153 (1988) 2-24
White-Bey v Dep't of Corrections, 239 Mich App 221 (2000) 6-41
Whorton v Bockting, 549 US 406 (2007) 5-54
Whren v United States, 517 US 806 (1996) 3-100, 3-134
Wiggins v Smith (Sewall), 539 US 510 (2003) 5-112
Wyoming v Houghton, 526 US 295 (1999) 3-107

Y

Yeager v United States, 557 US 110 (2009) 5-96
Youngblood v West Virginia, 547 US 867 (2006) 3-6

 Michigan Judicial Institute © 2012

Michigan Statutes

MCL 8.3 7-26
MCL 8.3k 5-24
MCL 8.5 7-26
MCL 15.231 6-97
MCL 15.234 6-94, 6-96, 6-97
MCL 24.207 7-17
MCL 24.301 7-18
MCL 24.303 7-19
MCL 24.304 7-19
MCL 24.306 7-18
MCL 28.291 6-4
MCL 28.291(1) 6-4
MCL 28.721 6-29, 6-54, 6-97
MCL 28.722 6-95
MCL 28.722(a) 6-57
MCL 28.732 6-54
MCL 51.282(2) 6-77
MCL 205.28(2) 6-34
MCL 257.1 6-92
MCL 257.625a(6) 3-155
MCL 257.625c 3-150
MCL 257.625k(7) 6-34
MCL 330.1400(g) 3-27
MCL 330.1404 3-31
MCL 330.1434 3-31
MCL 330.1515 3-31
MCL 330.1516 3-31
MCL 330.1750 3-29
MCL 330.1750(1) 3-29
MCL 330.1750(2) 3-29
MCL 330.2001a(6) 3-27
MCL 330.2020(1) 3-19
MCL 330.2020(2) 3-19
MCL 330.2022(2) 3-24
MCL 330.2024 3-20
MCL 330.2026(1) 3-21
MCL 330.2030(1) 3-22

MCL 330.2030(2) 3-22
MCL 330.2030(3) 3-22
MCL 330.2031 3-24
MCL 330.2031(2) 3-23
MCL 330.2032(3) 3-24
MCL 330.2034(1) 3-23, 3-24
MCL 330.2038 3-24
MCL 330.2040(1) 3-24
MCL 330.2042 6-73
MCL 330.2044(1) 3-24, 3-25
MCL 330.2044(3) 3-25
MCL 330.2050(1) 3-30, 4-9
MCL 330.2050(2) 3-31
MCL 330.2050(3) 3-31
MCL 333.7401 6-20, 6-23, 6-49
MCL 333.7401(2) 3-162, 5-75, 6-61, 6-69
MCL 333.7401(3) 6-19
MCL 333.7403(2) 5-75, 6-61, 6-62
MCL 333.7411 6-50, 6-52, 6-59
MCL 333.7461 6-21, 6-49
MCL 333.16101 6-4
MCL 393.503 3-11
MCL 393.506(1) 5-26
MCL 400.1501(d) 2-9
MCL 436.1703 6-50, 6-52
MCL 552.631 2-10
MCL 552.631(2) 2-10
MCL 552.632 2-10
MCL 552.641 1-23, 1-26
MCL 600.606 6-60
MCL 600.1060 6-51
MCL 600.1301 5-8
MCL 600.1307a 5-12
MCL 600.1307a(1) 5-12
MCL 600.1315 5-12
MCL 600.1337 5-11
MCL 600.1354(1) 5-12
MCL 600.1420 1-4
MCL 600.1432 5-25
MCL 600.1434 5-25
MCL 600.1455(1) 5-27
MCL 600.1645 3-43
MCL 600.1701 1-21, 1-23
MCL 600.1701(e) 1-21, 6-36
MCL 600.1701(g) 1-23
MCL 600.1711(1) 1-22
MCL 600.1711(2) 1-22
MCL 600.1715 1-29
MCL 600.1715(1) 1-26
MCL 600.1715(2) 1-25, 1-26
MCL 600.1735 1-23

 Michigan Judicial Institute © 2012

MCL 600.1852(2) 5-27
MCL 600.2101 Appx-15
MCL 600.2163a 3-3
MCL 600.2167(1) 2-45
MCL 600.2167(2) 2-45
MCL 600.2167(3) 2-45
MCL 600.2167(4) 2-45
MCL 600.2441 7-14
MCL 600.2950 1-23, 1-26, 1-27
MCL 600.2950(23) 1-29, 3-158
MCL 600.2950a 1-23, 1-26, 1-27
MCL 600.2950a(2) 1-27
MCL 600.2950a(3) 1-27
MCL 600.2950a(20) 1-29, 3-158
MCL 600.2950a(23) 1-28
MCL 600.2963 1-12
MCL 600.2963(1) 1-12
MCL 600.2963(8) 1-12
MCL 600.4310(3) 6-85
MCL 600.4835 2-17
MCL 600.8311 7-2
MCL 600.8312 3-41
MCL 600.8341 7-10
MCL 600.8342 7-2
MCL 600.8515 2-21
MCL 712A.4 6-59
MCL 712A.18e(14) 6-94
MCL 750.2 7-26
MCL 750.10 2-39
MCL 750.10a 6-70, 6-72
MCL 750.49(5) 6-34
MCL 750.50(4) 6-34
MCL 750.72 6-60
MCL 750.81c(3) 2-20
MCL 750.82 3-160, 5-78
MCL 750.82(1) 3-160
MCL 750.83 6-60
MCL 750.84 3-160, 6-60
MCL 750.86 6-60
MCL 750.89 3-161, 5-78, 6-60
MCL 750.91 6-60
MCL 750.110 6-22
MCL 750.110a 6-22
MCL 750.110a(2) 5-76, 5-77, 6-60
MCL 750.110a(4) 5-76, 5-77
MCL 750.145a 5-83
MCL 750.145c 6-25, 6-27
MCL 750.145c(2) 6-92
MCL 750.145c(3) 6-92
MCL 750.145c(4) 6-92
MCL 750.145d 6-92

