MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

August 23, 2013, through June 6, 2014

CORBIN R. DAVIS
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2015

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
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JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator

CHAD C. SCHMUCKER[2]
JOHN A. HOHMAN, Jr[3]

Clerk: LARRY S. ROYSTER
Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

[1] To June 1, 2014.

[2] To October 31, 2013.

[3] From November 18, 2013.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2015
MARK T. BOONSTRA	2015
MICHAEL J. RIORDAN	2019

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE[1]

[1] From October 14, 2013.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
	ANGELA PASULA	2019
3.	DAVID J. ALLEN	2015
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	THOMAS CAMERON	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	ALEXIS GLENDENING	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	CYNTHIA GRAY HATHAWAY	2017
	DANIEL ARTHUR HATHAWAY	2015

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	CHARLES S. HEGARTY	2015
	CATHERINE HEISE	2015
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	VERA MASSEY JONES	2015
	EDWARD JOSEPH	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	QIANA D. LILLARD	2015
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015[1]
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019[2]
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2017
	JEANNE STEMPIEN	2017[3]
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	MARGARET MARY VanHOUTEN	2015
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	JOHN G. McBAIN, Jr.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015

[1] To March 26, 2014.

[2] To March 17, 2014.

[3] To October 1, 2013.

		Term Expires January 1 of
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	JAMES T. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	TIMOTHY G. HICKS	2017
	KATHY HOOGSTRA	2015
	WILLIAM C. MARIETTI	2017

		Term Expires January 1 of
	ANNETTE ROSE SMEDLEY	2019
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015
	JENNIFER FAUNCE	2019
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	KATHRYN A. VIVIANO	2017
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENENFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017

		Term Expires January 1 of
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2015
31.	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
	MICHAEL L. WEST	2019
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2015
37.	JAMES C. KINGSLEY	2015
	BRIAN KIRKHAM	2017
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2015
39.	ANNA MARIE ANZALONE	2015
	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2019
40.	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2015
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	STEPHEN CARRAS	2013
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	GEORGE J. MERTZ	2015

		Term Expires January 1 of
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JEFFREY L. SAUTER	2015
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ARTHUR J. COTTER	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	ROBERT C. KROPF	2015
	JULIE K. PHILLIPS	2015
	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017
14B.	CHARLES POPE	2015
15.	JOSEPH F. BURKE	2019
	CHRISTOPHER S. EASTHOPE	2015

		Term Expires January 1 of
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2017
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2015
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2015
22.	SABRINA JOHNSON	2013
23.	GENO SALOMONE	2019
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2017
25.	MICHAEL F. CUINGAN	2015
	DAVID J. ZELENAK	2017
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2017
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2017
	DEMETRIA BRUE	2015
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	WANDA EVANS	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015

		Term Expires January 1 of
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	DAVID PERKINS	2015
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	DEAN AUSILIO	2017
	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2015
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015
	DEREK W. MEINECKE	2019
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	DEBRA NANCE	2019
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015

		Term Expires January 1 of
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	HUGH B. CLARKE, Jr.	2017
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2015
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019

		Term Expires January 1 of
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2015
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013
	DAWN A. KILDA	2015
75.	MICHAEL CARPENTER	2015
	JOHN HENRY HART	2015
76.	ERIC JANES	2015
	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015

		Term Expires January 1 of
83.	DANIEL L. SUTTON	2015
84.	AUDREY D. VAN ALST	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	JAMES N. ERHART	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2016
CARL F. JARBOE	2018
THEODORE A. METRY	2016
MATTHEW R. RUMORA	2018

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	JOHN MEAD	2019
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	2015
Clare/Gladwin	MARCY A. KLAUS	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2015

Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2019
Iosco	CHRISTOPHER P. MARTIN	2019
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2017
Kalamazoo	G. SCOTT PIERANGELI	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	MIRIAM CAVANAUGH	2019
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2015
Macomb	CARL J. MARLINGA	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2015
Monroe	CHERYL E. LOHMEYER	2015
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019

Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2015
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015[1]
Washtenaw	DARLENE A. O'BRIEN	2019
Washtenaw	JULIA OWDZIEJ	2015
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	TERRANCE A. KEITH	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	MARTIN T. MAHER	2015
Wayne	LISA MARIE NEILSON	2017
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

[1] To May 1, 2014.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie.	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
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ADMINISTRATIVE ORDER
No. 1998-5

Entered January 29, 2014, effective immediately (File No. 2013-41)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendments of Administrative Order No. 1998-5 are adopted, effective immediately and pending public comment. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

[Additions to the text of Administrative Order No. 1998-5 are indicated in underlining and deleted text is shown by strikeover.]

CHIEF JUDGE RESPONSIBILITIES; LOCAL INTERGOVERNMENTAL RELATIONS

~~On order of the Court, the following order is effective immediately. This order replaces Administrative Order No. 1997-6, which is rescinded.~~

I.-II. [Unchanged.]

III. FUNDING DISPUTES; MEDIATION AND LEGAL ACTION

If, after the local funding unit has made its appropriations (including, for purposes of this section,

amendments of existing appropriations or enforcement of existing appropriations), a court concludes that the funds provided for its operations by its local funding unit are insufficient to enable the court to properly perform its duties and that legal action is necessary, the procedures set forth in this order must be followed.

1. ~~Legal action may be commenced 30 days after the court has notified~~ The chief judge of the court shall notify the State Court Administrator that a dispute exists regarding court funding that the court and the local funding unit have been unable to resolve~~, unless mediation of the dispute is in progress, in which case legal action may not be commenced within 60 days of the commencement of the mediation~~. The notice must be accompanied by a written communication indicating that the chief judge of the court has approved the commencement of legal proceedings. With the notice, the court must supply the State Court Administrator with all facts relevant to the funding dispute. The State Court Administrator must attempt to aid the court and the local funding unit to resolve the dispute. If requested by the court and the local funding unit, the State Court Administrator must appoint a person or entity to serve as mediator within five business days. ~~The State Court Administrator may extend this period for an additional 30 days.~~

~~2. During the waiting period provided in paragraph 1, the State Court Administrator must attempt to aid the court and the involved local funding unit to resolve the dispute.~~

~~3~~2. If~~, after the procedure provided in paragraph 2 has been followed,~~ the court concludes that a civil action to compel funding is necessary, ~~the State Court Administrator must assign a disinterested judge to preside over the action~~ a civil action may be commenced by the

chief judge, consistent with MCL 141.436 and MCL 141.438, if applicable. If not applicable, a civil action may be commenced by the chief judge, and the State Court Administrator must assign a disinterested judge to preside over the action.

43. Chief judges or representatives of funding units may request the assistance of the State Court Administrative Office to mediate situations involving potential disputes at any time, before differences escalate to the level of a formal funding dispute.

IV.-X. [Unchanged.]

Staff Comment: The amendments of Administrative Order No. 1998-5 modify the way county-funded courts pursue disputes over court funding. These modifications are adopted with immediate effect, but pending public comment and a future public hearing, in light of the recent enactment of 2013 PA 172.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-41. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

ADMINISTRATIVE ORDER No. 2013-8

TRIAL COURT REQUIREMENTS FOR PROVIDING MEANINGFUL ACCESS TO THE COURT FOR LIMITED ENGLISH PROFICIENT PERSONS

Entered September 11, 2013, effective immediately (File No. 2012-03)—REPORTER.

In order to ensure that those persons with limited English proficiency have meaningful access to Michigan courts, the Michigan Supreme Court adopts this order requiring courts to adopt a language access plan.

"Limited English proficient" person means a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the court process.

Within 90 days of the date of this order, each trial court shall adopt a language access plan. This plan must substantially conform to the model promulgated by the state court administrator. The plan must provide meaningful access to limited English proficient persons who have contacts with the court and its administrative staff. The plan shall be submitted to and approved by the State Court Administrative Office as a local administrative order under MCR 8.112.

ADMINISTRATIVE ORDER No. 2013-9

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 40TH CIRCUIT COURT, THE 71-A DISTRICT COURT, AND THE LAPEER COUNTY PROBATE COURT

Entered September 18, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 40th Circuit Court, the 71-A District Court, and the Lapeer County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2013-10

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 44TH CIRCUIT COURT, THE 53RD DISTRICT COURT, AND THE LIVINGSTON COUNTY PROBATE COURT

Entered September 18, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 44th Circuit Court, the 53rd District Court, and the Livingston County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2013-11

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 1ST CIRCUIT COURT, THE 2-B DISTRICT COURT, AND THE HILLSDALE COUNTY PROBATE COURT

Entered September 18, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 1st Circuit Court, the 2-B District Court, and the Hillsdale County Probate Court.

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

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

ADMINISTRATIVE ORDER No. 2013-12

REVISED CASEFLOW MANAGEMENT GUIDELINES AND RESCISSION OF ADMINISTRATIVE ORDER NO. 2011-3

Entered October 2, 2013, effective January 1, 2014 (File No. 2013-24)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order No. 2013-12 is adopted, and Administrative Order No. 2011-3 is rescinded, effective January 1, 2014.

Administrative Order No. 2013-12

The management of the flow of cases in the trial court is the responsibility of the judiciary. In carrying out that responsibility, the judiciary must balance the rights and interests of individual litigants, the limited resources of the judicial branch and other participants in the justice system, and the interests of the citizens of this state in having an effective, fair, and efficient system of justice.

Accordingly, on order of the Court,

A. The State Court Administrator is directed, within available resources, to:

1. assist trial courts in implementing caseflow management plans that incorporate case processing time guidelines established pursuant to this order;

2. gather information from trial courts on compliance with caseflow management guidelines; and

3. assess the effectiveness of caseflow management plans in achieving the guidelines established by this order.

B. Trial courts are directed to:

1. maintain current caseflow management plans consistent with case processing time guidelines established in this order, and in cooperation with the State Court Administrative Office;

2. report to the State Court Administrative Office caseflow management statistics and other caseflow management data required by that office; and

3. cooperate with the State Court Administrative Office in assessing caseflow management plans implemented pursuant to this order.

On further order of the Court, the following time guidelines for case processing are provided as goals for the administration of court caseloads. These are only guidelines and are not intended to supersede procedural requirements in court rules or statutes for specific cases, or to supersede reporting requirements in court rules or statutes. The trial courts shall not dismiss cases for the sole reason that the case is likely to exceed the guideline. In addition, these guidelines do not supplant judicial discretion if, for good cause, a specific case of any type requires a time line that extends beyond the maximum permitted under these guidelines.

Note: The phrase "adjudicated" refers to the date a case is reported in Part 2 of the caseload report forms and instructions. Aging of a case is suspended for the time a case is inactive as defined in Parts 2 and 4 of the caseload report forms and instructions. Refer to these specific definitions for details.

Matters Submitted to the Judge. 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 or 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.

Probate Court Guidelines.

1. Estate, Trust, Guardianship, and Conservatorship Proceedings. 75% of all contested matters should be adjudicated within 182 days from the date of the filing of objection and ~~100~~95% within 364 days. 2.

Mental Illness Proceedings; Judicial Admission Proceedings. 90% of all petitions should be adjudicated within 14 days from the date of filing and ~~100~~98% within 28 days. 3.

Civil Proceedings. ~~75~~70% of all cases should be adjudicated within 364 days from the date of case filing and ~~100~~95% within 728 days.

District Court Guidelines.

1. *Civil Proceedings.*

a. General Civil. 90% of all general civil and miscellaneous civil cases should be adjudicated within 273 days from the date of case filing and ~~100~~98% within 455 days.

b. Summary Civil. ~~100~~95% of all small claims, landlord/tenant, and land contract actions should be adjudicated within 126 days from the date of case filing ~~except,~~ in those cases where there is no jury demand. ~~100~~65% of all landlord/tenant and land contract actions where a jury is demanded~~, actions~~ should be adjudicated within 154 days from the date of case filing.

2. *Felony, Misdemeanor, and Extradition Detainer Proceedings.*

a. Misdemeanor. ~~90~~85% of all statute and ordinance misdemeanor cases, including misdemeanor drunk driving and misdemeanor traffic, should be adjudicated within 63 days from the date of first appearance and ~~100~~95% within 126 days.

b. Felony and Extradition/Detainer. ~~80~~60% of all preliminary examinations in felony, felony drunk driving, felony traffic, and extradition/detainer cases should be concluded within 14 days of arraignment and ~~100~~75% within 28 days.

3. Civil Infraction Proceedings. 90% of all civil infraction cases, including traffic, nontraffic, and parking cases, should be adjudicated within 35 days from the date of filing and ~~100~~98% within 84 days.

Circuit Court Guidelines.

1. Civil Proceedings. ~~75~~70% of all cases should be adjudicated within 364 days from the date of case filing and ~~100~~95% within 728 days.

2. *Domestic Relations Proceedings.*

a. Divorce Without Children. ~~90~~85% of all divorce cases without children should be adjudicated within 182 days from the date of case filing and ~~100~~98% within 364 days.

b. Divorce With Children. ~~90~~85% of all divorce cases with children should be adjudicated within 301 days from the date of case filing and ~~100~~95% within 364 days.

c. Paternity. ~~90~~75% of all paternity cases should be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

d. Responding Interstate Establishment. ~~90~~75% of all incoming interstate actions to establish support should

be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

e. Child Custody Issues, Other Support, and Other Domestic Relations Matters. ~~90~~75% of all child custody, other support, and other domestic relations issues not listed above should be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

3. *Delinquency Proceedings*. Where a minor is being detained or is held in court custody, ~~90~~80% of all original petitions or complaints should have adjudication and disposition completed within 84 days from the authorization of the petition and ~~100~~90% within 98 days. Where a minor is not being detained or held in court custody, 75% of all original petitions or complaints should have adjudication and disposition completed within 119 days from the authorization of the petition and ~~100~~98% within 210 days.

4. *Child Protective Proceedings*. Where a child is in out-of-home placement (foster care), ~~90~~75% of all original petitions should have adjudication and disposition completed within 84 days from the authorization of the petition and ~~100~~85% within 98 days. Where a child is not in out-of-home placement (foster care), 75% of all original petitions should have adjudication and disposition within 119 days from the authorization of the petition and ~~100~~95% within 210 days.

5. *Designated Proceedings*. 90% of all original petitions should be adjudicated within 154 days from the designation date and ~~100~~98% within 301 days. Minors held in custody should be afforded priority for trial.

6. *Juvenile Traffic and Ordinance Proceedings*. 90% of all citations should have adjudication and disposition completed within 63 days from the date of first appearance and ~~100~~98% within 126 days.

7. Adoption Proceedings.

a. Petitions for Adoption. 90% of all petitions for adoption should be finalized or otherwise concluded within 287 days from the date of filing and ~~100~~98% within 364 days.

b. Petitions to Rescind Adoption. ~~100~~98% of all petitions to rescind adoption should be adjudicated within 91 days from the date of filing.

8. *Miscellaneous Family Proceedings.*

a. Name Change. ~~100~~90% of all petitions should be adjudicated within 126 days from the date of filing.

b. Safe Delivery. ~~100~~98% of all petitions should be adjudicated within 273 days from the date of filing.

c. Personal Protection. 100% of all petitions filed ex parte should be adjudicated within 24 hours of filing. 90% of all petitions not filed ex parte should be adjudicated within 14 days from the date of filing and 100% within 21 days.

d. Emancipation of Minors. ~~100~~98% of all petitions should be adjudicated within 91 days from the date of filing.

e. Infectious Diseases. ~~100~~98% of all petitions should be adjudicated within 91 days from the date of filing.

f. Parental Waiver. ~~100~~98% of all petitions should be adjudicated within 5 days from the date of filing.

9. *Ancillary Proceedings.*

a. Guardianship and Conservatorship Proceedings. 75% of all contested matters should be adjudicated within 182 days from the date of filing and ~~100~~95% within 364 days.

b. Mental Illness Proceedings; Judicial Admission. 90% of all petitions should be adjudicated within 14 days from the date of filing and ~~100~~98% within 28 days.

10. *Criminal Proceedings*. ~~90~~70% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; ~~98~~85% within 154 days; and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial.

With SCAO approval, circuit courts may establish by local administrative order an alternative guideline for criminal proceedings that would provide that ~~90%~~75% of all felony cases should be adjudicated within 154 days from the date of entry of the order binding the defendant over to the circuit court and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial. Courts requesting the alternative guideline must give the sheriff the opportunity to comment on the proposed order.

11. *Appellate, Administrative Review, and Extraordinary Writ Proceedings*.

a. Appeals from Courts of Limited Jurisdiction. ~~100~~98% of all appeals to circuit court from courts of limited jurisdiction should be adjudicated within 182 days from the filing of the claim of appeal.

b. Appeals from Administrative Agencies. ~~100~~98% of all appeals to the circuit court from administrative agencies should be adjudicated within 182 days from the filing of the claim of appeal.

c. Extraordinary Writs. ~~98~~90% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing and ~~100~~98% within 91 days.

Staff Comment: Administrative Order No. 2013-12 rescinds Administrative Order No. 2011-3 and updates the guidelines found in that order. The updates revise the guidelines to make them more reflective of disposition rates based on statewide court data and to accommodate the fact that there may be delay in any case type that would make 100 percent disposition nearly impossible. However, the 100 percent disposition expectation remains in place for personal protection petitions.

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

REVISED CASEFLOW MANAGEMENT GUIDELINES AND RESCISSION OF ADMINISTRATIVE ORDER NO. 2011-3

Entered May 7, 2014, effective immediately (File No. 2013-33)—REPORTER.