MCL 750.157a 6-60
MCL 750.157b 6-60
MCL 750.158 6-71
MCL 750.165 2-10
MCL 750.165(3) 2-10
MCL 750.165(4) 6-58
MCL 750.186a 6-60
MCL 750.193 6-19
MCL 750.195 6-19
MCL 750.197 6-19
MCL 750.223 6-19
MCL 750.227 6-19
MCL 750.227a 6-19
MCL 750.227b 6-33
MCL 750.227b(2) 6-19
MCL 750.230 6-19
MCL 750.316 6-60
MCL 750.317 6-60
MCL 750.335a 6-71, 6-72
MCL 750.338 6-71, 6-72
MCL 750.338a 6-71, 6-72
MCL 750.338b 6-71, 6-72
MCL 750.349 6-60
MCL 750.350a 6-50, 6-52
MCL 750.430 6-50, 6-52
MCL 750.506 6-27
MCL 750.520a(j) 5-95
MCL 750.520b 6-60
MCL 750.520b(1) 3-161
MCL 750.520c 6-92
MCL 750.520d 6-92
MCL 750.520d(1) 3-161, 5-116
MCL 750.520g 6-92
MCL 750.520j 3-11, 3-12, 3-14
MCL 750.520j(1) 3-11, 3-13
MCL 750.520j(2) 3-11
MCL 750.520k 1-4, 1-7
MCL 750.529 3-160, 6-60
MCL 750.529a 6-60
MCL 750.529a(1) 3-161
MCL 750.531 6-60
MCL 761.1(d) 2-39
MCL 761.1(g) 6-28, 6-47
MCL 761.1(k) 5-3
MCL 762.7 3-40, 3-41
MCL 762.8 3-41
MCL 762.11 6-50, 6-52, 6-53, 6-54, 6-55
MCL 762.11(1) 6-53, 6-55
MCL 762.11(2) 6-54
MCL 762.11(3) 6-54, 6-55
MCL 762.12 6-56, 6-57

 Michigan Judicial Institute © 2012

MCL 762.13(1) 6-56
MCL 762.13(2) 6-56
MCL 762.13(4) 6-56
MCL 762.13(5) 6-56
MCL 762.14(1) 6-57
MCL 762.14(2) 6-57
MCL 762.14(4) 6-57
MCL 762.15 6-53
MCL 763.1 2-29, 3-9, 5-50
MCL 763.2 5-1
MCL 763.3 5-2, 5-3, Appx-13, Appx-
MCL 763.3(1) 5-3
MCL 763.5 3-158
MCL 764.1d 2-2
MCL 764.13 2-5
MCL 764.15b(2) 1-28
MCL 764.15b(8) 1-28
MCL 764.26 2-5
MCL 765.1 2-20
MCL 765.5 2-11
MCL 765.6(1) 2-11
MCL 765.6(2) 2-11
MCL 765.6a 2-10
MCL 765.6b(3) 2-9
MCL 765.6b(6) 2-9
MCL 765.7 2-21
MCL 765.15 2-18, 2-20
MCL 765.15(1) 2-18, 2-19
MCL 765.15(2) 2-18
MCL 765.15(a) 2-18
MCL 765.26 2-15, 2-16
MCL 765.26(1) 2-16
MCL 765.28 2-17
MCL 765.28(1) 2-17
MCL 765.28(2) 2-17, 2-18, 2-20
MCL 765.28(3) 2-17
MCL 765.29 3-9
MCL 766.1 2-41
MCL 766.4 2-42, 2-43
MCL 766.7 2-42
MCL 766.13 2-42, 2-43
MCL 767.1 2-1, 2-2, 2-36
MCL 767.2 2-39
MCL 767.3 2-36
MCL 767.4 2-36
MCL 767.7 2-36
MCL 767.7a 2-36
MCL 767.7c 2-36
MCL 767.7d 2-36, 2-37
MCL 767.7e 2-36
MCL 767.7f 2-36, 2-37

MCL 767.7g 2-36
MCL 767.9 2-38
MCL 767.11 2-36
MCL 767.12 2-36
MCL 767.19e 2-36, 2-38
MCL 767.23 2-36
MCL 767.25(1) 2-36
MCL 767.25(3) 2-37
MCL 767.29 3-40
MCL 767.30 2-37
MCL 767.32 5-27
MCL 767.35 3-9
MCL 767.37 2-37, 4-2, Appx-3
MCL 767.40 2-2
MCL 767.40a(1) 3-8
MCL 767.40a(2) 3-9
MCL 767.42 2-2
MCL 767.42(1) 2-36
MCL 767.44 3-7, 3-8
MCL 767.45 2-47
MCL 767.45(1) 2-47, 2-48
MCL 767.55 2-48
MCL 767.61a 3-10, 6-71
MCL 767.71 2-42
MCL 767.76 2-48
MCL 767.91 3-9
MCL 767.94a 3-2, 3-8
MCL 767A.1 2-40, 2-41
MCL 767A.2 2-39
MCL 767A.3 2-39
MCL 767A.3(1) 2-39
MCL 767A.4(g) 2-39
MCL 767A.5(1) 2-39
MCL 767A.5(2) 2-39
MCL 767A.5() 2-39
MCL 767A.5(6) 2-40, 2-41
MCL 767A.6(1) 2-40
MCL 767A.8 2-40, 2-41
MCL 767A.9 2-39
MCL 768.1 3-46
MCL 768.2 3-56
MCL 768.3 5-46
MCL 768.5 3-44
MCL 768.7a 6-19
MCL 768.7a(2) 6-75
MCL 768.7b(2) 6-19
MCL 768.8 5-2
MCL 768.10 5-13
MCL 768.12(1) 5-14
MCL 768.12(2) 5-14
MCL 768.13(1) 5-14

 Michigan Judicial Institute © 2012

MCL 768.13(2) 5-14
MCL 768.13(3) 5-14
MCL 768.14 5-24
MCL 768.15 5-24
MCL 768.16 5-21, 5-25, 5-83, Appx-18
MCL 768.17 5-102
MCL 768.18 5-9, 5-20
MCL 768.20 3-15
MCL 768.20(1) 3-15
MCL 768.20(2) 3-15, 3-16
MCL 768.20(3) 3-15
MCL 768.20a 3-26, 3-29
MCL 768.20a(1) 3-26
MCL 768.20a(2) 3-26
MCL 768.20a(3) 3-10, 3-26, 4-9
MCL 768.20a(4) 3-26
MCL 768.20a(5) 3-25, 3-27
MCL 768.20a(6) 3-27
MCL 768.21 3-16
MCL 768.21(1) 3-16, 3-26
MCL 768.21(2) 3-16
MCL 768.21a 3-29
MCL 768.21a(1) 3-26, 3-27, 3-28, 4-8
MCL 768.21a(2) 3-28
MCL 768.21a(3) 3-26
MCL 768.26 5-6
MCL 768.28 5-40
MCL 768.29 5-38, 5-72, Appx-15
MCL 768.29a(1) 3-27
MCL 768.32 5-75, 5-76
MCL 768.32(1) 5-76
MCL 768.32(2) 5-80
MCL 768.35 4-1, 6-71, Appx-9
MCL 768.36(1) 3-30
MCL 768.36(2) 4-8
MCL 769.1 6-65, Appx-25
MCL 769.1() 6-59, 6-60, 6-61
MCL 769.1(3) 6-59, 6-60, 6-61, 6-62
MCL 769.1(4) 6-61
MCL 769.1(5) 6-62
MCL 769.1(6) 6-63
MCL 769.1(7) 6-64
MCL 769.1(8) 6-65
MCL 769.1(9) 6-64
MCL 769.1(10) 6-65
MCL 769.1(11) 6-65
MCL 769.1a 6-58
MCL 769.1a(2) 6-37
MCL 769.1a(3) 6-38
MCL 769.1a(12) 6-40
MCL 769.1a(14) 6-40

MCL 769.1b 6-63
MCL 769.1b(1) 6-66, 6-69
MCL 769.1b(2) 6-66, 6-67
MCL 769.1b(3) 6-66, 6-67, 6-70
MCL 769.1b(5) 6-69
MCL 769.1b(7) 6-70
MCL 769.1f 6-33
MCL 769.1h Appx-26
MCL 769.1h(1) 6-18
MCL 769.1j 6-29, 6-32, 6-35, 6-36, 6-53, Appx-26
MCL 769.1j(1) 6-35
MCL 769.1j(7) 6-35
MCL 769.1k 6-32, 6-33, 6-36, Appx-26, Appx-
MCL 769.1k(1) 6-32, 6-36
MCL 769.1k(2) 6-32
MCL 769.1k(4) 6-33
MCL 769.1k(5) 6-33
MCL 769.1l 1-12, 6-35
MCL 769.3(1) 6-33, 6-58
MCL 769.3(2) 6-58
MCL 769.4a 6-50, 6-52
MCL 769.8 6-18
MCL 769.8(1) 6-27
MCL 769.9 6-18
MCL 769.10 6-19, 6-20, 6-45, 6-47, 6-48, 6-49
MCL 769.10(1) 6-19, 6-20, 6-21, 6-49
MCL 769.10(2) 6-21, 6-49
MCL 769.10(3) 6-48
MCL 769.11 6-19, 6-20, 6-48, 6-49
MCL 769.11(1) 6-20, 6-21, 6-49
MCL 769.11(2) 6-21, 6-49
MCL 769.11(3) 6-48
MCL 769.11a 6-76
MCL 769.11b 6-73, 6-74, 6-75, 6-78
MCL 769.12 6-19, 6-20, 6-48, 6-49
MCL 769.12(1) 6-20, 6-21, 6-49
MCL 769.12(2) 6-21, 6-49
MCL 769.12(3) 6-48
MCL 769.13 6-46, 6-48
MCL 769.13(1) 6-45
MCL 769.13(2) 6-45
MCL 769.13(3) 6-46
MCL 769.13(4) 6-47
MCL 769.13(5) 6-46
MCL 769.13(6) 6-47
MCL 769.26 3-43, 5-104, 7-20
MCL 769.27 6-44
MCL 769.31(b) 6-3, 6-28
MCL 769.34(2) 6-6, 6-18, 6-49
MCL 769.34(3) 6-9, 6-10, 6-13, 7-32
MCL 769.34(4) 6-7