[The *only* portion of Administrative Order No. 2013-12 that is amended is found under the section entitled "Circuit Court Guidelines" in 8.c., as follows:]

8. Miscellaneous Family Proceedings.

a.-b. [Unchanged.]

c. Personal Protection. 100% of all petitions requesting ex parte relief ~~filed ex parte~~ should be adjudicated within 24 hours of filing. 90% of all petitions not requesting ex parte relief or in which a hearing will be set ~~not filed ex parte~~ should be adjudicated within 14 days from the date of filing and 100% within 21 days.

d.-f. [Unchanged.]

[The remaining sections 9.-11. under "Circuit Court Guidelines" of Administrative Order No. 2013-12 are unchanged.]

ADMINISTRATIVE ORDER No. 2013-13

CREATION OF COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

Entered October 30, 2013, effective January 1, 2014 (File No. 2012-18)—REPORTER.

For decades, criminal jury instructions in Michigan have been developed by the Standing Committee on Jury Instructions, Standard Criminal, of the State Bar of Michigan and then published by the Institute for Continuing Legal Education. The instructions were then made available for purchase. Now, however, recognizing their widespread use and the utility of the instructions for attorneys, litigants, and the courts, and in support of the notion that these materials should be readily available to all users, the Court desires to make use of the instructions mandatory and ensure that they are freely available to all, as are the model civil jury instructions.

In addition to the Court's adoption of proposed amendments of MCR 2.512 that will require the use of criminal jury instructions where appropriate, under this administrative order the Court creates a committee to propose new and to modify existing criminal jury instructions. The Court is appreciative of the long and distinguished service that members of the Standing Committee on Standard Criminal Jury Instructions

have provided over the years. Their dedicated service has produced a set of criminal jury instructions that has become a valuable tool in criminal proceedings. The Court also acknowledges the generous decision by the Institute of Continuing Legal Education to relinquish its copyright over the instructions, thus enabling this Court to make the instructions and much of their accompanying materials available to everyone for no charge on the Court's website.

The new Committee on Model Criminal Jury Instructions is established. The committee shall consist of 21 persons to be appointed by the Supreme Court. The Supreme Court will designate one member to serve as the chairperson of the committee. Generally members will be appointed for three-year terms and may be reappointed for two additional terms. However, to facilitate the transition and the staggering of terms, some initial appointments will be for abbreviated terms and those appointees who are members of the current State Bar of Michigan Standing Committee on Jury Instructions, Standard Criminal, will not be eligible for reappointment.

Effective January 1, 2014, the following persons are appointed to the new Committee on Model Criminal Jury Instructions:

For terms ending December 31, 2014:
The Honorable William J. Caprathe
The Honorable John T. Hammond
Ronald J. Bretz
Stephen M. Taratuta
Anica Letica
J. Mark Cooney
Torchio W. Feaster

For terms ending December 31, 2015:

The Honorable Brian R. Sullivan
William J. Vailliencourt, Jr.
Opolla Brown
The Honorable Annette M. Jurkiewicz-Berry
Louisa M. Papalas-Concessi
The Honorable Gene Schnelz
Lawrence B. Shulman

For terms ending December 31, 2016:

Rudolph A. Serra
Bonita S. Hoffman
The Honorable Paul J. Paruk
Christopher Smith
Stacia J. Buchanan
The Honorable Timothy G. Hicks
Timothy Baughman

Judge Caprathe is designated as chairperson for the duration of his term. Court staff will serve as reporter of the committee.

It shall be the duty of the committee to ensure that the Criminal Jury Instructions accurately state applicable law, and that the instructions are concise, understandable, conversational, unslanted, and not argumentative. The committee shall have the authority to amend or repeal existing instructions and, when necessary, to adopt new instructions.

Before doing so, the committee shall provide a text of the proposal to the secretary of the State Bar of Michigan and the state court administrator, and shall post the proposal on the Court's website [http://courts.mi.gov/Courts/MichiganSupremeCourt/MCrimJI]

for public comment. The notice and website posting shall state the time and method for commenting on the proposal. If the committee finds it necessary to take immediate action, the committee may adopt a new instruction or revision while the public comment period is pending.

By separate order, the Court is amending Rule 2.512 of the Michigan Court Rules to reflect the requirement to use the criminal jury instructions. The instructions, use notes, and history are expected to be posted on the Court's website by January 1, 2014. Additional supplemental commentary will be available shortly thereafter. Practitioners, litigants, and courts are encouraged to use the instructions as soon as practicable, but will be required to use them on the order's effective date of March 1, 2014.

ADMINISTRATIVE ORDER
No. 2013-14

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 20TH CIRCUIT COURT, THE 58TH DISTRICT COURT, AND THE OTTAWA COUNTY PROBATE COURT

Entered November 6, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 20th Circuit Court, the 58th District Court, and the Ottawa County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2013-15

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 31ST CIRCUIT COURT, THE 72ND DISTRICT COURT, AND THE ST. CLAIR COUNTY PROBATE COURT

Entered November 6, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 31st Circuit Court, the 72nd District Court, and the St. Clair County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2013-16

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 25TH CIRCUIT COURT, THE 96TH DISTRICT COURT, AND THE MARQUETTE COUNTY PROBATE COURT

Entered November 27, 2013, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 25th Circuit Court, the 96th District Court, and the Marquette County Probate Court.

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

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

ADMINISTRATIVE ORDER No. 2014-1

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 15TH CIRCUIT COURT, THE 3-A DISTRICT COURT, AND THE BRANCH COUNTY PROBATE COURT

Entered January 29, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately: *

The 15th Circuit Court, the 3-A District Court, and the Branch County Probate Court.

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

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

ADMINISTRATIVE ORDER No. 2014-2

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 9TH CIRCUIT COURT, THE 8TH DISTRICT COURT, AND THE KALAMAZOO COUNTY PROBATE COURT

Entered January 29, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 9th Circuit Court, the 8th District Court, and the Kalamazoo County Probate Court.

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

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

ADMINISTRATIVE ORDER No. 2014-3

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 29TH CIRCUIT COURT, THE 65A AND 65B DISTRICT COURTS, AND THE CLINTON COUNTY AND GRATIOT COUNTY PROBATE COURTS

Entered January 29, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 29th Circuit Court, the 65A and 65B District Courts, and the Clinton County and Gratiot County Probate Courts.

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

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

ADMINISTRATIVE ORDER No. 2014-4

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 30TH CIRCUIT COURT, THE 54A, 54B, AND 55TH DISTRICT COURTS, AND THE INGHAM COUNTY PROBATE COURT

Entered January 29, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 30th Circuit Court, the 54A, 54B, and 55th District Courts, and the Ingham County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-5

ORDER CREATING THE TASK FORCE ON THE ROLE OF THE STATE BAR OF MICHIGAN

Entered February 13, 2014, effective immediately (File No. 2014-07)—REPORTER.

[T]he regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest. . . . [*Falk v State Bar of Michigan*, 411 Mich 63, 114; 305 NW2d 201 (1981) (opinion of RYAN, J.).]

[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. [*Keller v State Bar of California*, 496 US 1, 13-14; 110 S Ct 2228; 110 L Ed 2d 1 (1990).]

The question having been raised about the appropriateness of the mandatory nature of the State Bar of Michigan, and the State Bar having requested that the

Michigan Supreme Court facilitate this important discussion, pursuant to its exclusive constitutional authority to establish "practice and procedure," Const 1963, art 6, § 5, the Court establishes the Task Force on the Role of the State Bar of Michigan to address whether the State Bar's current programs and activities support its status as a mandatory bar.

The task force is charged with determining whether the State Bar's duties and functions "can[] be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys" (*Falk,* 411 Mich at 112 [opinion of RYAN, J.]) under the First Amendment principles articulated in *Keller* and *Falk*. At the same time, the task force should keep in mind the importance of protecting the public through regulating the legal profession, and how this goal can be balanced with attorneys' First Amendment rights.

The task force shall examine existing State Bar programs and activities that are germane to the compelling state interests recognized in *Falk* and *Keller* to justify a mandatory bar. In addition, the task force shall examine what other programs the State Bar of Michigan ought to undertake to enhance its constitutionally-compelled mission. The task force is invited to examine how other mandatory bars satisfy their constitutionally-permitted mission and shall make its report and recommendations to the Court by June 2, 2014. The task force's report may also include proposed revisions of administrative orders and court rules governing the State Bar of Michigan in order to improve the governance and operation of the State Bar.

The members appointed to the task force are as follows:

Danielle Michelle Brown
Hon. Alfred M. Butzbaugh (Ret.)
Thomas W. Cranmer
Peter H. Ellsworth
John E. McSorley
Colleen A. Pero
John W. Reed
Hon. Michael J. Riordan
Thomas C. Rombach
Hon. John J. Walsh
Janet K. Welch
Vanessa Peterson Williams

Hon. Alfred M. Butzbaugh is appointed as chairperson of the task force.

Nelson Leavitt shall serve as the reporter of the task force.

Justice McCormack shall serve as the Court's liaison to the task force.

ADMINISTRATIVE ORDER No. 2014-6

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 43RD CIRCUIT COURT, THE 4TH DISTRICT COURT, AND THE CASS COUNTY PROBATE COURT

Entered March 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 43rd Circuit Court, the 4th District Court, and the Cass County Probate Court.

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

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

ADMINISTRATIVE ORDER No. 2014-7

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 42ND CIRCUIT COURT, THE 75TH DISTRICT COURT, AND THE MIDLAND COUNTY PROBATE COURT

Entered March 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 42nd Circuit Court, the 75th District Court, and the Midland County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-8

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 27TH CIRCUIT COURT, THE 78TH DISTRICT COURT, AND THE NEWAYGO COUNTY AND OCEANA COUNTY PROBATE COURT

Entered March 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 27th Circuit Court, the 78th District Court, and the Newaygo County and Oceana County Probate Courts.

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

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

ADMINISTRATIVE ORDER
No. 2014-9

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 24TH CIRCUIT COURT, THE 73 A DISTRICT COURT, AND THE SANILAC COUNTY PROBATE COURT

Entered March 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 24th Circuit Court, the 73A District Court, and the Sanilac County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-10

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 6TH CIRCUIT COURT AND THE OAKLAND COUNTY PROBATE COURT

Entered March 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 6th Circuit Court and the Oakland County Probate Court.

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

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

AMENDED ADMINISTRATIVE ORDER No. 1998-5

RETENTION OF THE AMENDMENTS OF ADMINISTRATIVE ORDER NO. 1998-5 (REGARDING COURT FUNDING DISPUTES)

Entered June 4, 2014, effective immediately (File No. 2013-41)—REPORTER.

By order dated January 29, 2014, the Court adopted amendments of Administrative Order No. 1998-5, effective immediately, but pending public comment and a public hearing. Notice and an opportunity for comment at a public hearing having been provided, the amendments of Administrative Order No. 1998-5 are retained, with additional revisions indicated below, effective immediately.

[Additions to the text of Administrative Order No. 1998-5 are indicated in underlining and deleted text is shown by strikeover.]

CHIEF JUDGE RESPONSIBILITIES; LOCAL INTERGOVERNMENTAL RELATIONS.

I.-II . [Unchanged.]

III. Funding Disputes; Mediation and Legal Action

If, after the local funding unit has made its appropriations (including, for purposes of this section, amendments of existing appropriations or enforcement

of existing appropriations), a court concludes that the funds provided for its operations by its local funding unit are insufficient to enable the court to properly perform its duties and that legal action is necessary, the procedures set forth in this order must be followed.

1. The chief judge of the court shall notify the State Court Administrator that a dispute exists regarding court funding that the court and the local funding unit have been unable to resolve. The notice must be accompanied by a written communication indicating that the chief judge of the court has approved the commencement of legal proceedings. With the notice, the court must supply the State Court Administrator with all facts relevant to the funding dispute. The State Court Administrator must attempt to aid the court and the local funding unit to resolve the dispute. If requested by the court and the local funding unit, the State Court Administrator must appoint a person or entity to serve as mediator within five business days. Any mediation that occurs as a result of the appointment of a mediator under this paragraph is intended to be the mediation referred to in MCL 141.438(6) and (8) and MCL 141.436(9).

2. If the court concludes that a civil action to compel funding is necessary, a civil action may be commenced by the chief judge, consistent with MCL 141.436 and MCL 141.438, if applicable.[1] If not applicable, a civil action may be commenced by the ~~chief judge~~court, and the State Court Administrator is authorized to ~~must~~ assign a disinterested judge to preside over the action.

3. Chief judges or representatives of funding units may request the assistance of the State Court Administrative Office to mediate situations involving potential disputes at any time, before differences escalate to the level of a formal funding dispute.

IV.-X. [Unchanged.]

[1] The statutory provisions referred to in this paragraph relate to funding disputes between courts and their county funding unit(s). Third class district courts and municipal courts are not subject to the referenced statutory provisions.

Staff Comment: The amendments of Administrative Order No. 1998-5 modify the way courts pursue disputes over court funding. These modifications were adopted following enactment of 2013 PA 172.

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

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Amended September 5, 2013, effective immediately (File No. 2012-24)—REPORTER.

[The present language is amended as indicated below in underlining and overstriking.]

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A)-(C) [Unchanged.]

(D) Stay on Appeal. Stay on appeal is governed by MCR 7.101(H), 7.209, and 7.302(~~G~~I). If a party appeals a trial court's denial of the party's claim of governmental immunity, the party's appeal operates as an automatic stay of any and all proceedings in the case until the issue of the party's status is finally decided.

(E)-(G) [Unchanged.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A) Scope and Applicability of Rule, Definitions.

(1) All domestic relations cases, as defined in MCL 552.502(~~l~~m), are subject to mediation under this rule, unless otherwise provided by statute or court rule.

(2)-(4) [Unchanged.]

(B)-(K) [Unchanged.]

RULE 3.807. INDIAN CHILD.

(A) [Unchanged.]

(B) Jurisdiction, Notice, Transfer, Intervention.

(1)-(2) [Unchanged.]

(3) The Indian custodian of the child, ~~and~~ the Indian child's tribe, and the Indian child have a right to intervene at any point in the proceeding ~~for foster care placement or termination of parental rights~~ pursuant to MCL 712B.7(6).

(C) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(13) [Unchanged.]

(14) "Legal Custodian" means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term "Indian custodian" as defined in MCR 3.002(~~7~~15).

(15)-(17) [Unchanged.]

(18) "Parent" means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term "parent" as defined in MCR 3.002(~~10~~20).

(19)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.905. INDIAN CHILDREN; JURISDICTION, NOTICE, TRANSFER, INTERVENTION.

(A)-(C) [Unchanged.]

(D) The Indian custodian of the child, ~~and~~ the Indian child's tribe, and the Indian child have a right to intervene at any point in the proceeding pursuant to MCL 712B.7(6).

RULE 3.920. SERVICE OF PROCESS.

(A)-(B) [Unchanged.]

(C) Notice of Proceeding Concerning Indian Child. If the court knows or has reason to know an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe~~, by personal service or~~ by registered mail with return receipt requested~~,~~ of the pending proceedings on a petition filed under MCR 3.931 or MCR 3.961 and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. Subsequent notices shall be served in accordance with this subrule for proceedings under MCR 3.967 and MCR 3.977.

(2) [Unchanged.]

(D)-(I) [Unchanged.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D) [Unchanged.]

(E) Retention and Destruction of Court Case Files and Other Court Records. This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).

(1)-(2) [Unchanged.]

(3) Delinquency and Motor Vehicle Code Case Files.

(a)-(b) [Unchanged.]

(c) Except as provided by subrules (2), (3)(a), and (3)(b), the court may destroy the legal records in the case files pertaining to a person's juvenile offenses when the person becomes 30 years of age. The social records in the case files pertaining to a person's juvenile offenses may be destroyed three years after entry of the order terminating jurisdiction of that person or when the person becomes 18 years old, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2~~3~~). The court must destroy the records in traffic and local ordinance case files opened by issuance of a citation pursuant to the motor vehicle code or a local corresponding ordinance when the person becomes 30 years of age.

(d) [Unchanged.]

(4) Child Protective Case Files. Except as provided in subrule (2), the court may destroy the legal records in the child protective proceeding case files pertaining to a child, 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminating jurisdiction of that child or when the child becomes 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2~~3~~).

(5)-(7) [Unchanged.]

(F)-(G) [Unchanged.]

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A) Preliminary Inquiry. When a petition is not accompanied by a request for detention of the juvenile,

the court may conduct a preliminary inquiry. Except in cases involving offenses enumerated in the Crime Victim's Rights Act, MCL 780.781(1)(~~f~~g), the preliminary inquiry need not be conducted on the record. The court may, in the interest of the juvenile and the public:

(1)-(5) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1) [Unchanged.]

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one qualified expert witness is present to provide testimony.

(3)-(13) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.967. REMOVAL HEARING FOR INDIAN CHILD.

(A)-(C) [Unchanged.]

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR

3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.

(E)-(F) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(F) [Unchanged.]

(G) Termination of Parental Rights; Indian Child. In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

(1) the court is satisfied that active efforts as defined in MCR 3.002 have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and

(2) [Unchanged.]

(H)-(K) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A) [Unchanged.]

(B) Complaint.

(1) [Unchanged.]

(2) Specific Requirements.

(a)-(c) [Unchanged.]

(d) If possession is claimed for a serious and continuing health hazard or for extensive and continuing physical injury to the premises pursuant to MCL 600.5714(1)~~(c)~~(d), the complaint must

(i)-(ii) [Unchanged.]