 Michigan Judicial Institute © 2012

MCL 769.34(5) 6-6, 6-59
MCL 769.34(6) 6-33
MCL 769.34(7) 6-17, 6-44, Appx-26
MCL 769.34(10) 6-5, 6-8, 6-17, 6-44
MCL 770.1 5-104, 7-26
MCL 770.3(1) 7-4, 7-6
MCL 770.3(2) 7-2, 7-6
MCL 770.3a 4-18
MCL 770.8 2-21
MCL 770.9 2-21
MCL 770.9a 2-21
MCL 770.9a(1) 2-20
MCL 770.9a(3) 2-20, 6-94
MCL 770.9b 2-20, 2-21
MCL 770.12(3) 2-21
MCL 771.1 1-26, 6-19, 6-20, 6-53
MCL 771.1() 6-28
MCL 771.1(2) 6-51, 6-64
MCL 771.1(3) 6-51
MCL 771.1(4) 6-64
MCL 771.2(1) 6-28, 6-82
MCL 771.2() 6-28
MCL 771.2a 6-28
MCL 771.3 6-34, 6-56
MCL 771.3(1) 6-29, 6-31, 6-40
MCL 771.3(2) 6-29, 6-31, 6-34
MCL 771.3() 6-29
MCL 771.3(5) 6-34
MCL 771.3(6) 6-31, 6-34
MCL 771.3(7) 6-31
MCL 771.3(8) 6-32, 6-34
MCL 771.3(9) 6-50, 6-53
MCL 771.3a(1) 6-65
MCL 771.3b 6-25, 6-30
MCL 771.3b(1) 6-22, 6-24
MCL 771.3b(2) 6-24, 6-25
MCL 771.3b(4) 6-25
MCL 771.3b(5) 6-25
MCL 771.3b(6) 6-26
MCL 771.3b(8) 6-26
MCL 771.3b(9) 6-26
MCL 771.3b(12) 6-26
MCL 771.3b(13) 6-26
MCL 771.3b(17) 6-24
MCL 771.3c 6-29
MCL 771.4 6-28, 6-80, 6-81, 6-83, 6-84
MCL 771.14 6-3, Appx-25
MCL 771.14(1) 6-1
MCL 771.14(2) 6-2, 6-3, 6-4, 6-18
MCL 771.14(3) 6-62
MCL 771.14(6) Appx-25

MCL 771.14(7) 6-4
MCL 771.14(9) 6-4
MCL 771.14a 1-26
MCL 771.14a(2) 6-62
MCL 775.15 3-9, 5-27
MCL 775.19a 3-11
MCL 775.22 2-20
MCL 777.11 6-6
MCL 777.14(2) 6-4
MCL 777.15 3-10
MCL 777.16q 6-72
MCL 777.21 6-6, 6-45, 6-48
MCL 777.21(2) 6-3
MCL 777.21(3) 6-48
MCL 777.50(4) 6-57
MCL 777.61 6-3, 6-48
MCL 777.69 6-3, 6-48
MCL 780.131 3-51, 3-52
MCL 780.131(2) 3-50, 3-51
MCL 780.133 3-51, 3-52
MCL 780.601 3-53
MCL 780.621 6-92, 6-95, 6-96
MCL 780.621(1) 6-91, 6-92
MCL 780.621(2) 6-92
MCL 780.621(3) 6-93
MCL 780.621(4) 6-93
MCL 780.621(5) 6-93, 6-94
MCL 780.621(6) 6-93
MCL 780.621(7) 6-94
MCL 780.621(8) 6-95
MCL 780.621(9) 6-95
MCL 780.621(10) 6-92
MCL 780.621a(b) 6-92
MCL 780.622 6-95, 6-96
MCL 780.622(1) 6-95
MCL 780.623 6-93, 6-94, 6-95
MCL 780.623(1) 6-96
MCL 780.623(2) 6-96, 6-97
MCL 780.623(3) 6-96, 6-97
MCL 780.623(4) 6-97
MCL 780.623(5) 6-97
MCL 780.624 6-92
MCL 780.651 3-116
MCL 780.651(1) 3-115
MCL 780.652 3-116
MCL 780.652(1) 3-120
MCL 780.652(2) 3-121
MCL 780.653 3-116, 3-117, 3-119
MCL 780.653(b) 3-118
MCL 780.654 3-116
MCL 780.654(1) 3-120

 Michigan Judicial Institute © 2012

MCL 780.655 3-123
MCL 780.656 3-101, 3-156
MCL 780.751 6-37, 6-58
MCL 780.752(1) 6-16
MCL 780.764 6-2
MCL 780.765 6-16
MCL 780.766 6-37
MCL 780.766(2) 6-37, Appx-26
MCL 780.766(8) 6-38
MCL 780.766(9) 6-38
MCL 780.766(10) 6-40, 6-41
MCL 780.766(11) 6-40
MCL 780.766(12) 6-40
MCL 780.766(14) 6-40
MCL 780.766a Appx-26
MCL 780.767(1) 6-37
MCL 780.767(4) 6-40
MCL 780.771 7-15, 7-16
MCL 780.772a 6-94
MCL 780.794(2) 6-37
MCL 780.811(1) 6-94
MCL 780.826(2) 6-37
MCL 780.827a 6-94
MCL 780.901 6-36
MCL 780.905 6-29
MCL 780.905(1) 6-36
MCL 780.905(2) 6-36
MCL 791.233(1) 7-14
MCL 791.233e(5) 7-14
MCL 791.233e(6) 7-14
MCL 791.234 6-75
MCL 791.234(9) 7-3, 7-15
MCL 791.234(11) 7-14, 7-15
MCL 791.234a(1) 6-22
MCL 791.234a(2) 6-22, 6-23
MCL 791.234a(3) 6-22, 6-23
MCL 791.234a(4) 6-22, 6-23
MCL 791.234a(5) 6-23
MCL 791.234a(6) 6-24
MCL 791.234c 6-4
MCL 791.234c(1) 6-4
MCL 791.235 7-16
MCL 791.236 7-16
MCL 791.238(1) 6-74, 6-75
MCL 791.238(2) 6-74, 6-76
MCL 791.238(5) 6-75
MCL 791.238(6) 6-74, 6-76
MCL 791.240a(1) 7-18
MCL 791.265a(9) 3-114
MCL 791.268 1-12
MCL 798.14(1) 6-22, 6-24, 6-26

MCL 798.16(1) 6-26
MCL 798.16(2) 6-24
MCL 800.33 6-76, 6-77
MCL 801.81 6-31
MCL 801.251 6-27
MCL 801.251(1) 6-27
MCL 801.263(2) 3-162
MCL 803.223 6-65
MCL 803.301 6-62
MCL 803.309 6-62

 Michigan Judicial Institute © 2012

Michigan Court Rules

MCR 1.108 3-55
MCR 1.108(1) 3-55
MCR 1.110 6-36, Appx-12
MCR 2.002 1-12, 2-26
MCR 2.002(D) 1-12, 2-26
MCR 2.002(G) 1-12, 2-26
MCR 2.003 1-13, 1-15, 5-5, Appx-14
MCR 2.003(B) 1-15
MCR 2.003(C) 1-13, 1-17, 1-18, 1-19
MCR 2.003(E) 1-18
MCR 2.107(B) 1-23
MCR 2.107(E) 7-8
MCR 2.107(G) 1-8
MCR 2.114 6-86
MCR 2.115(B) 1-8
MCR 2.119 1-5, 1-9, 7-11
MCR 2.119(A) 3-35
MCR 2.119(B) 1-17
MCR 2.119(C) 3-35, 3-36
MCR 2.119(F) 3-91, 3-92, 7-11
MCR 2.302(B) 3-3
MCR 2.302(C) 1-8
MCR 2.314(B) 3-29
MCR 2.401 3-36
MCR 2.401(B) 3-36
MCR 2.401(C) 3-36
MCR 2.401(E) 3-36
MCR 2.401(F) 3-36
MCR 2.503(B) 3-56
MCR 2.504 3-40
MCR 2.506 5-27
MCR 2.506(A) 5-27
MCR 2.506(B) 5-27
MCR 2.506(E) 5-27
MCR 2.506(F) 5-27
MCR 2.506(H) 5-28
MCR 2.506(I) 5-28

MCR 2.507(A) 5-29
MCR 2.507(B) 5-30
MCR 2.507(C) 5-31
MCR 2.507(E) 5-34
MCR 2.507(F) 5-29, 5-32
MCR 2.507(G) 4-2
MCR 2.510 5-8, 5-10, 5-11, 5-12, 5-14, 5-15
MCR 2.510(C) 5-10, 5-12
MCR 2.511(A) 5-8
MCR 2.511(C) 5-11
MCR 2.511(D) 5-12, 5-13
MCR 2.511(E) 5-14, 5-15
MCR 2.511(F) 5-11, 5-15
MCR 2.511(H) 5-24, 5-41
MCR 2.512(A) 5-73, Appx-17
MCR 2.512(B) 5-73
MCR 2.512(C) 5-81
MCR 2.512(D) 5-73
MCR 2.513 5-86
MCR 2.513(A) 5-73
MCR 2.513(B) 5-28, 5-84
MCR 2.513(C) 5-29, Appx-17, Appx-, Appx-
MCR 2.513(D) 5-30
MCR 2.513(E) 5-39
MCR 2.513(H) 5-39, 5-86
MCR 2.513(I) 5-39
MCR 2.513(J) 5-40, 5-41
MCR 2.513(K) 5-39
MCR 2.513(L) 5-32, 5-33, 5-34, Appx-17
MCR 2.513(M) 5-36, Appx-17
MCR 2.513(N) 5-32, 5-73, 5-74, 5-80, 5-81, 5-89, Appx-17, Appx-, Appx-18
MCR 2.513(O) 5-86, 5-88, Appx-18
MCR 2.513(P) 5-88
MCR 2.514(C) 5-90
MCR 2.515(A) 5-96
MCR 2.515(B) 5-97
MCR 2.515(C) 5-97
MCR 2.517(A) 3-38, 3-39, 3-60, 5-6, 7-30, 7-31
MCR 2.518(B) Appx-18
MCR 2.613(A) 7-21
MCR 2.613(C) 3-40, 4-23, 5-8, 7-19
MCR 2.625 7-14
MCR 3.207(A) 2-9
MCR 3.303 7-19
MCR 3.310(B) 1-27
MCR 3.604 7-4
MCR 3.606 1-23
MCR 3.606(A) 1-23
MCR 3.700 2-9
MCR 3.705(B) 1-28
MCR 3.706(A) 2-9

 Michigan Judicial Institute © 2012

MCR 3.707(A) 1-28
MCR 3.708 1-23, 1-28
MCR 3.708(F) 1-28
MCR 3.708(H) 1-28, 1-29
MCR 3.928 1-22, 1-23
MCR 3.928(C) 1-22
MCR 6.001(D) 1-12, 3-35, 3-36
MCR 6.001(E) 5-4
MCR 6.004(A) 3-46, 3-47
MCR 6.004(C) 3-48, 3-50
MCR 6.004(D) 3-50
MCR 6.005 Appx-3, Appx-5, Appx-
MCR 6.005(B) 1-11, 2-26, 2-27
MCR 6.005(C) 1-11, 2-27, 6-35
MCR 6.005(D) 1-12, 2-30, 2-34, 6-80, Appx-5
MCR 6.005(E) 2-34, 2-35, 3-56, 6-81
MCR 6.005(F) 2-25, 3-39, 7-31
MCR 6.005(G) 2-25
MCR 6.005(I) 2-36, 2-38
MCR 6.006 5-66
MCR 6.006(A) 1-1
MCR 6.006(C) 1-1, 1-2, 5-53, 5-68
MCR 6.101(A) 2-1
MCR 6.101(B) 2-2
MCR 6.101(C) 2-2
MCR 6.102(A) 2-2
MCR 6.102(B) 2-2
MCR 6.102(F) 2-2
MCR 6.103(A) 2-2
MCR 6.103(B) 2-2, 6-79
MCR 6.103(C) 2-2, 6-79
MCR 6.104 2-2
MCR 6.104(A) 2-2, 2-5
MCR 6.104(E) 2-42, Appx-3
MCR 6.106(A) 2-7
MCR 6.106(B) 2-7, 2-8, 2-11, 2-12, 2-13, 2-21
MCR 6.106(C) 2-8
MCR 6.106(D) 2-7, 2-8, 2-9, 2-13
MCR 6.106(E) 2-9, 2-10
MCR 6.106(F) 2-12, 2-13, 2-21
MCR 6.106(G) 2-13
MCR 6.106(H) 2-13, 2-14, 2-21
MCR 6.106(I) 2-15, 2-19
MCR 6.110(A) 2-42
MCR 6.110(B) 2-42, 2-43
MCR 6.110(C) 2-43, 2-47
MCR 6.110(D) 2-47, 3-37, 3-59
MCR 6.110(E) 2-43, 2-47
MCR 6.110(F) 2-46, 2-47
MCR 6.110(H) 2-46, 2-47
MCR 6.111 2-51, 2-52