(e) If possession is sought for trespass pursuant to MCL 600.5714(1)~~(d)~~(f), the complaint must describe, when known by the plaintiff, the conditions under which possession was unlawfully taken or is unlawfully held and allege that no lawful tenancy of the premises has existed between the parties since defendant took possession.

(C)-(O) [Unchanged.]

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A)-(E) [Unchanged.]

(F) A claim is considered presented

(1) on mailing, if addressed to the personal representative or trustee, or the attorney for the personal representative or trustee, or

(2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

~~For purposes of this subrule (F), personal representative includes a proposed personal representative.~~

Staff Comment: These amendments reflect changes that correct minor technical errors that have occurred in drafting or the changes respond to recent adopted rule revisions, which occasionally inadvertently create incorrect cross-references in other rules.

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

Adopted September 11, 2013, effective immediately (File No. 2012-03)—REPORTER.

The Michigan Supreme Court embraces the goal of providing access to all the courts of this State. This includes interpreter services for persons with Limited English Proficiency (LEP), to ensure that they have meaningful access to our courts.

The rules we adopt today provide court-appointed foreign language interpreters for truly needy LEP persons to support their access to justice, while not compelling taxpayers to bear the burden for LEP persons who can afford to pay for this service.

Our rules provide for court interpreters without cost to indigent LEP persons. If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court at the conclusion of the case or court proceeding. Moreover, our rules provide additional protection by allowing the trial judge to provide a court interpreter without cost to any LEP party, based on the judge's finding that assessing costs for the interpreter would limit that person's access to court.

Some history is in order. In August 2010, under the leadership of then Chief Justice MARILYN KELLY, the Supreme Court convened a steering committee of judges and court administrators to develop proposals addressing access to court services for LEP individuals. The steering committee produced a court rule proposal specifying the procedures for appointment of an interpreter in Michigan's trial courts, as well as creating a structure for certifying various levels of interpreters, and creating a board to produce recommended requirements for interpreters and handle any misconduct claims.

Since February 2011, the Court has also worked cooperatively with the United States Department of Justice to improve the ability of LEP persons to access Michigan's courts. The Court's staff has communicated regularly with the Department, sharing numerous versions of the proposed court rules, exchanging ideas for the hiring and training of interpreters, and devising new and innovative ways to provide interpreter services at low or reduced costs. The Justice Department, through its administrative investigation function, has identified areas for improvement in individual trial courts across the state.

As a result of the dedicated work of the LEP committee, as well as the helpful and productive discussions with the Justice Department, the Court has fashioned a rule that reasonably accommodates access to the courts for LEP individuals with limited resources, and provides additional protection by allowing the trial judge to make a fact-based individualized determination whether assessment of costs would limit an LEP person's access to the court. This is a truly "flexible and fact-dependent standard." 67 Fed Reg 41459 (June 18, 2002). In fact, the rule is an individualized assessment that balances the four factors of (1) the number or proportion of LEP persons eligible to be served or likely to be encountered in court; (2) the frequency with which LEP individuals come into contact with the courts; (3) the nature and importance of the court system in people's lives; and (4) the resources available and costs. *Id*. The rules the Court has adopted strike the balance between ensuring meaningful access while not imposing undue burdens on Michigan's local courts. *Id*.

The Court has adopted a rule that focuses on the critical legal requirement: *meaningful access*. Under

MCR 1.111(B)(1), a court is required to provide an interpreter for a party or witness if the court determines one is needed for either the party or the witness to meaningfully participate. LEP services are provided to all who have a need for them, and, under the rule, only parties who are able to pay for them are subject to reimbursement at the conclusion of the matter. In determining whether a party has the ability to reimburse for interpreter services, the court will impose costs only if the party has income above 125% of the federal poverty level *and* the court finds assessment of the interpreter costs would not unreasonably impede the person's ability to pursue or defend a claim. In other words, MCR 1.111(A)(4) and (B)(1) ensure that there will be no chilling effect on the LEP person's opportunity to pursue or defend a legal action.

Further, the rule we adopt is a frank acknowledgement that our trial courts—and indeed, our State's economy—are under severe financial stress and cannot, without explicit legal authority, be required to provide, at taxpayer expense, interpreter services for all LEP persons regardless of their means.

We will conduct appropriate educational programs with state court judges, administrators, and stakeholders as we work to implement this significant change in Michigan's procedure for appointment of foreign language interpreters.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, MCR 1.111 and MCR 8.127 are adopted, effective immediately.

[The following court rules are new rules.]

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS.

(A) Definitions.

When used in this rule, the following words and phrases have the following definitions:

(1) "Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.

(2) "Party" means a person named as a party or a person with legal decision-making authority in the case or court proceeding.

(3) "Reimbursement" means reimbursement at the conclusion of the case or court proceeding.

(4) A person is "financially able to pay for interpretation costs" if the court determines that requiring reimbursement of interpreter costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court. For purposes of this rule, a person is financially able to pay for interpreter costs when:

(a) The person's family or household income is greater than 125% of the federal poverty level; and

(b) An assessment of interpreter costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter.

(5) "Certified foreign language interpreter" means a person who has:

(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) met all the requirements established by the state court administrator for this interpreter classification, and

(c) registered with the State Court Administrative Office.

(6) "Interpret" and "interpretation" mean the oral rendering of spoken communication from one language to another without change in meaning.

(7) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) met the requirements established by the state court administrator for this interpreter classification; and

(iii) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(i) both the entity and the person have registered with the State Court Administrative Office; and

(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(i) the entity has registered with the State Court Administrative Office; and

(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services

(B) Appointment of a Foreign Language Interpreter.

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.

(2) The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding.

(3) In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under subrule (B)(1), the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record. If no such requests have been made, the court may conduct an examination of the

person on the record to determine whether such services are necessary. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(C) Waiver of Appointment of Foreign Language Interpreter.

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings.

The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) Avoidance of Potential Conflicts of Interest.

(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c) The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety.

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)(5). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)(5) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)(5) within a reasonable time.

(b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by this rule and is not otherwise disqualified.

(F) Appointment of Foreign Language Interpreters.

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)(7). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2) If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person.

(3) The court shall appoint a single interpreter for a case or court proceeding. The court may appoint more than one interpreter after consideration of the nature and duration of the proceeding; the number of parties in interest and witnesses requiring an interpreter; the primary languages of those persons; and the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding.

(4) The court may set reasonable compensation for interpreters who are appointed by the court. Court-appointed interpreter costs are to be paid out of funds provided by law or by the court.

(5) If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for payment of interpretation costs.

(6) Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter.

(7) At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement, and of the continuing obligation to inform the court of any change in financial status.

(G) Administration of Oath or Affirmation to Interpreters.

The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

RULE 8.127. FOREIGN LANGUAGE BOARD OF REVIEW AND REGULATION OF FOREIGN LANGUAGE INTERPRETERS.

(A) Foreign Language Board of Review.

(1) The Supreme Court shall appoint a Foreign Language Board of Review, which shall include:

(a) a circuit judge;

(b) a probate judge;

(c) a district judge;

(d) a court administrator;

(e) a fully-certified foreign language interpreter who practices regularly in Michigan courts;

(f) an advocate representing the interests of the limited English proficiency populations in Michigan;

(g) a prosecuting attorney in good standing and with experience using interpreters in the courtroom;

(h) a criminal defense attorney in good standing and with experience using interpreters in the courtroom;

(i) a family law attorney in good standing and with experience using interpreters in the courtroom.

(2) Appointments to the board shall be for terms of three years. A board member may be appointed to no more than two full terms. Initial appointments may be of different lengths so that no more than three terms expire in the same year. The Supreme Court may remove a member at any time.

(3) If a position on the board becomes vacant because of death, resignation, or removal, or because a member is no longer employed in the capacity in which he or she was appointed, the board shall notify the state court administrator who will recommend a successor to the Supreme Court to serve the remainder of the term.

(4) The state court administrator shall assign a staff person to serve as executive secretary to the board.

(B) Responsibilities of Foreign Language Board of Review.

The Foreign Language Board of Review has the following responsibilities:

(1) The board shall recommend to the state court administrator a Michigan Code of Professional Responsibility for Court Interpreters, which the state court administrator may adopt in full, in part, or in a modified form. The Code shall govern the conduct of Michigan court interpreters.

(2) The board must review a complaint that the State Court Administrative Office schedules before it pursuant to subrule (D). The board must review the com-

plaint and any response and hear from the interpreter and any witnesses at a meeting of the board. The board shall determine what, if any, action it will take, which may include revoking certification, prohibiting the interpreter from obtaining certification, suspending the interpreter from participating in court proceedings, placing the interpreter on probation, imposing any fines authorized by law, and placing any remedial conditions on the interpreter.

(3) Interpreter Certification Requirements

The board shall recommend requirements for interpreters to the state court administrator that the state court administrator may adopt in full, in part, or in a modified form concerning the following:

(a) requirements for certifying interpreters as defined in MCR 1.111(A)(5). At a minimum, those requirements must include that the applicant is at least 18 years of age and not under sentence for a felony for at least two years and that the interpreter attends an orientation program for new interpreters.

(b) requirements for interpreters to be qualified as defined in MCR 1.111(A)(7).

(c) requirements under which an interpreter certified in another state or in the federal courts may apply for certification based on the certification already obtained. The certification must be a permanent or regular certification and not a temporary or restricted certification.

(d) requirements for interpreters as defined in MCR 1.111(A)(5) to maintain their certification.

(e) requirements for entities that provide interpretation services by telecommunications equipment to be qualified as defined in MCR 1.111(A)(7).

(C) Interpreter Registration.

(1) Interpreters who meet the requirements of MCR 1.111(A)(5) and MCR 1.111(A)(7)(a) and (b) must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to maintain their status. The fee for registration is $60. The fee for renewal is $30. The renewal application shall include a statement showing that the applicant has used interpreting skills during the 12 months preceding registration. Renewal applications must be filed or postmarked on or before September 30. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) Entities that employ a certified foreign language interpreter as defined in MCR 1.111(A)(5), or a qualified foreign language interpreter as defined in MCR 1.111(A)(7) must also register with the State Court Administrative Office and pay the registration fee and renewal fees.

(D) Interpreter Misconduct or Incompetence.

(1) An interpreter, trial court judge, or attorney who becomes aware of misconduct on the part of an interpreter committed in the course of a trial or other court proceeding that violates the Michigan Code of Professional Responsibility for Court Interpreters must report details of the misconduct to the State Court Administrative Office.

(2) Any person may file a complaint in writing on a form provided by the State Court Administrative Office. The complaint shall describe in detail the incident and the alleged incompetence, misconduct, or omission. The State Court Administrative Office may dismiss the

complaint if it is plainly frivolous, insufficiently clear, or alleges conduct that does not violate this rule. If the complaint is not dismissed, the State Court Administrative Office shall send the complaint to the interpreter by regular mail or electronically at the address on file with the office.

(3) The interpreter shall answer the complaint within 28 days after the date the complaint is sent. The answer shall admit, deny, or further explain each allegation in the complaint. If the interpreter fails to answer, the allegations in the complaint are considered true and correct.

(4) The State Court Administrative Office may review records and interview the complainant, the interpreter, and witnesses, or set the matter for a hearing before the Foreign Language Board of Review. Before setting the matter for a hearing, the State Court Administrative Office may propose a resolution to which the interpreter may stipulate.

(5) If the complaint is not resolved by stipulation, the State Court Administrative Office shall notify the Foreign Language Board of Review, which shall hold a hearing. The State Court Administrative Office shall send notice of the date, time, and place of the hearing to the interpreter by regular mail or electronically. The hearing shall be closed to the public. A record of the proceedings shall be maintained but shall not be public.

(6) The interpreter may attend all of the hearings except the board's deliberations. The interpreter may be represented by counsel and shall be permitted to make a statement, obtain testimony from the complainant and witnesses, and comment on the claims and evidence.

(7) The State Court Administrative Office shall maintain a record of all interpreters who are sanctioned for

incompetence or misconduct. If the interpreter is certified in Michigan under MCR 1.111(A)(5) because of certification pursuant to another state or federal test, the state court administrator shall report the findings and any sanctions to the certification authority in the other jurisdiction.

(8) This subrule shall not be construed to:

(a) restrict an aggrieved person from seeking to enforce this rule in the proceeding, including an appeal; or

(b) require exhaustion of administrative remedies.

(9) The State Court Administrative Office shall make complaint forms readily available and shall also provide complaint forms in such languages as determined by the State Court Administrative Office.

(10) Entities that employ interpreters are subject to the same requirements and procedures established by this subrule.

On further order of the Court, in response to the adoption of MCR 1.111 and MCR 8.127, the following amendment is adopted in Rule 2.507 of the Michigan Court Rules, effective immediately.

RULE 2.507. CONDUCT OF TRIALS.

(A)-(C) [Unchanged.]

~~(D) Interpreters. The court may appoint an interpreter of its own selection and may set reasonable compensation for the interpreter. The compensation is to be paid out of funds provided by law or by one or more of the parties, as the court directs, and may be taxed as costs, in the discretion of the court.~~

(E)-(G) [Relettered (D)-(F), but otherwise unchanged.]

MARKMAN, J. (*dissenting*). I respectfully dissent. On August 16, 2010, the Department of Justice sent a letter to the highest courts of all fifty states. The letter, from then Assistant Attorney General Thomas Perez of the Civil Rights Division, was sent "to provide greater clarity regarding the requirement that courts receiving federal financial assistance provide meaningful access for [limited-English-proficient (LEP)] individuals." According to the Department, "meaningful access" requires that state courts for the first time provide *free* interpreters to *all* LEP persons, regardless of the individual's ability to pay, "including non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate" in "*all* court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges" and "court-managed offices, operations, and programs," including "information counters; intake or filing offices; cashiers; records rooms; sheriff's offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; [and] detention facilities," as well as during meetings with any "individuals who are employed, paid, or supervised by the courts," including "criminal defense counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, [and] trustees." The letter further advised state supreme courts that the failure to provide these services "may" place them in violation of Title VI of the Civil Rights Act of 1964, prohibiting discrimination in the provision of services "on the ground of race, color, or national origin."

Thus, the costs of non-compliance with the Department's LEP demands are evident: if a state court system fails to comply, their state's federal financial assistance would be placed in jeopardy. At least in part

because of this risk, the Court has chosen to comply in significant respects with the demands of the Department by adopting two new court rules, MCR 1.111 and MCR 8.127. Because I believe the rules being adopted today under the coercive circumstances created by the Department are both unnecessary and ill-advised, I dissent.

The full scope of the Department's demands is staggering. The Department does not simply demand that free interpreters be provided to indigent criminal defendants and others whose comprehension of court proceedings may be a matter of constitutional imperative. Rather, it demands that state courts, including Michigan, for the first time provide *free* interpreters for *all* persons involved in any way in criminal, civil, mediation, arbitration, and administrative hearings regardless of an individual's ability to pay. So, the next time a Gulf state emir or a South American multimillionaire businessman, who is limited-English-proficient, chooses to file a civil lawsuit in this state, the Department would guarantee as a matter of legal right that the people of Grand Rapids, Detroit, and Marquette would be subsidizing that lawsuit.[1] But even this illustration does not identify the outer limits of the Department's generosity with Michigan taxpayers' money, as free interpreters must be provided not only to parties and litigants, but also to witnesses and all other "individuals whose presence or participation in a court

[1] I acknowledge that Michigan's Treasury will not be depleted by lawsuits brought by Gulf state emirs and South American multimillionaires, but the point is simply that these persons would be *eligible* for, and legally *entitled* to, such public largesse, as would far larger numbers of financially able, non-English-proficient persons who should be required to look to their *own* resources to pursue private civil lawsuits, just as they already are required to do with regard to hiring counsel, conducting pretrial investigations, and securing expert witnesses.

matter is necessary or appropriate." Accordingly, any family member of a party or a witness might under the Department's proposed rules be entitled to a free interpreter without regard to ability to pay. Furthermore, the Department's proposed rules would not only apply to court-like proceedings, but also to any court-managed office, operation, and program, including information counters. Within the "Hall of Justice," for example, in which this Court is located, an interpreter would have to be employed to assist limited-English-proficient visitors and tourists in exploring our museum-like Learning Center. Finally, the Department's proposed rules would not just apply to court-managed offices, but would also apply to meetings with individuals who are employed, paid or supervised by the courts, such as a doctor or psychologist. Indeed, the breadth of the Department's proposed rules can hardly be overstated— they would apply for the benefit of almost any individual having virtually any interaction with any court-related proceeding or program, and they would require the courts to provide these individuals with free interpreters regardless of their ability to pay.

It is not altogether clear the extent of federal grants that would be placed at risk if Michigan failed to comply with the Department's LEP demands and if the Department was to file a lawsuit to withdraw such assistance. In a letter of October 5, 2012, the Department refers broadly to compliance with its demands "as a condition of [the court system] receiving *federal financial assistance*," an amount estimated at $108.6 million, not including grants paid directly to local courts. However, in an earlier letter of September 28, 2011, the Department more narrowly refers to a $1.5 million program as triggering the LEP requirements. No doubt, the Civil Rights Division has recognized that it is a more effective "negotiating" strategy to allow a state to stew in

uncertainty concerning the financial stakes involved should it fail to jump high enough in response to the Department's demands. In fact, however, I seriously question whether the Department could actually deprive the Michigan court system of the entirety of its federal funding for partial non-compliance with its extraordinarily overreaching LEP demands. The U.S. Supreme Court has recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *South Dakota v Dole*, 483 US 203, 211; 107 S Ct 2793; 97 L Ed 2d 171 (1987), quoting *Steward Machine Co v Davis*, 301 US 548, 590; 57 S Ct 883; 81 L Ed 1279 (1937). Accordingly, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' " *Id.* at 207, quoting *Massachusetts v United States*, 435 US 444, 461; 98 S Ct 1153; 55 L Ed 2d 403 (1978); see also *Nat'l Federation of Indep Business v Sebelius*, 567 US___; 132 S Ct 2566, 2604 (2012) (opinion by Roberts, C.J.) ("When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."). In *Dole*, the Court upheld the financial inducement because "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age [would be] 5% of the funds otherwise obtainable under specified highway grant programs." *Id.* at 211. It is hardly self-evident that the Court would look as favorably upon a threat directed toward the Michigan court system focused upon the loss of 100% of its federal financial assistance, almost all of which has little or nothing to do with the matter in dispute. See, for example, *Nat'l Federation of Indep Business*, 567 US at

___; 132 S Ct 2566; 183 L Ed 2d 450 (opinion by Roberts, C.J.) ("[T]he financial 'inducement' Congress has chosen [in this case] is much more than 'relatively mild encouragement'—it is a gun to the head.").

The breadth of the Department's demands, and the intransigence of its position, are all the more remarkable in light of the flimsiness of the legal support for its view that Michigan and other states would be in violation of the laws of the United States by failing to adopt *in toto* its LEP rules. The purported source of the Department's newly-discovered power to demand the free provision of interpreters to all who might wish to take advantage is Title VI of the Civil Rights Act of 1964. More precisely, the Department relies upon a *letter* from the Assistant Attorney General placing a new *gloss* upon a non-binding statement of "*policy guidance*" previously issued by the Department.[2] That

[2] DOJ's "policy guidance" provides, in pertinent part:

> Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens. [67 Fed Reg 41,455 June 18, 2002.]

To begin with (and perhaps to end with, as well), DOJ's "policy guidance" "lack[s] the force of law." *Christensen v Harris Co*, 529 US 576, 587; 120 S Ct 1655; 146 L Ed 2d 621 (2000). Furthermore, nothing within this generalized "policy guidance" even arguably requires the adoption of the Department's breathtakingly broad and specific free-interpreters-for-all rules set forth in its subsequent demand letter to this and to other state supreme courts.

"policy guidance" in turn is ostensibly based upon the Department's own *regulations*,[3] which are in turn based upon Title VI, the only authority in this listing that is an actual statute of the United States. 42 USC 2000d *et seq*. To restate, the Department relies upon a *letter* signed by the Assistant Attorney General purporting to interpret his own "*policy guidance*" purporting to be grounded in a *regulation* of the Department purporting to construe an actual *statute*, which statute in relevant part closely implicates the Fourteenth Amendment to the Constitution. Not exactly, I would submit, what the Framers had in mind when they described the "legislative power" of the United States in Article I, § 1 of the Constitution. And Title VI prohibits discrimination in the provision of public services "on the ground of race, color, or national origin," none of which forms of discrimination are apparently implicated by LEP policy, even under the Department's own regulations and "policy guidance."

Not surprisingly, the Department fails to provide any specific details or documentary, non-anecdotal evidence of instances in which discriminatory practices within the Michigan court system have actually prevented any individual from "meaningfully participating" in the

[3] See, e.g., 28 CFR 42.104(b)(2), which forbids recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." The propriety of this particular federal regulation has been called into question. See, e.g., *Alexander v Sandoval*, 532 US 275, 281-282; 121 S Ct 1511; 149 L Ed 2d 517 (2001) (regulations that "proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [Title VI] . . . are in considerable tension with the rule of [*Bakke*, 438 US 265] and [*Guardians*, 463 US 582] that [Title VI] forbids only intentional discrimination . . . .").

judicial process because of race, color, or national origin.[4] But, of course, as the Department views things, "discrimination" does not simply mean "discrimination," as traditionally understood i.e., distinguishing or differentiating between persons "because of," "due to," "on account of," "on the basis of," or "on the grounds of" race, color, or national origin, but encompasses also the theory of "disparate impact or results," or statistical "discrimination."[5] See n 3. Relying upon this theory, evidence of an intention or purpose to discriminate becomes largely irrelevant, and it is sufficient that statistically-imperfect outcomes or results are produced by public and private policies and actions.

But the legal flaws of the "disparate impact" theory, upon which the Department's LEP demands rest, reach even deeper. In numerous cases, such as *Regents of Univ of Cal v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978), *Guardians Ass'n v Civil Serv Comm*, 463 US 582; 103 S Ct 3221; 77 L Ed 2d 866 (1983), and *Alexander v Sandoval,* 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001), the U.S. Supreme Court has held that Title VI prohibits only *intentional* discrimination and that "[i]t is clear now that the disparate-impact regulations do not simply apply [Title VI]—since they indeed forbid conduct that [Title VI] permits." *Alexander*, 532 US at 285; see also n 3; compare *Lau v Nichols*, 414 US 563; 94 S Ct 786; 39 L Ed 2d 1 (1974).[6]

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[4] The only specific complaint identified by the Department of which I am aware pertains to an allegation against a Washtenaw county court, not for failing to provide interpreters, but for failing to provide interpreters *free of charge*.

[5] None of which is to suggest that "disparate impact" theory is an invention of the current Department of Justice; it is not.

[6] The Constitution likewise prohibits only intentional discrimination. See, e.g., *City of Mobile v Bolden*, 446 US 55, 62; 100 S Ct 1490; 64 L Ed 2d 47 (1980); *Massachusetts Personnel Admin v Feeney*, 442 US 256, 272;

Indeed, the Civil Rights Division's own recent conduct demonstrates that it is well aware of the shaky foundations of its "disparate impact" theory. As the media has widely reported, Assistant Attorney General Perez, apparently apprehensive that the U.S. Supreme Court might directly repudiate the "disparate impact" theory, engaged in a quid pro quo in February with the city of St. Paul, Minnesota, whereby the Department agreed not to intervene in two civil rights cases against the city in exchange for the city's agreement to withdraw its appeal in *Magner v Gallagher*, ___US___; 132 S Ct 548; 181 L Ed 2d 395 (2011), a case calling the "disparate impact" theory into question and scheduled to be heard by the U.S. Supreme Court. See, e.g., *Another Supreme Court Dare*, Wall St J, May 23, 2013. It is manifest that the desire of the Division to protect its "disparate impact" theory was central to this agreement. In a press release explaining its decision to withdraw its appeal, St. Paul stated that, if not withdrawn, such appeal "could completely eliminate "disparate impact" civil rights enforcement . . . The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition." *The Talented Mr. Perez*, Wall St J, March 21, 2013. This agreement caused Assistant Attorney General Perez's nomination for Secretary of Labor to be delayed in the Senate for months. Thus, the Department grounds its efforts to compel state supreme courts to adopt its preferred LEP court rules exclusively in "disparate impact" analysis. However, not only has the Department failed to present any evidence of any intentional discrimination by Michigan based "on the ground of race, color, or na-

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99 S Ct 2282; 60 L Ed 2d 870 (1979); *Village of Arlington Hts v Metro Housing Dev Corp*, 429 US 252, 265; 97 S Ct 555; 50 L Ed 2d 450 (1977); *Washington v Davis*, 426 US 229, 239; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

tional origin," but it has failed even to present evidence of "disparate impact discrimination," much less connect a state's LEP policies with Title VI discriminations. Given that Title VI nowhere requires or implies the free appointment of interpreters, the Department's argument that Title VI provides it with the legal authority to compel state adoption of its favored LEP policies deserves to be resisted and challenged in court if necessary.

Consistent with the federal and state constitutions, Michigan law already requires the appointment of interpreters for all criminal defendants that are in need of an interpreter. MCL 775.19a; *People v Warren (After Remand)*, 200 Mich App 586, 591-592; 504 NW2d 907 (1993), lv den 445 Mich 857 (1994); *People v Atsilis*, 60 Mich App 738, 739; 31 NW2d 534 (1975). And in civil matters, a trial court may also appoint an interpreter and direct that interpretation costs "be paid out of funds provided by law or by one or more of the parties." MCR 2.507(D). By all measures, these rules have operated well. Indeed, in my experience on this Court over the last 14 years, I cannot recall a single case in which an LEP person alleged that he or she had been denied an interpreter. The Department's crusade, at least in Michigan, is a classic case of a solution in search of a problem.

Despite the absence of any obvious problem in Michigan, as well as the dubiousness of federal authority to compel Michigan to adopt new LEP rules, this Court has chosen to comply in significant part with the demands of the Department by adopting new court rules that will *require* courts to appoint foreign language interpreters for any party or witness[7] who requires one to "meaningfully participate" in any "case or

[7] MCR 1.111(B)(1) provides:

court proceeding,"[8] including most notably *civil* proceedings. Then, "at the conclusion of the case or proceeding," MCR 1.111(A)(3), "[i]f a party is financially able to pay for interpretation costs,[9] the court *may* order the party to reimburse the court for payment of interpretation costs." MCR 1.111(F)(5) (emphasis added). That is, the new court rules provide trial courts with the discretion to provide *free* interpreters, even where an individual is "financially able to pay for interpretation costs."[10]

> If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court *shall* appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party. [Emphasis added.] In addition, MCR 1.111(B)(2) provides that "[t]he court *may* appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." (Emphasis added.)

[8] "Case or Court Proceeding" is defined as "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

[9] "A person is financially able to pay for interpreter costs when: (a) The person's family or household income is greater than 125% of the federal poverty level; and (b) An assessment of interpreter costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(4). In light of (a), it is anyone's surmise as to what (b) adds to the "financially able to pay" analysis, except that it is clear there will be some unknown number of persons *above* 125% of the poverty level who will be viewed as legally *entitled* to free, i.e., taxpayer-funded, interpreter services.

[10] The "standardlessness" of free interpreter appointments for financially-able individuals renders it unlikely that there will be meaningful appellate review of such appointments. It is equally unlikely that there will be incentive on the part of any other party to object to these appointments, since, of course, it is not something for which *they* would

While I respect that this Court has not fully accepted the Department's demands, I believe nonetheless that it has acceded to significantly more of these demands than is warranted, and that what remains in dispute is of considerably-diminished practical consequence, notwithstanding the intransigence of the Department in insisting that this Court comply with exactitude to its demands. The rules adopted and implemented by the Court today require the appointment at public expense of interpreters in all "court proceedings," including both criminal and civil cases, for all parties and witnesses. These rules then allow, but do not require, the court to order financially-able parties to reimburse the Court at the conclusion of trial. The likely success of such after-the-fact reimbursement efforts can only be estimated by examining the rate at which judicial bodies have successfully recouped other types of post-trial costs and fees from those owing such amounts. The Court both significantly expands the scope of judicial proceedings in which interpreters must be provided and significantly expands the scope of judicial proceedings in which interpreters must be provided at public expense, including to individuals who are financially able to pay for such services themselves.

Rather than adopting the new court rules under duress from the Department, I would reject its demands and apprise now Secretary Perez's successor as Assistant Attorney General that, in the judgment of the people of Michigan, and as reflected in the decisions of

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be paying. Thus, the new rules effectively favor the appointment of interpreters, including free interpreters, see MCR 1.111(F)(6) ("Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter."), but do not favor the reimbursement of costs associated with such appointments. See MCR 1.111(A)(3), providing, " 'Reimbursement' means reimbursement at the *conclusion* of the case or court proceeding." (Emphasis added.)

their elected legislative, executive, and judicial representatives, the court rules of our state concerning interpreters have operated fairly and effectively to ensure that limited-English-proficient individuals have reasonable and meaningful access to Michigan's court system in circumstances in which there is a constitutional or legal right to a free interpreter. If the Department then wishes to carry out its implicit threats to sue the state, I would aggressively defend against that suit and ensure that the burden of proof is clearly placed upon the Department to demonstrate: (1) that there is a constitutional or legal right to a free interpreter in all judicial and court-related proceedings or programs; (2) that there is a constitutional or legal right to a free interpreter in all judicial and court-related proceedings or programs, without regard to financial ability to pay; (3) that there is evidence that the state of Michigan has been engaged in either constitutional or statutorily-prohibited discrimination against persons on the basis of national origin or any other "protected category"; (4) that "discrimination" in the context of either the Constitution or Title VI is properly defined with reference to "disparate impact" analysis; (5) that a federal agency acts pursuant to its authority within our constitutional architecture, in particular our system of federalism, when it seeks to require the supreme courts of every state to adopt court rules imposing considerable new financial costs upon their citizens, which rules are predicated upon "letter interpretations" grounded in statements of "policy guidance" based upon administrative regulations purporting to interpret congressional statutes; and (6) that the Department possesses the constitutional authority to deprive the Michigan court system of the entirety of its federal financial assistance where Michigan does not fully assent to the conditions imposed by the Department pertaining to limited-

English-proficiency persons, i.e., that the "financial inducement" the Department has chosen in that circumstance is closer to a "relatively mild encouragement" than to a "gun to the head." Who can better assert the constitutional prerogatives of the 50 states of our Union than their supreme courts acting together?[11]

Perhaps most troubling to me is that the demands of the Department are reflective of an increasingly familiar pattern by which this and other state supreme courts have routinely been "commandeered" or "dragooned" by federal agencies to enact new court rules, not as the product of any exercise of independent judgment by the courts themselves that such rules are warranted, but as the product of financial threats by these agencies. These demands typically occur in areas of policy that lie within the core constitutional responsibility of the states, such as child support regulations, foster care rules, and juvenile guardianship policies, and where there is little or no federal authority that can be discerned from the Constitution. A charade then proceeds in which the federal agency pretends to respect the authority of the state courts, and the state courts pretend to exercise that authority. A constitutional dynamic thus arises that caricatures the proper relationship between our national and state governments, in which publicly-unaccountable federal officials decree

[11] What is particularly regrettable about the Court's position today is that, despite the significant accommodations that have been made to the Department, Michigan may *yet* find itself subject to a lawsuit because we have not accommodated the Department's demands "jot and tittle." The lawsuit that I have described in this paragraph would be of consequence both in asserting the rule of law and in delineating the contours of American federalism. The lawsuit that may *now* result despite the Court's efforts at deterrence will instead focus largely upon mere details that divide the Department and this Court.

word-for-word to elected state justices what new court rules are required, and how exactly the justices must cast their votes at their next judicial "deliberations." It is hard to imagine a more distorted illustration of republican self-government, in which elected representatives of the people become little more than mechanical instrumentalities for obediently carrying out the demands of federal officials. And by this process, the federal government's spending authority is abused, both by imposing obligations upon the states allowing the federal government to accomplish policy ends it could accomplish in no other fashion, and by making state representatives appear feckless and ridiculous. Although I believe that this Court has conceded too much to the demands of the Department, as I have already indicated, it is very much to the Court's credit that it has refused to accept in its entirety the Department's extreme and unwarranted demands.

Because I believe that our state's current court rules reasonably and meaningfully protect limited-English-proficient individuals as to their constitutional and legal rights, I would retain these rules and would not adopt those demanded in their place by the Department.[12]

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[12] By the adoption of our new rules, the Court also establishes an additional and unnecessary judicial-branch bureaucracy, one whose absence the state has endured well for its first 175 years—a nine-member Foreign Language Board of Review and Regulation of Foreign Language Interpreters, replete with its own staff, Code of Professional Responsibility for Court Interpreters, state certification requirements, standards of conduct, training programs, continuing certification requirements, registration fees for both interpreters and "entities that employ a certified foreign language interpreter," disciplinary procedures, and an array of new administrative processes.

Amended September 18, 2013, effective January 1, 2014 (File No. 2011-19)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. If they have made a plea agreement, which may include an agreement to a sentence to a specific term or within a specific range, the agreement must be stated on the record or reduced to writing and signed by the parties. The parties may memorialize their agreement on a form substantially approved by the SCAO. The written agreement shall be made part of the case file.

(2) [Unchanged.]

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a ~~specific sentence disposition~~ sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to ~~the sentence~~ a specified term or within a specified range as agreed to ~~or recommended by the prosecutor~~; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow ~~the sentence disposition~~ an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range~~it~~, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after ~~After~~ acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves ~~a prosecutorial sentence recommendation or~~ an agreement for a ~~specific~~ sentence for a specified term or within a specified range, 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.

(3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under subsection (2)(a) or (2)(b) if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.

(C)-(E) [Unchanged.]

Staff Comment: The amendments of MCR 6.302 and MCR 6.310 eliminate the ability of a defendant to withdraw a plea if the defendant and prosecutor agree that the prosecutor will recommend a particular sentence, but the court chooses to impose a sentence greater than that recommended by the prosecutor. Further, the amendment clarifies that a defendant's misconduct that occurs between the time the plea is accepted and the defendant's sentencing may result in a forfeiture of the defendant's right to withdraw a plea in either a *Cobbs* or *Killebrew* case. In addition, the amendments require that a plea agreement (which may include a sentence agreement) must be stated on the record or reduced to writing. A form developed to accommodate this writing is available on the Court's website. The amendments also include various technical changes to reflect that a sentence agreement includes a sentence for a specific term or a sentence within a specific range.

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

CAVANAGH, J., would decline to adopt and would close the file.