MCR 6.112(B) 2-2, 2-41
MCR 6.112(C) 2-2
MCR 6.112(D) 2-47
MCR 6.112(E) 3-7
MCR 6.112(F) 6-45
MCR 6.112(G) 2-3
MCR 6.112(H) 2-48
MCR 6.113(A) 2-51, 2-52
MCR 6.113(B) 2-51, 2-52, Appx-3
MCR 6.113(C) 2-52
MCR 6.113(E) 2-52, 5-2, Appx-14
MCR 6.120 2-49, 2-50
MCR 6.120(A) 2-49, 3-43
MCR 6.120(B) 2-49, 2-50, 3-43, 3-44
MCR 6.120(C) 2-50, 3-44
MCR 6.121 2-50
MCR 6.121(A) 2-50, 3-44
MCR 6.121(B) 2-50, 3-44
MCR 6.121(C) 2-50, 3-45
MCR 6.121(D) 2-51
MCR 6.125 3-20, 3-21
MCR 6.125(B) 3-20
MCR 6.125(C) 3-21
MCR 6.125(D) 3-21
MCR 6.125(E) 3-22
MCR 6.125(F) 3-24
MCR 6.201 3-2, 3-3, 3-4, 3-6, 3-8
MCR 6.201(A) 3-2, 3-4, 3-7, 3-8, 3-11
MCR 6.201(B) 3-3, 3-4
MCR 6.201(C) 3-4
MCR 6.201(D) 3-4
MCR 6.201(F) 3-2
MCR 6.201(H) 3-2
MCR 6.201(I) 3-4
MCR 6.201(J) 3-6
MCR 6.201(K) 3-3
MCR 6.300 Appx-3
MCR 6.301(B) 4-3
MCR 6.301(C) 4-7, 4-8
MCR 6.302 3-30, 4-2, 4-4, 4-5, 4-6, 4-7, 4-8, 4-13, Appx-9
MCR 6.302(A) 4-1, 4-6, 4-14, 6-83
MCR 6.302(B) 4-2, 4-3, 6-21, Appx-12
MCR 6.302(C) 4-2, 4-3, 4-23, 4-27
MCR 6.302(D) 4-3, 4-7, 4-8
MCR 6.302(E) 4-1, 4-3
MCR 6.303 3-30, 4-7
MCR 6.304(A) 4-8
MCR 6.304(B) 4-9
MCR 6.304(C) 4-8
MCR 6.304(D) 4-9
MCR 6.310 4-18

 Michigan Judicial Institute © 2012

MCR 6.310(A) 4-9
MCR 6.310(B) 4-3, 4-9, 4-12, 4-23
MCR 6.310(C) 4-10, 4-13, 4-23, 6-85
MCR 6.310(D) 4-18
MCR 6.310(E) 4-22
MCR 6.312 4-17
MCR 6.401 5-2, Appx-13, Appx-
MCR 6.402 5-2, 5-3, 5-4, Appx-13, Appx-
MCR 6.402(A) 5-2, 5-4
MCR 6.402(B) 5-2, 5-3, 5-4, 5-5
MCR 6.403 3-39, 5-7, 7-31, Appx-15, Appx-
MCR 6.410 5-94
MCR 6.410(A) 5-9
MCR 6.410(B) 5-94
MCR 6.411 5-19, 5-20, Appx-18
MCR 6.412(A) 5-8, 5-10, 5-11, 5-12, 5-14, 5-15
MCR 6.412(B) Appx-17
MCR 6.412(C) 5-10, Appx-17
MCR 6.412(D) 5-12
MCR 6.412(E) 5-14
MCR 6.412(F) Appx-17
MCR 6.414 5-33, 5-88
MCR 6.414(C) 5-29
MCR 6.414(D) 5-39
MCR 6.414(G) 5-32, 5-33
MCR 6.414(J) 5-88
MCR 6.419 5-69, Appx-17
MCR 6.419(B) 5-69
MCR 6.419(C) 5-6
MCR 6.419(D) 3-39
MCR 6.419(E) 5-69, 7-31
MCR 6.420 5-98
MCR 6.420(A) 5-98, Appx-18
MCR 6.420(C) 5-94, 5-96
MCR 6.420(D) 5-97, 5-98, Appx-18
MCR 6.425(A) 6-1, 6-18
MCR 6.425(B) 6-4, 6-84
MCR 6.425(D) 6-4, 6-6, Appx-25, Appx-
MCR 6.425(E) 6-5, 6-9, 6-16, 6-17, 6-37, 6-84, Appx-, Appx-, Appx-, Appx-, Appx-25, Appx-, Appx-26
MCR 6.425(F) 4-18, Appx-26
MCR 6.425(G) 4-19
MCR 6.427 6-41, 6-42
MCR 6.428 6-42
MCR 6.429(A) 6-42, 6-43
MCR 6.429(B) 6-43, 6-44, 6-85
MCR 6.429(C) 6-5, 6-44
MCR 6.431(A) 5-69, 5-103, 5-104, 6-85
MCR 6.431(B) 5-104, 5-109, 7-31
MCR 6.431(C) 5-105
MCR 6.435(B) 6-43

MCR 6.445(A) 6-67, 6-79
MCR 6.445(B) 6-80, 6-83
MCR 6.445(C) 6-80
MCR 6.445(D) 6-81
MCR 6.445(E) 3-40, 6-81, 6-82, 7-31
MCR 6.445(F) 6-67, 6-80, 6-83
MCR 6.445(G) 6-68, 6-83, 6-84
MCR 6.445(H) 6-85
MCR 6.500 4-13, 6-85, 6-88, 6-89, 6-90
MCR 6.501 6-85
MCR 6.502 6-85
MCR 6.502(A) 6-86
MCR 6.502(B) 6-86
MCR 6.502(C) 6-86, 6-87, 6-88
MCR 6.502(D) 6-88
MCR 6.502(E) 6-86
MCR 6.502(F) 6-88
MCR 6.502(G) 6-88
MCR 6.503(A) 6-88
MCR 6.503(B) 6-88
MCR 6.504(A) 6-88
MCR 6.504(B) 6-88, 6-89
MCR 6.505(A) 6-89
MCR 6.505(B) 6-90
MCR 6.506 6-89
MCR 6.506(A) 6-86
MCR 6.507(A) 6-89
MCR 6.507(B) 6-89
MCR 6.507(C) 6-89
MCR 6.508(A) 6-89
MCR 6.508(B) 6-89
MCR 6.508(C) 6-89
MCR 6.508(D) 6-90, 6-91
MCR 6.508(E) 3-40, 6-91
MCR 6.610(D) 1-11
MCR 6.610(F) 4-28
MCR 6.901(B) 6-59
MCR 6.903(C) 6-60
MCR 6.905(C) 2-34, 6-66
MCR 6.931(A) 6-59, 6-60, 6-61, 6-63
MCR 6.931(B) 6-60, 6-61
MCR 6.931(C) 6-61
MCR 6.931(D) 6-62
MCR 6.931(E) 3-40, 6-62, 6-63
MCR 6.931(F) 6-63, 6-64, 6-65, 6-68
MCR 6.933(A) 6-67
MCR 6.933(B) 6-64, 6-67, 6-68
MCR 6.933(C) 6-69
MCR 6.933(D) 6-69
MCR 6.935(A) 6-65
MCR 6.935(B) 6-65, 6-66

 Michigan Judicial Institute © 2012

MCR 6.935(C) 6-65, 6-66
MCR 6.935(D) 6-66
MCR 6.937 6-66
MCR 6.937(A) 6-66, 6-67
MCR 6.937(B) 6-67
MCR 6.938(A) 6-69
MCR 6.938(C) 6-70
MCR 6.938(D) 6-69
MCR 6.938(E) 6-70
MCR 7.101 7-1, 7-15
MCR 7.101(A) 7-1
MCR 7.101(B) 7-1
MCR 7.101(O) 7-14
MCR 7.102(8) 7-2
MCR 7.102(9) 7-3
MCR 7.103(A) 7-2, 7-4
MCR 7.103(B) 7-2, 7-6, 7-15
MCR 7.104 7-5, 7-8
MCR 7.104(A) 7-4, 7-5
MCR 7.104(C) 7-5, 7-9
MCR 7.104(D) 7-5, 7-8, 7-9, 7-16
MCR 7.104(E) 7-5, 7-8, 7-9
MCR 7.104(F) 7-6
MCR 7.105 7-16
MCR 7.105(A) 7-6, 7-7
MCR 7.105(B) 7-7, 7-8
MCR 7.105(C) 7-8
MCR 7.105(D) 7-8, 7-9, 7-17
MCR 7.105(E) 7-8
MCR 7.105(F) 7-7, 7-9, 7-10, 7-16
MCR 7.106(A) 7-9
MCR 7.106(B) 7-9
MCR 7.106(C) 7-9
MCR 7.106(D) 7-9
MCR 7.106(E) 7-9
MCR 7.106(F) 7-9
MCR 7.107 7-2
MCR 7.108 7-16
MCR 7.108(A) 7-3
MCR 7.108(C) 7-3, 7-4
MCR 7.109 7-10
MCR 7.109(A) 7-10
MCR 7.109(E) 7-11
MCR 7.109(F) 7-10
MCR 7.109(G) 7-10, 7-11
MCR 7.109(H) 7-10, 7-13
MCR 7.110 7-11
MCR 7.111 7-12, 7-17
MCR 7.111(A) 7-12
MCR 7.111(B) 7-12
MCR 7.111(C) 7-12