Amended October 2, 2013, effective January 1, 2014 (File No. 2011-26)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs

(1)-(7) [Unchanged.]

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

(i) for a new trial, ~~or~~

(ii) to set aside the judgment, or

(iii) for rehearing or reconsideration.

(9)-(11) [Unchanged.]

RULE 2.405. OFFERS TO STIPULATE TO ENTRY OF JUDGMENT.

(A)-(C) [Unchanged.]

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(5) [Unchanged.]

(6) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion

(i) for a new trial, ~~or~~

(ii) to set aside the judgment, or

(iii) for rehearing or reconsideration.

(E) [Unchanged.]

RULE 2.625. TAXATION OF COSTS.

(A)-(E) [Unchanged.]

(F) Procedure for Taxing Costs.

(1) [Unchanged.]

(2) When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C),

(a)-(c) [Unchanged.]

(3)-(4) [Unchanged.]

(G)-(J) [Unchanged.]

Staff Comment: The amendments of MCR 2.403(O)(8), MCR 2.405(D)(6), and MCR 2.625(F)(2) add language that references a motion for rehearing or reconsideration (consistent with the Court of Appeals opinion in *MEEMIC Ins Co v DTE Energy Co,* 292 Mich App 278 [2011]) to the list of motions that toll the period of time in which a party may file a request for case-evaluation sanctions.

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

Entered October 2, 2013, effective immediately (File No. 2013-02)—REPORTER.

By order dated March 20, 2013, the Court adopted amendments of Rules 3.002, 3.800, 3.802, 3.807, 3.903, 3.905, 3.920, 3.921, 3.935, 3.961, 3.963, 3.965, 3.967, 3.974, 3.977, and 5.402 of the Michigan Court Rules, effective immediately, but pending public comment and a public hearing. Notice and an opportunity for comment and a public hearing having been provided, the amendments of these rules are retained.

By further order of the Court, the Court adopts the following amendment, effective immediately:

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(9) [Unchanged.]

(10) The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or for other good cause shown. If the court knows or has reason to know the child is an Indian, the court may adjourn the hearing for up to 21 days to ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1). If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrule (C), and as applicable, MCR 3.967.

(11)-(13) [Unchanged.]

(C)-(D) [Unchanged.]

Staff Comment: The amendment of MCR 3.965 allows a slightly longer adjournment period in cases that involve Indian children to accommodate the statutory provisions that require notice to be provided at least ten days before the hearing.

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

Amended October 2, 2013, effective January 1, 2014 (File No. 2011-31)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 7.105. APPLICATION FOR LEAVE TO APPEAL.

(A)-(C) [Unchanged.]

(D) Reply. Within 7 days after service of the answer, the appellant may file a reply brief that conforms to MCR 7.212(G).

~~(D)~~(E)-~~(F)~~(G) [Former subsections (D)-(F) are relettered, but otherwise unchanged.]

RULE 7.111. BRIEFS.

(A) Time for Filing and Service.

(1)-(2) [Unchanged.]

(3) Within 14 days after the appellee's brief is served on appellant, the appellant may file a reply brief. The brief must conform to MCR 7.212(G) and must be served on all other parties to the appeal.

(4) *Briefs in Cross Appeals*. The filing and service of briefs by a cross appellant and a cross appellee are governed by subrules (A)(1) ~~and (2)~~-(3).

~~(4)~~(5)-~~(5)~~(6) [Former subsections (4)-(5) renumbered, but otherwise unchanged.]

(B)-(D) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(C) [Unchanged.]

(D) Reply. A reply brief may be filed as provided by MCR 7.212(G).

~~(D)~~(E)-~~(G)~~(H) [Former subsections (D)-(G) are relettered, but otherwise unchanged.]

Staff Comment: These amendments permit the filing of a reply brief in support of an application for leave to appeal in the circuit court and the Court of Appeals, and following the filing of a claim of appeal in the circuit court.

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

Amended October 2, 2013, effective January 1, 2014 (File No. 2013-12)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 7.313. MOTIONS IN SUPREME COURT.

(A)-(D) [Unchanged.]

(E) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed (the date of an opinion is stamped on the upper right corner of the first page):

(a)-(c) [Unchanged.]

The motion for rehearing must include reasons why the Court should modify its opinion. Motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3).

(2)-(4) [Unchanged.]

(F) Motion for Reconsideration. To move for reconsideration of a Court order, a party must file the items required by subrule (A) within 21 days after the date of certification of the order. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3). The clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

Staff Comment: The amendments of MCR 7.313 clarify that the decision whether to grant rehearing or reconsideration in the Michigan Supreme Court should be made consistent with the standard incorporated in MCR 2.119(F)(3), similar to the reference for consideration of such motions in the Court of Appeals contained in MCR 7.215(I)(l).

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

Amended October 2, 2013, effective January 1, 2014 (File No. 2012-06)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 9.221. CONFIDENTIALITY; DISCLOSURE.

(A)-(H) [Unchanged.]

(I) Disclosure to Chief Judge. Notwithstanding the prohibition against disclosure in this rule, and except for those situations that involve a dismissal with explanation, the commission shall notify the chief judge of a court when the commission has taken action under MCR 9.207(B)(2)-(5) involving a magistrate or referee of that court. Upon the chief judge's request, the referee or magistrate shall provide the chief judge with a copy of the commission's written notice of disposition.

Staff Comment: The amendment of MCR 9.221 adds a new subrule (I) that requires the Judicial Tenure Commission to notify a court's chief judge if a referee or magistrate is subject to a corrective action that does not rise to the level of a formal complaint, including a letter of caution, a conditional dismissal, an admonishment, or a recommendation for private censure. The new requirement does not apply to a dismissal with explanation.

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

Amended October 30, 2013, effective March 1, 2014 (File No. 2012-18)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 2.512. INSTRUCTIONS TO JURY.

(A)-(C) [Unchanged.]

(D) Model Civil Jury Instructions and Model Criminal Jury Instructions.

(1) The Committee on Model Civil Jury Instructions and the Committee on Model Criminal Jury Instructions appointed by the Supreme Court ~~has~~ have the authority to adopt model ~~civil~~ jury instructions ~~(M Civ JI)~~ and to amend or repeal those instructions approved by a predecessor committee. Before adopting, amending, or repealing an instruction, ~~the~~ each committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. If the committee finds it necessary to take immediate action, the committee may adopt a new instruction or revision while the public comment period is pending. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model ~~civil~~ jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions or ~~its~~ a predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever ~~the~~ a committee recommends that no instruction be given on a particular matter, the court

shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model ~~civil~~ jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.

Staff Comment: The Court has determined that the function of adopting, amending, and repealing model criminal jury instructions should be structured similar to that for model civil jury instructions. As part of that structural change, this amendment requires trial courts to use model jury instructions in criminal cases under the same circumstances in which they are used in civil cases, i.e., if the instructions are applicable, accurately state the applicable law, and are requested by a party.

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

Amended November 27, 2013, effective January 1, 2014 (File No. 2012-04)—REPORTER.

[The present language is amended as indicated below; underlining indicates new text and strikeover indicates text that has been deleted.]

RULE 3.218. FRIEND OF THE COURT RECORDS; ACCESS.

(A) General~~Definitions~~. Friend of the court records are not subject to a subpoena issued under these Michigan Court Rules. Unless another rule specifically provides for the protection or release of friend of the

court records, this rule governs. When used in this subrule, unless the context indicates otherwise,

(1) "records" means ~~paper files, computer files, microfilm, microfiche, audio tape, video tape, photographs, and includes records as defined in MCR 1.109~~any case-specific information the friend of the court office maintains in any media;

(2) [Unchanged.]

(3) "confidential information" means

(a) staff notes ~~from investigations, mediation sessions, and settlement conferences~~;

(b) ~~Family Independence Agency~~ any confidential information from the Department of Human Services child protective services ~~reports~~ unit or information included in any reports to protective services from a friend of the court office;

(c) ~~formal mediation~~ records from alternative dispute resolution processes, including the confidentiality of mediation records as defined in MCR 2.412;

(d) communications from minors;

(e) friend of the court grievances filed by the opposing party and the responses;

(f) ~~a party's address or any other~~ information ~~if release is prohibited by~~ when a court order prohibits its release;

(g)-(h) [Unchanged.]

(4) Reference to an agency, office, officer, or capacity includes an employee or contractor working within that agency or office, or an employee or caseworker acting on behalf of that office or working in the capacity referred to.

(5) "Governmental agency" means any entity exercising constitutional, legislative, executive, or judicial authority, when providing benefits or services.

(B) A friend of the court office must provide access to nonconfidential records to the following:

(1) A party~~,~~; third-party custodian~~,~~; guardian or conservator~~;~~ guardian ad litem or counsel for a minor~~,~~; lawyer-guardian ad litem~~,~~; ~~and~~ an attorney of record~~,~~; and the personal representative of the estate of a party. ~~must be given access to friend of the court records related to the case, other than confidential information.~~

The friend of the court may honor a request from a person identified in this paragraph to release information to a governmental agency providing services to that individual, or before which an application for services is pending.

(2) An officer in the Judge Advocate General's office in any branch of the United States military, if the request is made on behalf of a service member on active duty otherwise identified in this subrule.

(C) ~~A citizen advisory committee established under the Friend of the Court Act, MCL 552.501 *et seq.*,~~Unless the release is otherwise prohibited by law, a friend of the court office must provide access to all nonconfidential and confidential records to the following:

(1) ~~shall be given access to a grievance filed with the friend of the court, and to information related to the case, other than confidential information;~~ Other agencies and individuals as necessary for the friend of the court to implement the state's plan under Title IV, Part D of the Social Security Act, 42 USC 651 *et seq.* or as required by the court, state law, or regulation that is consistent with this state's IV-D plan.

(2) The Department of Human Services, as necessary to report suspected abuse or neglect or to allow the Department of Human Services to investigate or provide services to a party or child in the case.~~may be given~~

~~access to confidential information related to a grievance if the court so orders, upon clear demonstration by the committee that the information is necessary to the performance of its duties and that the release will not impair the rights of a party or the well-being of a child involved in the case.~~

~~When a citizen advisory committee requests information that may be confidential, the friend of the court shall notify the parties of the request and that they have 14 days from the date the notice was mailed to file a written response with the court. If the court grants access to the information, it may impose such terms and conditions as it determines are appropriate to protect the rights of a party or the well-being of a child.~~

(3) Other agencies that provide services under Title IV, part D of the Social Security Act, 42 USC 651 *et seq*.

(4) Auditors from state and federal agencies, as required to perform their audit functions with respect to a friend of the court matter.

(5) Corrections, parole, or probation officers, when, in the opinion of the friend of the court, access would assist the office in enforcing a provision of a custody, parenting time, or support order.

(6) Michigan law enforcement personnel who are conducting a civil or criminal investigation related directly to a friend of the court matter, and to federal law enforcement officers pursuant to a federal subpoena in a criminal or civil investigation.

(D) ~~Protective services personnel from the Family Independence Agency must be given access to friend of the court records related to the investigation of alleged abuse and neglect.~~A citizen advisory committee established under the Friend of the Court Act, MCL 552.501 *et seq.*

(1) shall be given access to a grievance filed with the friend of the court, and to information related to the case, other than confidential information.

(2) may be given access to confidential information related to a grievance if the court so orders, upon demonstration by the committee that the information is necessary to the performance of its duties and that the release will not impair the rights of a party or the well-being of a child involved in the case.

When a citizen advisory committee requests information that may be confidential, the friend of the court shall notify the parties of the request and that they have 14 days from the date the notice was mailed to file a written response with the court.

If the court grants access to the information, it may impose such terms and conditions as it determines are appropriate to protect the rights of a party of the well-being of a child.

(E) ~~The prosecuting attorney and personnel from the Office of Child Support and the Family Independence Agency must be given access to friend of the court records required to perform the functions required by title IV, part D of the Social Security Act, 42 USC 651 *et seq*.~~A friend of the court office may refuse to provide access to a record in the friend of the court file if the friend of the court did not create or author the record. On those occasions, the requestor may request access from the person or entity that created the record.

~~(F) Auditors from state and federal agencies must be given access to friend of the court records required to perform their audit functions.~~

~~(G)-(H)~~ [Redesignated as (F)-(G), but otherwise unchanged.]

Staff Comment: These amendments reflect state and federal statutory and regulation revisions that have occurred in the last decade, and add specificity and detail to the existing language in MCR 3.218.

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

Amended January 29, 2014, effective immediately (File No. 2012-03)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendments of Rule 1.111 of the Michigan Court Rules are adopted, effective immediately and pending public comment. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas of public hearings are posted at Administrative Matters & Court Rules page.

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

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS.

(A) Definitions

When used in this rule, the following words and phrases have the following definitions:

(1) "Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.

(2) "Party" means a person named as a party or a person with legal decision-making authority in the case or court proceeding.

~~(3) "Reimbursement" means reimbursement at the conclusion of the case or court proceeding.~~

(3~~4~~) A person is "financially able to pay for interpretation costs" if the court determines that requiring reimbursement of ~~interpreter~~interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court. For purposes of this rule, a person is financially able to pay for ~~interpreter~~interpretation costs when:

(a) The person's family or household income is greater than 125% of the federal poverty level; and

(b) An assessment of ~~interpreter~~interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter.

(5)-(7) [Renumbered (4)-(6), but otherwise unchanged.]

(B)-(E) [Unchanged.]

(F) Appointment of Foreign Language Interpreters

(1)-(4) [Unchanged.]

(5) If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for ~~payment~~ all or a portion of interpretation costs.

(6) Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter.

(7) At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement~~, and of the continuing obligation to inform the court of any change in financial status~~. The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information.

(G) [Unchanged.]

(H) Request for Review

(1) Any time a court denies a request for the appointment of a foreign language interpreter or orders reimbursement of interpretation costs, it shall do so by written order.

(2) An LEP individual may immediately request review of the denial of appointment of a foreign language interpreter or an assessment for the reimbursement of interpretation costs. A request for review must be submitted to the court within 56 days after entry of the order.

(a) In a court having two or more judges, the chief judge shall decide the request for review de novo.

(b) In a single-judge court, or if the denial was issued by a chief judge, the judge shall refer the request for review to the state court administrator for assignment to another judge, who shall decide the request de novo.

(c) A pending request for review under this subrule stays the underlying litigation.

(d)A pending request for review under this subrule must be decided on an expedited basis.

(e) No motion fee is required for a request for review made under this subrule.

Staff Comment: The amendments of MCR 1.111 make technical revisions and insert an interim review process for cases in which a court denies a request for an interpreter or orders reimbursement of interpretation costs. These revisions are adopted with immediate effect, but pending public comment and a future public hearing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this amendment may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-03. Your

comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MARKMAN, J. I would not adopt the proposed amendments of MCR 1.111(H)(2)(a) to (b) establishing a process that requires the chief judge of a court or a judge assigned by the state court administrator to review the denial of a request for either the appointment of an interpreter or the public reimbursement of interpretation costs.

Amended January 29, 2014, effective May 1, 2014 (File No. 2013-10)—REPORTER.

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

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(b)[Unchanged.]

(c) After a final judgment or final order has been entered and the time for an appeal of right has passed, papers must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney;

(d) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A)-(B) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment or final order is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. The appearance applies in an appeal taken before entry of final judgment or final order by the trial court.

(2) [Unchanged.]

Staff Comment: The amendment of MCR 2.107 provides clarification by adding the phrase "final order" so that after either a final judgment or final order has entered, papers should be served on the party after the time for appeal has passed. The amendment of MCR 2.117 states that the duration of an attorney's appearance extends until a final judgment or final order is entered. This amendment is intended to clarify that representation by an attorney who appears in a postjudgment motion ends with the final order related to that matter (after the period for appeal of right has passed).

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

Amended January 29, 2014, effective May 1, 2014 (File No. 2013-38)—REPORTER.

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

RULE 2.510. JUROR PERSONAL HISTORY QUESTIONNAIRE.

(A) [Unchanged.]

(B) Completion of Questionnaire.

(1) The court clerk or the jury board, as directed by the chief judge, shall supply each juror drawn for jury service with a questionnaire in the form adopted pur-

suant to subrule (A). The court clerk or the jury board shall direct the juror to complete the questionnaire ~~in the juror's own handwriting~~ before the juror is called for service.

(2) [Unchanged.]

(C) Return of ~~Filing~~ the Questionnaire.

(1) On completion, the questionnaire shall be ~~filed with~~ returned to the court clerk or the jury board, as designated under subrule (B)(1). The only persons allowed to examine the questionnaire are:

(a)-(d)[Unchanged.]

(2) [Unchanged.]

(3) The questionnaires must be maintained ~~kept on file~~ for 3 years from the time they are returned ~~filled out~~. They may be created and maintained in any medium authorized by court rules pursuant to MCR 1.109.

(D) Summoning Jurors for Court Attendance. The court clerk, the court administrator, the sheriff, or the jury board, as designated by the chief judge, shall summon jurors for court attendance at the time and in the manner directed by the chief judge ~~or the judge to whom the action in which jurors are being called for service is assigned~~. For a juror's first required court appearance, service must be by written notice addressed to the juror at the juror's residence as shown by the records of the clerk or jury board. The notice may be by ordinary mail or by personal service. For later service, notice may be in the manner directed by the court. The person giving notice to jurors shall keep a record of the notice and make a return if directed by the court. The return is presumptive evidence of the fact of service.

(E) [Unchanged.]

Staff Comment: The amendments of MCR 2.510 allow courts to authorize prospective jurors to complete and return questionnaires electronically, and allow courts to create and maintain them electronically (i.e., in any medium authorized by court rules pursuant to MCR 1.109). The change also deletes language in MCR 2.510(D) to clarify that the chief judge is responsible for initiation of the court's policies for summoning prospective jurors.

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

Amended January 29, 2014, effective May 1, 2014 (File No. 2012-23)—REPORTER.

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

RULE 8.109. MECHANICAL RECORDING OF COURT PROCEEDINGS.

(A) Official Record. Trial courts are authorized to use audio and video recording equipment for making a record of court proceedings. If a trial court uses audio or video recording ~~devices~~equipment for making the record of court proceedings, it shall use only recording ~~devices~~equipment that meets the standards as published by the State Court Administrative Office (i.e., the Standards for Digital Video Recording Systems, the Standards for Digital Audio Recording Systems), or analog equipment that the State Court Administrative Office has approved for use.

(B) Operating Standards. Trial courts that use audio or video recording equipment, whether digital or analog, must adhere to the audio and video recording operating standards published by the State Court Administrative Office.

(C) [Former (B) relettered, but otherwise unchanged.]

Staff Comment: The amendments of MCR 8.109 provide explicit authority for courts to use audio and video recording equipment to make a record of court proceedings and require that trial courts using recording equipment follow the standards for recording proceedings that are published by the State Court Administrative Office.

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

Amended January 29, 2014, effective May 1, 2014 (File No. 2012-26)—REPORTER.

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

RULE 8.111. ASSIGNMENT OF CASES.

(A) Application. The rule applies to all courts defined in subrule 8.110(A), regardless whether the court is acting in the capacity of a trial court or an appellate court.

(B)-(D) [Unchanged.]

Staff Comment: This amendment of MCR 8.111 clarifies that the rule applies regardless whether a court is acting in the capacity of a trial court or an appellate court, such as a circuit court considering an appeal of a district court or probate court determination.

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

Amended March 26, 2014, effective May 1, 2014 (File No. 2012-30)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.621. PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(A)-(D) [Unchanged.]

(E) Receivers. When necessary to protect the rights of a judgment creditor, the court may, under MCR 2.622, appoint a receiver in a proceeding under subrule (A)(2), pending the determination of the proceeding.

(F)-(H) [Unchanged.]

RULE 2.622. RECEIVERS ~~IN SUPPLEMENTARY PROCEEDINGS~~.

(A) Appointment of Receiver. Upon the motion of a party or on its own initiative, and for good cause shown, the court may appoint a receiver as provided by law. A receiver appointed under this section is a fiduciary for the benefit of all persons appearing in the action or proceeding. For purposes of this rule, "receivership estate" means the entity, person, or property subject to the receivership.

(B) Selection of Receiver. If the court determines there is good cause to appoint a receiver, the court shall select the receiver in accordance with this subrule. Every receiver selected by the court must have sufficient competence, qualifications, and experience to administer the receivership estate. \und

(1) Stipulated Receiver or No Objection Raised. The moving party may request, or the parties may stipulate to, the selection of a receiver. The moving party shall describe how the nominated receiver meets the requirement in subsection (B) that a receiver selected by the court have sufficient competence, qualifications, and experience to administer the receivership estate, considering the factors listed in subsection (B)(5). If the nonmoving party does not file an objection to the moving party's nominated receiver within 14 days after the petition or motion is served, or if the parties stipulate to the selection of a receiver, the court shall

appoint the receiver nominated by the party or parties, unless the court finds that a different receiver should be appointed.

(2) Receiver Appointed Sua Sponte. If the court appoints a receiver on its own initiative, any party may file objection to the selected receiver and submit an alternative nominee for appointment as receiver within 14 days after the order appointing the receiver is served. The objecting party shall describe how the alternative nominee meets the requirement in subsection (B) that a receiver selected by the court have sufficient competence, qualifications, and experience to administer the receivership estate, considering the factors listed in subsection (B)(5).

(3) Reduction in Time to Object. The court, for good cause shown, may in its discretion, with or without motion or notice, order the period for objection to the selected receiver reduced.

(4) Objections. The party filing an objection must serve it on all parties as required by MCR 2.107, together with a notice of hearing.

(5) If a party objects under subsection (B)(2) or the court makes an initial determination that a different receiver should be appointed than the receiver nominated by a party under subsection (B)(1), the court shall state its rationale for selecting a particular receiver after considering the following factors:

(a) experience in the operation and/or liquidation of the type of assets to be administered;

(b) relevant business, legal and receivership knowledge, if any;

(c) ability to obtain the required bonding if more than a nominal bond is required;

(d) any objections to any receiver considered for appointment;

(e) whether the receiver considered for appointment is disqualified under subrule (B)(6); and

(f) any other factor the court deems appropriate.

(6) Except as otherwise provided by law or by subrule (B)(7), a person or entity may not serve as a receiver or in any other professional capacity representing or assisting the receiver, if such person or entity:

(a) is a creditor or a holder of an equity security of the receivership estate:

(b) is or was an investment banker for any outstanding security of the receivership estate;

(c) has been, within three years before the date of the appointment of a receiver, an investment banker for a security of the receivership estate, or an attorney for such an investment banker, in connection with the offer, sale, or issuance of a security of the receivership estate;

(d) is or was, within two years before the date of the appointment of a receiver, a director, an officer, or an employee of the receivership estate or of an investment banker specified in subrule (b) or (c) of this section, unless the court finds the appointment is in the best interest of the receivership estate and that there is no actual conflict of interest by reason of the employment;

(e) has an interest materially adverse to the interest of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in the receivership estate or an investment banker specified in subrule (b) or (c) of this section, or for any other reason;

(f) has or represents an interest adverse to the receivership estate or stands in any relation to the

subject of the action or proceeding that would tend to interfere with the impartial discharge of duties as an officer of the court.

(g) has, at any time within five years before the date of the appointment of a receiver, represented or been employed by the receivership estate or any secured creditor of the receivership estate as an attorney, accountant, appraiser, or in any other professional capacity and the court finds an actual conflict of interest by reason of the representation or employment;

(h) is an "insider" as defined by MCL 566.31(g);

(i) represents or is employed by a creditor of the receivership estate and, on objection of an interested party, the court finds an actual conflict of interest by reason of the representation or employment; or

(j) has a relationship to the action or proceeding that will interfere with the impartial discharge of the receiver's duties.

(7) Any person who has represented or has been employed by the receivership estate is eligible to serve for a specified limited purpose, if the court determines such employment or appointment is in the best interest of the receivership estate and if such professional does not represent or hold an interest materially adverse to the receivership estate.

(C) Order of Appointment. The order of appointment shall include provisions related to the following:

(1) bonding amounts and requirements as provided in subrule (G);

(2) identification of real and personal property of the receivership estate;

(3) procedures and standards related to the reasonable compensation of the receiver as provided in subrule (F);

(4) reports required to be produced and filed by the receiver, including the final report and accounting;

(5) a description of the duties, authority and powers of the receiver;

(6) a listing of property to be surrendered to the receiver; and

(7) any other provision the court deems appropriate.

(D) Duties.

(1) Within 7 days after entry of the order of appointment, the receiver shall file an acceptance of receivership with the court. The acceptance shall be served on all parties to the action.

(2) Unless otherwise ordered, within 28 days after the filing of the acceptance of appointment, the receiver shall provide notice of entry of the order of appointment to any person or entity having a recorded interest in all or any part of the receivership estate.

(3) The receiver shall file with the court an inventory of the property of the receivership estate within 35 days after entry of the order of appointment, unless an inventory has already been filed.

(4) The receiver shall account for all receipts, disbursements and distributions of money and property of the receivership estate.

(5) If there are sufficient funds to make a distribution to a class of creditors, the receiver may request that each creditor in the class of all creditors file a written proof of claim with the court. The receiver may contest the allowance of any claim.

(6) The receiver shall furnish information concerning the receivership estate and its administration as reasonably requested by any party to the action or proceeding.

(7) The receiver shall file with the court a final written report and final accounting of the administration of the receivership estate.

~~(A)~~(E) Powers ~~and Duties~~.

(1) ~~A receiver of the property of a debtor appointed pursuant to MCL 600.6104(4) has, unless restricted by special order of the court,~~ Except as otherwise provided by law or by the order of appointment, a receiver has general power ~~and authority~~ to sue for and collect all ~~the~~ debts, demands, and rents ~~belonging to~~of the ~~debtor~~receivership estate, and to compromise ~~and~~or settle ~~those that are unsafe and of doubtful character~~claims.

(2) A receiver may ~~sue in the name of the debtor when it is necessary or proper to do so, and may apply for an order directing the tenants of real estate belonging to the debtor, or of which the debtor is entitled to the rents, to pay their rents to the receiver.~~liquidate the personal property of the receivership estate into money. By separate order of the court, a receiver may sell real property of the receivership estate.

~~(3) A receiver may make leases as may be necessary, for terms not exceeding one year.~~

~~(4) A receiver may convert the personal property into money, but may not sell real estate of the debtor without a special order of the court.~~

(~~5~~3) A receiver ~~is not allowed the costs of a suit brought by the receiver against an insolvent person from whom the receiver is unable to collect the costs, unless the suit is brought by order of the court or by consent of all persons interested in the funds in the receiver's hands.~~may pay the ordinary expenses of the receivership but may not distribute the funds in the receivership estate to a party to the action without an order of the court.

(64) ~~A receiver may sell doubtful debts and doubtful claims to personal property at public auction, giving at least 7 days' notice of the time and place of the sale.~~A receiver may only be discharged on order of the court.

~~(7) A receiver must give security to cover the property of the debtor that may come into the receiver's hands, and must hold the property for the benefit of all creditors who have commenced, or will commence, similar proceedings during the continuance of the receivership.~~

(F) Compensation and Expenses of Receiver.

(1) A receiver shall be entitled to reasonable compensation for services rendered to the receivership estate.

(2) The order appointing a receiver shall specify:

(a) the source and method of compensation of the receiver;

(b) that interim compensation may be paid to the receiver after notice to all parties to the action or proceeding and opportunity to object as provided in subsection (5);

(c) that all compensation of the receiver is subject to final review and approval of the court.

(3) All approved fees and expenses incurred by a receiver, including fees and expenses for persons or entities retained by the receiver, shall be paid or reimbursed as provided in the order appointing the receiver.

(4) The receiver shall file with the court an application for payment of fees and the original notice of the request. The notice shall provide that fees and expenses will be deemed approved if no written objection is filed with the court within 7 days after service of the notice. The receiver shall serve the notice and a copy of the application on all parties to the action or proceedings, and file a proof of service with the court.

~~(8) A receiver may not pay the funds in his or her hands to the parties or to another person without an order of the court.~~

(5) The application by a receiver, for interim or final payment of fees and expenses, shall include:

(a) A description in reasonable detail of the services rendered, time expended, and expenses incurred;

(b) The amount of compensation and expenses requested;

(c) The amount of any compensation and expenses previously paid to the receiver;

(d) The amount of any compensation and expenses received by the receiver from or to be paid by any source other than the receivership estate;

(e) A description in reasonable detail of any agreement or understanding for a division or sharing of compensation between the person rendering the services and any other person except as permitted in subpart (6).

If written objections are filed or if, in the court's determination, the application for compensation requires a hearing, the court shall schedule a hearing and notify all parties of the scheduled hearing.

(6) A receiver or person performing services for a receiver shall not, in any form or manner, share or agree to share compensation for services rendered to the receivership estate with any person other than a firm member, partner, employer, or regular associate of the person rendering the services except as authorized by order of the court.

~~(9) A receiver may only be discharged from the trust on order of the court.~~

(G) Bond.

~~(B) Notice When Other Action or Proceeding Pending; Appointment.~~In setting an appropriate bond for the receiver, the court may consider factors including but not limited to:

(1) The value of the receivership estate, if known;

(2) The amount of cash or cash equivalents expected to be received into the receivership estate;

(3) The amount of assets in the receivership estate on deposit in insured financial institutions or invested in U.S. Treasury obligations;

(4) Whether the assets in the receivership estate cannot be sold without further order of the court;

(5) If the receiver is an entity, whether the receiver has sufficient assets or acceptable errors and omissions insurance to cover any potential losses or liabilities of the receivership estate;

(6) The extent to which any secured creditor is undersecured;

(7) Whether the receivership estate is a single parcel of real estate involving few trade creditors; and

(8) Whether the parties have agreed to a nominal bond.

~~(1) The court shall ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether another action or motion under MCR 2.621 is pending against the judgment debtor.~~

~~(2) If another action or motion under MCR 2.621 is pending and a receiver has not been appointed in that proceeding, notice of the application for the appointment of a receiver and of all subsequent proceedings respecting the receivership must be given, as directed by the court, to the judgment creditor prosecuting the other action or motion.~~

~~(3) If several actions or motions under MCR 2.621 are filed by different creditors against the same debtor, only one receiver may be appointed, unless the first appointment was obtained by fraud or collusion, or the receiver is an improper person to execute the trust.~~

~~(4) If another proceeding is commenced after the appointment of a receiver, the same person may be appointed receiver in the subsequent proceeding, and must give further security as the court directs. The receiver must keep a separate account of the property of the debtor acquired since the commencement of the first proceeding, and of the property acquired under the appointment in the later proceeding.~~

(H) Intervention. An interested person or entity may move to intervene. Any motion to intervene shall comply with MCR 2.209.

(I) Removal of Receiver. After notice and hearing, the court may remove any receiver for good cause shown.

~~(C) Claim of Adverse Interest in Property.~~

~~(1) If a person brought before the court by the judgment creditor under MCR 2.621 claims an interest in the property adverse to the judgment debtor, and a receiver has been appointed, the interest may be recovered only in an action by the receiver.~~

~~(2) The court may by order forbid a transfer or other disposition of the interest until the receiver has sufficient opportunity to commence the action.~~

~~(3) The receiver may bring an action only at the request of the judgment creditor and at the judgment creditor's expense in case of failure. The receiver may require reasonable security against all costs before commencing the action.~~

~~(D) Expenses in Certain Cases. When there are no funds in the hands of the receiver at the termination of~~

~~the receivership, the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and may direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them.~~

Staff Comment: The amendments of MCR 2.621 and MCR 2.622 were submitted to the Michigan Supreme Court on behalf of the "Receivership Committee" (a committee created because of a need identified by the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan) to expand and update the rules regarding receivership proceedings.

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

Amended April 2, 2014, effective immediately (File No. 2014-08)—REPORTER.

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

RULE 3.221. HEARINGS ON SUPPORT AND PARENTING TIME ENFORCEMENT ACT BENCH WARRANTS.

(A)-(B) [Unchanged.]

(C) Bond Review Hearing. A person who has not posted a bond, and whose case cannot be heard as provided in subrule (B), must without unnecessary delay be brought before a judge~~,~~ ~~magistrate,~~ or referee for a review of the bond.

(D)-(H) [Unchanged.]

(I) Review; Modification of Release Decision.

(1) Review. A party seeking review of a release decision may file a motion in the court having appellate

jurisdiction over the decision maker. If the decision was made by a ~~magistrate or~~ referee, a party is entitled to a new hearing. Otherwise, the reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion.

(2) [Unchanged.]

(J)-(K) [Unchanged.]

Staff Comment: The amendments of MCR 3.221 strike the term "magistrate" from subsections (C) and (I) to clarify the rule because there is no statutory authority for district court magistrates to conduct bond review hearings on support and parenting time enforcement act bench warrants.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Amended April 23, 2014, effective immediately (File No. 2013-21)—REPORTER.

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

RULE 6.112. THE INFORMATION OR INDICTMENT.

(A)-(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the

defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

RULE 6.113. THE ARRAIGNMENT ON THE INDICTMENT OR INFORMATION.

(A)-(D) [Unchanged.]

(E) Elimination of Arraignments. A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence, as provided in MCR 6.112(F).

Staff Comment: These amendments clarify how a prosecutor's notice of enhanced sentence required under MCL 769.13(1) is to be provided in courts in which arraignment has been eliminated under MCR 6.113(E).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-21. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Amended May 7, 2014, effective immediately (File No. 2013-33)—REPORTER.

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

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS

(A)-(D) [Unchanged.]

(E) Avoidance of Potential Conflicts of Interest

(1) [Unchanged.]

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)~~(5)~~(4). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)~~(5)~~(4) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)~~(5)~~(4) within a reasonable time.

(b) [Unchanged.]

(F) Appointment of Foreign Language Interpreters

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)~~(7)~~(6). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2)-(7) [Unchanged.]

(G)-(H) [Unchanged.]

RULE 1.201. AMENDMENT PROCEDURES.

(A) Notice of Proposed Amendment. Before amending the Michigan Court Rules or other sets of rules within its jurisdiction, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment, and the manner and date for submitting comments. The notice also will be posted on the Court's website, ~~www.courts.mi.gov/supremecourt~~ http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx.

(B)-(E) [Unchanged.]

RULE 3.302. SUPERINTENDING CONTROL.

(A)-(C) [Unchanged.]

(D) Jurisdiction.

(1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals. ~~In this rule the term "circuit court" includes the Recorder's Court of the City of Detroit as to superintending control actions of which that court has jurisdiction.~~

(2) When an appeal in the Supreme Court, the Court of Appeals, or the circuit court~~, or the recorder's court~~ is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

(E) [Unchanged.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D) [Unchanged.]

(E) Retention and Destruction of Court Case Files and Other Court Records. This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).