MCR 7.111(D) 7-12
MCR 7.112 7-13
MCR 7.113(A) 7-12, 7-13
MCR 7.113(B) 7-13
MCR 7.113(C) 7-13
MCR 7.114(A) 7-12
MCR 7.114(B) 7-13
MCR 7.114(C) 7-13
MCR 7.114(D) 7-11
MCR 7.115 7-15
MCR 7.115(A) 7-14
MCR 7.118 7-15
MCR 7.118(A) 7-15
MCR 7.118(B) 7-15
MCR 7.118(C) 7-16
MCR 7.118(D) 7-3, 7-15, 7-16
MCR 7.118(E) 7-16
MCR 7.118(F) 7-16
MCR 7.118(G) 7-17, 7-18
MCR 7.118(H) 7-17, 7-18
MCR 7.118(I) 7-18
MCR 7.118(J) 7-18
MCR 7.200 6-90
MCR 7.202(6) 7-2
MCR 7.204(A) 5-103, 6-42
MCR 7.205(A) 5-103
MCR 7.205(E) 3-60, 7-18
MCR 7.205(F) 5-103, 6-85
MCR 7.208(B) 5-104, 6-43
MCR 7.208(C) 7-2
MCR 7.210(A) 7-10
MCR 7.210(B) 1-3
MCR 7.211(C) 1-9, 2-29, 5-104, 6-43, 7-11, 7-29, 7-30
MCR 7.212(A) 1-3, 5-104
MCR 7.212(B) 7-12
MCR 7.212(C) 7-12, 7-19
MCR 7.212(D) 7-12
MCR 7.213(C) 3-61
MCR 7.215(C) 3-12, 3-21, 4-6, 5-29, 5-31, 5-43, 5-49, 5-87, 7-22
MCR 7.215(J) 7-22
MCR 7.216 7-13
MCR 7.216(A) 7-33
MCR 7.300 6-90
MCR 7.316(A) 7-33
MCR 8.107(A) 3-39
MCR 8.107(B) 3-39
MCR 8.108(B) 1-2
MCR 8.108(E) 1-2
MCR 8.109(A) 1-2
MCR 8.111(C) 2-46
MCR 8.116(D) 1-5, 1-6

 Michigan Judicial Institute © 2012

MCR 8.119 1-9
MCR 8.119(E) 1-6, 1-8
MCR 8.119(F) 1-6, 1-8, 1-9
MCR 9.100 1-19
MCR 9.103(A) 1-19
MCR 9.104(1) 1-19
MCR 9.104(4) 1-19
MCR 6302(B) 4-1
MCR 7101(O) 7-14

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Michigan Rules of Evidence

MRE 103(a) 7-21
MRE 103(d) 7-21
MRE 104(a) 3-38, 3-63
MRE 104(b) 3-59
MRE 104(c) 3-63, 3-64
MRE 104(d) 3-63
MRE 302 3-37
MRE 302(a) 3-37
MRE 404(a) 3-13, 3-14
MRE 404(b) 1-28, 3-59, 5-28
MRE 410 3-61, 4-4, 4-5, 4-17
MRE 601 5-26
MRE 603 5-25
MRE 604 5-26
MRE 606 5-103
MRE 606(b) 5-103
MRE 609 3-39
MRE 609(b) 7-31
MRE 611(a) 5-38
MRE 611(b) 5-31
MRE 611(c) 5-31
MRE 613(b) 3-61
MRE 615 5-26, Appx-17
MRE 702 7-32
MRE 801(d) 3-17, 3-61, 3-84
MRE 803(5) 5-61
MRE 803(22) 4-5
MRE 804(a) 3-61, 5-54
MRE 804(b) 3-61, 5-63, 5-65
MRE 1101(a) 1-24, 3-22, 3-59
MRE 1101(b) 1-24, 2-12, 2-13, 2-14, 2-38, 2-43, 3-38, 6-4, 6-17, 6-81

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Michigan Rules of Professional Conduct

MRPC 1.7 1-20
MRPC 1.8 1-20
MRPC 1.9 1-20
MRPC 3.7 1-20
MRPC 8.3 1-20

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Michigan Criminal Jury Instructions

CJI2d 1.4 5-23
CJI2d 1.9 3-37
CJI2d 2.1 5-24
CJI2d 2.9 5-39
CJI2d 2.15 5-21
CJI2d 2.19 3-44, 3-45
CJI2d 3.7 3-44, 3-45
CJI2d 3.12 5-90, 5-91, 5-92
CJI2d 3.19 2-48
CJI2d 3.19(2) 2-48
CJI2d 3.19(3) 2-48
CJI2d 5.12 3-10
CJI2d 7.4 3-18
CJI2d 7.9(2) 3-27
CJI2d 7.9(3) 3-27
CJI2d 7.9(4) 3-28
CJI2d 7.12 3-30
CJI2d 15.1 2-48
CJI2d 15.6 2-48
CJI2d 15.7 2-48
CJI2d 16.4 2-48
CJI2d 16.5 2-48
CJI2d 16.8 2-48
CJI2d 16.25 2-48
CJI2d 16.25(3) 2-48
CJI2d 17.3 2-48
CJI2d 18 2-48
CJI2d 18.3 2-48
CJI2d 20.1 2-48
CJI2d 20.2 2-48
CJI2d 20.12 2-48
CJI2d 20.13 2-48

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United States Code

11 USC 523(a) 6-37, 6-41
18 USC 3122 3-124
18 USC 3123(a) 3-124
18 USC 3123(b) 3-124
18 USC 3127(2) 3-124
28 USC 2254 6-85
28 USC 2254(d) 5-16, 5-22
42 USC 1983 3-124

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Constitutional Authority

Michigan Constitutional Authority

Const 1963, art 1, § 11 3-92, 3-98, 3-115, 3-116
Const 1963, art 1, § 13 2-29
Const 1963, art 1, § 14 5-1
Const 1963, art 1, § 15 2-7, 2-11, 2-21, 3-157, 5-99
Const 1963, art 1, § 16 2-11, 6-36
Const 1963, art 1, § 17 2-22, 3-18
Const 1963, art 1, § 20 1-3, 2-1, 2-22, 3-9, 3-46, 3-87, 5-1, 5-8, 5-9, 5-27, 5-46, 5-50, 5-51, 5-112
Const 1963, art 1, § 24 6-37
Const 1963, art 1, § 24(1) 6-16
Const 1963, art 6, § 1 1-21

U.S. Constitutional Authority

US Const, Am IV 3-92, 3-98, 3-116, 3-120
US Const, Am V 2-22, 3-18, 3-61, 3-157, 5-99
US Const, Am VI 1-3, 2-22, 2-29, 3-9, 3-46, 5-1, 5-8, 5-46, 5-50, 5-51, 5-112
US Const, Am XIV 2-22, 3-18

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