(1) [Unchanged.]

(2) Register of Actions, Indexes, and Orders. The register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; the order of adjudication and the order terminating jurisdiction for each delinquency case; the latest dispositive order for each designated case; and the order appointing a guardian ~~and any order dismissing, terminating, or revoking a guardian~~ for each juvenile guardianship case.

(3)-(5) [Unchanged.]

(6) Juvenile Guardianship Case Files. Except as provided in subrule (2), the~~The~~ court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian.

(7) [Unchanged.]

(F)-(G) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) [Unchanged.]

(2) Appointment of Attorney

(a) [Unchanged.]

(b) In a case involving the termination of parental rights, the order described in ~~(I)~~(J)(2) and (3) must be entered on a form approved by the State Court Admin-

istrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(3) [Unchanged.]

(K) [Unchanged.]

RULE 3.992. REHEARINGS; NEW TRIAL.

(A) Time and Grounds. Except for the case of a juvenile tried as an adult in the family division of the circuit court for a criminal offense, and except for a case in which parental rights are terminated, a party may seek a rehearing or new trial by filing a written motion stating the basis for the relief sought within 21 days after the date of the order resulting from the hearing or trial. In a case that involves termination of parental rights, a motion for new trial, rehearing, reconsideration, or other postjudgment relief shall be filed within 14 days after the date of the order terminating parental rights. The court may entertain an untimely motion for good cause shown. A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case.

(B)-(F) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)-(7) [Unchanged.]

(8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the ~~Indian Child Welfare Act, 25 USC 1901~~Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., the minor's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(B)-(E) [Unchanged.]

RULE 6.501. SCOPE OF SUBCHAPTER.

Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court ~~or the Recorder's Court for the City of Detroit~~ not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

RULE 6.509. APPEAL.

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 6-month time limit provided by MCR 7.205~~(F)~~(G)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B)-(D) [Unchanged.]

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A) [Unchanged.]

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court~~,~~ and court of claims~~, and recorder's court which~~ that is not a final judgment appealable of right;

(2) a final judgment entered by the circuit court ~~or the recorder's court~~ on appeal from any other court;

(3)-(5) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed within

(1)-(2) [Unchanged.]

Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court ~~or the Recorder's Court for the City of Detroit~~ not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

(3) If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205~~(F)~~(G), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This

exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1)-(3) [Unchanged.]

(4) 1 copy of certain transcripts, as follows:

(a) [Unchanged.]

(b) in an appeal from the circuit court ~~or recorder's court~~ after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court ~~or recorder's court~~;

(c)-(g) [Unchanged.]

(5)-(7) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Late Appeal.

(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule ~~(D)~~(E).

(2) [Unchanged.]

(3) Except as provided in subrules ~~(F)~~(G)(4)and ~~(F)~~(G)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than 6 months after the later of:

(a)-(b)[Unchanged.]

(4) The limitation provided in subrule ~~(F)~~(G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if

(a)-(c) [Unchanged.]

A motion for rehearing or reconsideration of a motion mentioned in subrule ~~(F)~~(G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule ~~(F)~~(G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule ~~(F)~~(G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) Notwithstanding the 6-month limitation period otherwise provided in subrule ~~(F)~~(G)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the 6-month limitation period, or at any time after the 6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of

denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.

(6) [Unchanged.]

(H) [Unchanged.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1)-(8) [Unchanged.]

(9) Motion to Seal Court of Appeals File in Whole or in Part.

(a)-(b) [Unchanged.]

(c) Except as otherwise provided by statute or court rule, the procedure for sealing a Court of Appeals file is governed by MCR 8.119~~(F)~~(I). 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.

(d) [Unchanged.]

(e) An order granting a motion shall include a finding of good cause, as defined by MCR 8.119~~(F)~~(I)(2), and a finding that there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(f) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 8.127. FOREIGN LANGUAGE BOARD OF REVIEW AND REGULATION OF FOREIGN LANGUAGE INTERPRETERS.

(A) [Unchanged.]

(B) Responsibilities of Foreign Language Board of Review

The Foreign Language Board of Review has the following responsibilities:

(1)-(2) [Unchanged.]

(3) Interpreter Certification Requirements

The board shall recommend requirements for interpreters to the state court administrator that the state court administrator may adopt in full, in part, or in a modified form concerning the following:

(a) requirements for certifying interpreters as defined in MCR 1.111(A)~~(5)~~(4). At a minimum, those requirements must include that the applicant is at least 18 years of age and not under sentence for a felony for at least two years and that the interpreter attends an orientation program for new interpreters.

(b) requirements for interpreters to be qualified as defined in MCR 1.111(A)~~(7)~~(6).

(c) [Unchanged.]

(d) requirements for interpreters as defined in MCR 1.111(A)~~(5)~~(4) to maintain their certification.

(e) requirements for entities that provide interpretation services by telecommunications equipment to be qualified as defined in MCR 1.111(A)~~(7)~~(6).

(C) Interpreter Registration

(1) Interpreters who meet the requirements of MCR 1.111(A)~~(5)~~(4) and MCR 1.111(A)~~(7)~~(6)(a) and (b) must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to maintain their status. The fee for registra-

tion is $60. The fee for renewal is $30. The renewal application shall include a statement showing that the applicant has used interpreting skills during the 12 months preceding registration. Renewal applications must be filed or postmarked on or before September 30. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) Entities that employ a certified foreign language interpreter as defined in MCR 1.111(A)~~(5)~~(4), or a qualified foreign language interpreter as defined in MCR 1.111(A)~~(7)~~(6) must also register with the State Court Administrative Office and pay the registration fee and renewal fees.

(D) Interpreter Misconduct or Incompetence

(1)-(6) [Unchanged.]

(7) The State Court Administrative Office shall maintain a record of all interpreters who are sanctioned for incompetence or misconduct. If the interpreter is certified in Michigan under MCR 1.111(A)~~(5)~~(4) because of certification pursuant to another state or federal test, the state court administrator shall report the findings and any sanctions to the certification authority in the other jurisdiction.

(8)-(10) [Unchanged.]

Staff Comment: These amendments reflect changes that correct minor technical errors that have occurred in drafting or the changes respond to recent adopted rule revisions, which occasionally inadvertently create incorrect cross-references in other rules.

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

Amended June 4, 2014, effective September 1, 2014 (File No. 2013-03)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) Availability of Discovery.

(1)-(3) [Unchanged.]

(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(B)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 2.302 clarifies that discovery is available in postjudgment proceedings in domestic relations matters.

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

Amended June 4, 2014, effective September 1, 2014 (File No. 2013-19)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.602. ARBITRATION.

(A) Applicability of Rule. Courts shall have all powers described in MCL 691.1681 *et seq*., or reasonably related thereto, for arbitrations governed by that statute. The remainder of this rule applies to all other forms of arbitration, in the absence of contradictory provisions in the arbitration agreement or limitations imposed by statute, including MCL 691.1683(2). ~~This rule governs statutory arbitration under MCL 600.5001-600.5035.~~

(B) Proceedings ~~to Compel or to Stay~~Regarding Arbitration.

(2) On motion of a party showing an agreement to arbitrate~~ that conforms to the arbitration statute~~, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement~~ and the arbitration statute~~. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the motion.

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Discovery and Subpoenas~~; Depositions~~.

(1) The court may enforce a subpoena or discovery-related order for the attendance of a witness in this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state on conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective.~~ MCR 2.506 applies to arbitration hearings.~~

(2) A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this state and, on motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

(3)~~(2)~~ [Former subrule (2) renumbered as (3) but otherwise unchanged.]

(G)-(H) [Unchanged.]

(I) Award; Confirmation by Court. A party may move for confirmation of an arbitration award~~An arbitration award filed with the clerk of the court designated in the agreement or statute~~ within one year after the award was rendered. The court may ~~be~~ confirm~~ed by~~ the ~~court~~ award, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint or motion to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2)-(5) [Unchanged.]

(K)-(N) [Unchanged.]

Staff Comment: The amendments of MCR 3.602 apply to all other forms of arbitration that are not described in the newly adopted Revised Uniform Arbitration Act, MCL 691.1681 *et seq.*

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

Amended June 4, 2014, effective September 1, 2014 (File No. 2013-04)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A)-(B) [Unchanged.]

(C) Pursuant to 18 USC 2265(d)(3), a court is prohibited from making available to the public on the Internet any information regarding the registration of,

filing of a petition for, or issuance of an order under this rule if such publication would be likely to publicly reveal the identity or location of the party protected under the order.

Staff Comment: The amendment of MCR 3.705(C) prohibits publication of information on the Internet that could reveal the identity or location of the protected party.

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

Amended June 4, 2014, effective September 1, 2014 (File No. 2013-02)—REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) [Unchanged.]

(B) Interested Parties.

(1) [Unchanged.]

(2) If the court knows or has reason to know the adoptee is an Indian child, in addition to subrule (B)(1) ~~the above~~, the persons interested are the Indian child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:

(a)-(c) [Unchanged.]

(d) if the court knows or has reason to know the adoptee is an Indian child, the Indian child's tribe and

the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

RULE 3.801. PAPERS, EXECUTION.

(A) A waiver, affirmation, or disclaimer to be executed by the father of a child born out of wedlock may be executed any time after the conception of the child. If a putative father acknowledges paternity, he must receive notice of the hearing if the child is an Indian child.

(B) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Papers.

(1)-(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child. If the court knows or has reason to know an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6),

(a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested and delivery restricted to the addressee, of the pending proceedings on a petition for adoption of the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in

this rule. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

(4) [Unchanged.]

(B) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

RULE 3.804. CONSENT AND RELEASE ~~HEARING.~~

(A) Contents and Execution of Consent or Release.

In addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

(1) except in stepparent adoptions under MCL 710.23a(4), both parents must consent.

(2) to be valid, consent must be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent

jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. The court shall also certify that either the parent fully understood the explanation in English or that it was interpreted into a language that the parent understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.

(3) the consent must contain the information prescribed by MCL 712B.13(2).

(4) in a direct placement, as defined in MCL 710.22(o), a consent by a parent shall be accompanied by a verified statement that complies with MCL 712B.13(6).

(B) Hearing.

(1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.

(2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29. Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).

(C) Withdrawal of Consent to Adopt Indian Child.

A parent who executes a consent under MCL 712B.13 may withdraw that consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the child. Once a demand is

filed with the court, the court shall order the return of the child. Withdrawal of consent under MCL 712B.13 constitutes a withdrawal of a release executed under MCL 710.29 or a consent to adopt executed under MCL 710.44.

RULE 3.807. INDIAN CHILD.

(A) [Unchanged.]

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) [Unchanged.]

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d) [Unchanged.]

(3) [Unchanged.]

(C) [Unchanged.]

RULE 5.109. NOTICE OF GUARDIANSHIP PROCEEDINGS CONCERNING INDIAN CHILD.

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested and delivery restricted to the addressee, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. If a petition is filed with the court that subsequently identifies the minor as an Indian child after a guardianship has been established, notice of that petition must be served in accordance with this subrule.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)-(7) [Unchanged.]

(8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, the minor's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian~~,~~ or tribe~~,~~ is unknown, the Secretary of the Interior.

(B)-(E) [Unchanged.]

RULE 5.401. GENERAL PROVISIONS.

This subchapter governs guardianships, conservatorships, and protective order proceedings. The other rules in chapter 5 also apply to these proceedings unless they conflict with rules in this subchapter. Except as modified in this subchapter, proceedings for guardianships of adults and minors, conservatorships, and protective orders shall be in accordance with the Estates and Protected Individuals Code, 1998 PA 386 and, where applicable, the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, the Indian Child Welfare Act, 25 USC 1901 *et seq.*, or the Mental Health Code, 1974 PA 258, as amended.

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(2) [Unchanged.]

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in accordance with MCR 5.109(1).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d) [Unchanged.]

(4) The Indian custodian of the child, ~~and~~ the Indian child's tribe, and the Indian child have a right to intervene at any point in the proceeding pursuant to MCL 712B.7(6).

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall provide notice of the guardianship and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be mailed to the guardian by first-class mail.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor.

(1) Petition. A petition for guardianship of a minor shall be filed on a form approved by the State Court Administrative Office. The petitioner shall state in the

petition whether or not the minor is an Indian child or whether that fact is unknown. The petitioner shall document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian.

(2) Investigation. Upon the filing of a petition, the court may appoint a guardian ad litem to represent the interests of a minor and may order the Department of Human Services or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1). If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1). The report shall be filed with the court and served no later than 7 days before the hearing on the petition. If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership.

(3) Guardianship of an Indian Child. If the petition involves an Indian child and both parents intend to execute a consent pursuant to MCL 712B.13 and these rules, the court shall proceed under subrule (B). If the petition involves an Indian child and a consent will not be executed pursuant to MCL 712B.13 and these rules, the petitioner shall state in the petition what active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as defined in MCR 3.002(1). The court shall proceed under subrule (C).

(4) Social History. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form

approved by the ~~s~~State ~~c~~Court ~~a~~Administrative ~~o~~Office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(5) Limited Guardianship of the Child of a Minor. On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.

~~(B) Limited Guardianship.~~

~~(1) Modification of Placement Plan.~~

~~(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.~~

~~(b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days of the filing of the proposed modified plan.~~

~~(c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.~~

~~(d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.~~

~~(2) Limited Guardianship of the Child of a Minor. On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to~~

~~represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.~~

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.

(2) Hearing. The court must conduct a hearing on a petition for voluntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing on the petition must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).

(b) that a valid consent has been executed by both parents or the Indian custodian as required by MCL 712B.13 and this subrule.)

(c) if it is in the Indian child's best interest to appoint a guardian.

(d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.

(3) Withdrawal of Consent. A consent may be withdrawn at any time by sending written notice to the court substantially in compliance with a form approved by the State Court Administrative Office. Upon receipt of the notice, the court shall immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian except, if both parents executed a consent, both parents must withdraw their consent or the court must conduct a hearing within 21 days to determine whether to terminate the guardianship.

(C) Involuntary Guardianship of an Indian Child.

(1) Hearing. The court must conduct a hearing on a petition for involuntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).

(b) if the placement with the guardian meets the placement requirements in subrule (C)(2) and (3).

(c) if it is in the Indian child's best interest to appoint a guardian.

(d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.

(e) whether or not each parent wants to consent to the guardianship if consents were not filed with the petition. If each parent wants to consent to the guardianship, the court shall proceed in accordance with subrule (B).

(2) Placement. An Indian child shall be placed in the least restrictive setting that most approximates a family and in which his or her special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child. Absent good cause to the contrary, the placement of an Indian child must be in descending order of preference with:

(a) a member of the child's extended family,

(b) a foster home licensed, approved, or specified by the child's tribe,

(c) an Indian foster family licensed or approved by the Department of Human Services,

(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(3) Deviating from Placement. The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c). If the Indian child's tribe has established a different order of preference than the order prescribed in subrule (C)(2), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting

appropriate to the particular needs of the child, as provided in MCL 712B.23(6). Where appropriate, the preference of the Indian child or parent shall be considered.

(D) Hearing. If the petition for guardianship of a minor does not indicate that the minor is an Indian child as defined in MCR 3.002(12), the court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petitioner to comply with MCR 5.404(A)(1).

(~~C~~E) Limited Guardianship Placement Plans and Court-Structured Plans.

(1) All limited guardianship placement plans and court-structured plans shall at least include provisions concerning all of the following:

(a) visitation and contact with the minor by the parent or parents sufficient to maintain a parent and child relationship;

(b) the duration of the guardianship;

(c) financial support for the minor; and

(d) in a limited guardianship, the reason why the parent or parents are requesting the court to appoint a limited guardian for the minor.

(2) All limited guardianship placement plans and court-structured plans may include the following:

(a) a schedule of services to be followed by the parent or parents, child, and guardian and

(b) any other provisions that the court deems necessary for the welfare of the child.

(3) Modification of Placement Plan.

(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.

(b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days after the filing of the proposed modified plan.

(c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.

(d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.

(~~D~~F) Evidence.

(1) Involuntary Guardianship of an Indian Child. If a petition for guardianship involves an Indian child and the petition was not accompanied by a consent executed pursuant to MCL 712B.13 and these rules, the court may remove the Indian child from a parent or Indian

(d) in a limited guardianship, the reason why the parent or parents are requesting the court to appoint a limited guardian for the minor.

(2) All limited guardianship placement plans and court-structured plans may include the following:

(a) a schedule of services to be followed by the parent or parents, child, and guardian and

(b) any other provisions that the court deems necessary for the welfare of the child.

(3) Modification of Placement Plan.

(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.

(b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days after the filing of the proposed modified plan.

(c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.

(d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.

(~~D~~F) Evidence.

(1) Involuntary Guardianship of an Indian Child. If a petition for guardianship involves an Indian child and the petition was not accompanied by a consent executed pursuant to MCL 712B.13 and these rules, the court may remove the Indian child from a parent or Indian custodian and place that child with a guardian only upon clear and convincing evidence that:

(a) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,

(b) these efforts have proved unsuccessful, and

(c) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The evidence shall include the testimony of at least one qualified expert witness, as described in MCL 712B.17,

who has knowledge about the child-rearing practices of the Indian child's tribe. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. If the petitioner cannot show active efforts have been made, the court shall dismiss the petition and may refer the petitioner to the Department of Human Services for child protective services or to the tribe for services.

~~(1)~~-~~(3)~~ [Renumbered (2)-(4), but otherwise unchanged.]

(~~E~~G)Review of Guardianship for Minor.

(1) [Unchanged.]

(2) Investigation. The court shall appoint the ~~Family Independence Agency~~Department of Human Services or any other person to conduct an investigation of the guardianship of a minor. The investigator shall file a written report with the court within 28 days ~~of~~after such appointment. The report shall include a recommendation regarding whether the guardianship should be continued or modified and whether a hearing should be scheduled. If the report recommends modification, the report shall state the nature of the modification.

(3) [Unchanged.]

(~~F~~H) Termination of Guardianship.

(1) Necessity of Order. A guardianship may terminate without order of the court on the minor's death, adoption, marriage, or attainment of majority or in accordance with subrule (H)(6). No full, testamentary, or limited guardianship shall otherwise terminate without an order of the court.

(2) [Unchanged.]

(3) Petition for Family Division of Circuit Court to Take Jurisdiction. If the court appoints an attorney or the ~~Family Independence Agency~~Department of Human

Services to investigate whether to file a petition with the family division of circuit court to take jurisdiction of the minor, the attorney or ~~Family Independence Agency~~Department of Human Services shall, within 21 days, report to the court that a petition has been filed or why a petition has not been filed.

(a)-(b) [Unchanged.]

(4) [Unchanged.]

(5) Petition for Termination by a Party Other Than a Parent. If a petition for termination is filed by other than a parent or Indian custodian, the court may proceed in the manner for termination of a guardianship under section 5209 of the Estates and Protected Individuals Code, MCL 700.5209.

(6) Voluntary Consent Guardianship. The guardianship of an Indian child established pursuant to subrule (C) shall be terminated in accordance with subrule (B)(3).

Staff Comment: These amendments incorporate provisions of the Michigan Indian Family Preservation Act and the Indian Child Welfare Act and reflect a more integrated approach to addressing issues specific to Indian children.

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

Entered June 4, 2014, effective immediately (File No. 2012-11)—REPORTER.

On order of the Court, the proposed amendment of Rule 6.302 of the Michigan Court Rules having been published for comment at 495 Mich 1205 (Part 1, 2013), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action. File No. 2012-11.

AMENDMENTS OF LOCAL COURT RULES

FORTY-EIGHTH JUDICIAL CIRCUIT COURT

Entered November 27, 2013, effective immediately (File No. 2013-37)—REPORTER.

On order of the Court, Local Court Rule 2.503 of the 48th Circuit Court is rescinded, effective immediately.

COURT OF CLAIMS

Approved May 21, 2014, effective immediately (File No. 2014-16)—REPORTER.

[The following is a new local court rule that governs motion practice for the Court of Claims.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must

(a) be in writing,

(b) state with particularity the grounds and authority on which it is based,

(c) state the relief or order sought, and

(d) be signed by the party or attorney as provided in MCR 2.114.

(2) 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. Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Exhibits and attachments are to be abridged to include only the portions that are relevant to the motion or response. But, each exhibit and attachment shall fully provide identification of parties, witnesses, attorneys participating, date, and location. A set of unabridged exhibits and attachments shall be filed contemporaneously and separately with the Clerk of the Court at the time of filing a motion or response. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked judge's copy on the cover sheet; that notation may be handwritten.

(3) If a contested motion is filed after rejection of a proposed order under subrule (D), a copy of the rejected order and an affidavit establishing the rejection must be filed with the motion.

(4) All motions and responses shall include as part of the title the date of filing of the motion. (For example, DATE [dd/mm/yyyy] followed by MOTION FOR . . . or RESPONSE TO THE [dd/mm/yyyy] MOTION FOR . . .).

(5) There is no oral argument on motions unless a request is made in the motion or response, and the request is granted by the assigned judge. A notice of hearing, if any, will be provided by the court.

(6) The motion will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

(B) Form of Affidavits.

(1) If an affidavit is filed in support of or in opposition to a motion, it must:

(a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

(2) Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to the affidavit unless the papers or copies:

(a) have already been filed in the action;

(b) are matters of public record in the county in which the action is pending;

(c) are in the possession of the adverse party, and this fact is stated in the affidavit or the motion; or

(d) are of such nature that attaching them would be unreasonable or impracticable, and this fact and the reasons are stated in the affidavit or the motion.

(C) Time for Service and Filing of Motions and Responses.

(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte) and any supporting brief or affidavits must be served within 5 days after the date of filing as appears in the title of the motion, and in accordance with MCR 2.107.

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be filed with the court and served within 14 days after the date of filing as appears in the title of the motion and in accordance with MCR 2.107.

(3) The failure to file a response to a motion will result in the treatment of the motion as uncontested.

(4) 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 motion or response, or made by separate order.

(5) Unless the court sets a different time, any discovery motion must be filed at least 21 days before the discovery cut-off date.

(D) Uncontested Orders.

(1) Before filing a motion, a party may serve on the opposite party a copy of a proposed order and a request to stipulate to the court's entry of the proposed order.

(2) On receipt of a request to stipulate, a party may

(a) stipulate to the entry of the order by signing the following statement at the end of the proposed order: "I stipulate to the entry of the above order"; or

(b) waive notice and hearing on the entry of an order by signing the following statement at the end of the proposed order: "Notice and hearing on entry of the above order is waived."

A proposed order is deemed rejected unless it is stipulated to or notice and hearing are waived within 7 days after it is served.

(3) If the parties have stipulated to the entry of a proposed order or waived notice and hearing, the court may enter the order. If the court declines to enter the

order, it shall notify the parties by written order or notice a hearing on the motion. If a hearing is noticed by the court, the matter then proceeds as a contested motion under subrule (E).

(4) Notwithstanding the provisions of subrule (D)(3), stipulations and orders for adjournment are governed by MCR 2.503.

(E) Contested Motions.

(1) Contested motions will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

(2) When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

(3) In its discretion, the court may grant, dispense with, or limit oral arguments on motions; and may require the parties to file supplemental briefs in support of and in opposition to a motion.

(4) Appearance at a hearing noticed by the court is governed by the following:

(a) A party who, pursuant to subrule (D)(2), has previously rejected the proposed order before the court, and the court thereafter notices a hearing, must

(i) appear at the hearing held on the motion, and

(ii) before the hearing, if no response to the motion has been filed, file a response containing a concise statement of reasons and supporting authorities in opposition to the motion.

A party who fails to comply with this subrule is subject to assessment of costs under subrule (E)(4)(c).

(b) Unless excused by the court, the moving party must appear at a hearing on the motion. A moving party who fails to appear is subject to assessment of costs under subrule (E)(4)(c); in addition, the court may assess a penalty not to exceed $100, payable to the clerk of the court.

(c) If a party violates the provisions of subrule (E)(4)(a) or (b), the court shall assess costs against the offending party, that party's attorney, or both, equal to the expenses reasonably incurred by the opposing party in appearing at the hearing, including reasonable attorney fees, unless the circumstances make an award of expenses unjust.

(F) Motions for Rehearing or Reconsideration.

(1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), 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.

(2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.

(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.

(G) Motion Fees. The following provisions apply to actions in which a motion fee is required:

(1) A motion fee must be paid on the filing of any request for an order in a pending action, whether the request is entitled "motion," "petition," "application," or otherwise.

(2) The clerk shall charge a single motion fee for all motions filed at the same time in an action regardless of the number of separately captioned documents filed or the number of distinct or alternative requests for relief included in the motions.

(3) A motion fee may not be charged:

(a) in criminal cases;

(b) for a notice of settlement of a proposed judgment or order under MCR 2.602(B);

(c) for a request for an order waiving fees under MCR 2.002 or MCL 600.2529(4) or MCL 600.8371(6);

(d) if the motion is filed at the same time as another document in the same action as to which a fee is required; or

(e) for entry of an uncontested order under subrule (D).

Staff Comment: Local Court Rule 2.119 for the Court of Claims is adopted May 21, 2014, at the request of that court, effective immediately.

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

AMENDMENT OF THE RULES FOR THE BOARD OF LAW EXAMINERS

Entered September 5, 2013, effective immediately (File No. 2012-24)—REPORTER.

On order of the Court, the following corrections are adopted, effective immediately.

RULE 4. POST-EXAMINATION PROCEDURES.

(A) The ~~Assistant Secretary~~ Executive Director will release examination results at the Board's direction. Blue books will be kept for 3 months after results are released.

(B) Within 30 days after the day the results are released, the applicant may ask the Board to reconsider the applicant's essay grades. The applicant shall file with the ~~Assistant Secretary~~ Executive Director two (2) copies of

(1) the request;

(2) the answer given in the applicant's blue books; and

(3) an explanation why the applicant deserves a higher grade.

(C) An applicant for re-examination may obtain an application from the ~~Assistant Secretary~~ Executive Director. The application must be filed at least sixty (60) days before the examination. If the applicant's clear-

ance is more than three (3) years old, the applicant must be approved by the State Bar Committee on Character and Fitness.

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A) An applicant for admission without examination must

(1)-(5) [Unchanged.]

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

(B)-(C) [Unchanged.]

(D) An attorney

(1) ineligible for admission without examination because of the inability to satisfy Rule 5(A)(6~~5~~); and

(2) practicing law in an institutional setting, e.g., counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law. The applicant must satisfy Rule 5(A)(1)-~~(4)~~(3), and comply with Rule 5(B). The Board may then issue the special certificate, which will entitle the attorney to continue current employment if the attorney becomes an active member of the State Bar. If the attorney leaves the current employment, the special certificate automatically expires; if the attorney's new employment is also institutional, the attorney may reapply for another special certificate.

(E) Special Legal Consultants.

(a)-(b) [Unchanged.]

(c) An applicant for a license as a special legal consultant shall submit to the Board:

(1)-(3) [Unchanged.]

(4) shall execute and file with the ~~Assistant Secretary~~

Executive Director of the State Board of Law Examiners, in such form and manner as the Board may prescribe,

(i) a duly acknowledged instrument in writing setting forth the special legal consultant's address in the state of Michigan and designating the ~~Assistant Secretary~~ Executive Director of the State Board of Law Examiners an agent upon whom process may be served, with like effect as if served personally upon the special legal consultant, in any action or proceeding thereafter brought against the special legal consultant and arising out of or based upon any legal services rendered or offered to be rendered by the special legal consultant within or to residents of the state of Michigan whenever after due diligence service cannot be made upon the special legal consultant at such address or at such new address in the state of Michigan as the special legal consultant shall have filed in the office of the ~~Assistant Secretary~~ Executive Director of the State Board of Law Examiners by means of a duly acknowledged supplemental instrument in writing; and

(ii) the special legal consultant's commitment to notify the ~~Assistant Secretary~~ Executive Director of the State Board of Law Examiners of any resignation or revocation of the special legal consultant's admission to practice in the foreign country of admission, or of any censure, suspension or expulsion in respect of such admission.

Service of process on the ~~Assistant Secretary~~ Executive Director of the State Board of Law Examiners shall be made by personally delivering to and leaving with the ~~Assistant Secretary~~ Executive Director, or with a deputy or assistant authorized by the ~~Assistant Secretary~~ Executive Director to receive such service, at the ~~Assistant Secretary's~~ Executive Director's office, dupli-

cate copies of such process together with a fee of $10.00. Service of process shall be complete when the ~~Assistant Secretary~~ Executive Director has been so served. The ~~Assistant Secretary~~ Executive Director shall promptly send one of such copies to the special legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such special legal consultant at the address specified by the special legal consultant as aforesaid.

(d) [Unchanged.]

RULE 8. RECERTIFICATION.

An applicant for recertification shall file an application and other material required by the Board. After a hearing the Board shall either recertify the applicant or require that the applicant pass the examination described in Rule 3. An applicant may use the Board's subpoena power for the hearing. An applicant who is an inactive State Bar member or who had previously voluntarily resigned from the State Bar or who previously elected emeritus status, and who has been employed in another jurisdiction in one of the ways listed in Rule 5(A)(~~6~~5) is entitled to recertification by the Board.

Staff Comment: These amendments reflect changes that correct minor technical errors that have occurred in drafting or the changes respond to recent adopted rule revisions, which occasionally inadvertently create incorrect cross-references in other rules.

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

SUPREME COURT CASES

TER BEEK v CITY OF WYOMING

Docket No. 145816. Argued October 10, 2013 (Calendar No. 8). Decided February 6, 2014.

John Ter Beek, a resident of the city of Wyoming, filed an action in the Kent Circuit Court against the city, seeking to have a city zoning ordinance declared void and an injunction entered prohibiting its enforcement. The ordinance generally prohibited uses that were contrary to federal law, state law, or local ordinance, and permitted punishment of violations by civil sanctions. Ter Beek was a qualifying patient and held a registry identification card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. He wished to grow and use marijuana for medical purposes in his home and argued that § 4(a) of the MMMA, MCL 333.26424(a), which provides that registered qualifying patients shall not be subject to arrest, prosecution, or penalty in any manner for certain medical use of marijuana in accordance with the act, preempted the ordinance. Both parties moved for summary disposition. Ter Beek argued that because the federal controlled substances act (CSA), 21 USC 801 *et seq*., prohibited the use, manufacture, or cultivation of marijuana, the ordinance likewise prohibited the use, manufacture, or cultivation of marijuana for medical use and therefore conflicted with and was preempted by the MMMA. The city argued instead that the CSA preempted the MMMA. The court, Dennis B. Leiber, J., granted summary disposition in favor of the city, agreeing that the CSA preempted the MMMA. Ter Beek appealed. The Court of Appeals, SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ., reversed, concluding that the ordinance conflicted with § 4(a) of the MMMA and that the CSA did not preempt § 4(a) because it was possible to comply with both statutes simultaneously and the state-law immunity for certain medical marijuana patients under § 4(a) did not stand as an obstacle to the federal regulation of marijuana use. 297 Mich App 446 (2012). The Supreme Court granted the city leave to appeal. 493 Mich 957 (2013).

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

The federal controlled substances act does not preempt § 4(a) of the MMMA, but § 4(a) preempts the ordinance because the ordinance directly conflicts with the MMMA.

1. The Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, invalidates state laws that interfere with or are contrary to federal law. Under 21 USC 903, which specifically addresses the CSA's preemption of state statutes, the relevant inquiry is whether there is a positive conflict between the federal and state statutes so that the two cannot consistently stand together. Such a conflict can arise when it is impossible to comply with both the federal and the state requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

2. The CSA does not preempt § 4(a) on the ground of impossibility preemption. Impossibility preemption requires more than the existence of a hypothetical or potential conflict. It results when state law requires what federal law forbids or vice versa. It is not impossible to comply with both the CSA and § 4(a) of the MMMA. The CSA makes manufacture, distribution, or possession of marijuana a criminal offense under federal law. Section 4(a) of the MMMA does not require commission of that offense, however, nor does it prohibit punishment under federal law. Instead, if certain individuals choose to engage in MMMA-compliant medical use of marijuana, § 4(a) provides them a limited state-law immunity from arrest, prosecution, or penalty, an immunity that could not and does not purport to prohibit the federal criminalization of, or punishment for, that conduct.

3. Section 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA, and the CSA accordingly does not preempt § 4(a) on that ground. A state law presents an obstacle to a federal law if the purpose of the federal law cannot otherwise be accomplished. Under the CSA, Congress categorized marijuana as a Schedule I controlled substance, thereby designating it as contraband for any purpose and indicating that it has no acceptable medical uses. Michigan also has designated marijuana as a Schedule 1 controlled substance, and its possession, manufacture, and delivery remain punishable offenses under Michigan law. In enacting the MMMA, however, the people of the state chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana, allowing a limited class of individuals to engage in certain uses in an effort to provide for the health and welfare of Michigan citizens. While the MMMA and the CSA differ with respect to the medical use of marijuana, the limited state-law immunity for that use under

§ 4(a) does not frustrate the CSA's operation or prevent its purpose from being accomplished. The immunity does not purport to alter the CSA's federal criminalization of marijuana or interfere with or undermine federal enforcement of that prohibition. Moreover, by expressly declining in 21 USC 903 to occupy the field of regulating marijuana, the CSA explicitly contemplates a role for the states in that regard, and there is no indication that the purpose or objective of the CSA was to require states to enforce its prohibitions.

4. The ordinance is preempted by § 4(a). Under Const 1963, art 7, § 22, a municipality's power to adopt resolutions and ordinances relating to its municipal concerns is subject to the Constitution and the law. A municipality is therefore precluded from enacting an ordinance if the ordinance directly conflicts with the state's statutory scheme or if the statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even if there is no direct conflict between the two schemes of regulation. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. The city's ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits: the imposition of any penalty, including a civil one, on a registered qualifying patient whose medical use of marijuana falls within the scope of the immunity granted under § 4(a).

Court of Appeals' judgment affirmed, grant of summary disposition in favor of the city reversed, and case remanded to the circuit court for entry of summary disposition in favor of Ter Beek.

1. CONTROLLED SUBSTANCES — STATUTES — FEDERAL PREEMPTION — MICHIGAN MEDICAL MARIHUANA ACT.

The federal controlled substances act, 21 USC 801 *et seq*., specifically addresses preemption of state statutes in 21 USC 903; the relevant inquiry is whether there is a positive conflict between the federal and state statutes so that the two cannot consistently stand together; such a conflict arises when it is impossible to comply with both the federal and the state requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; impossibility preemption requires more than the existence of a hypothetical or potential conflict, but rather results when state law requires what federal law forbids or vice versa; a state law presents an obstacle to a federal law if the purpose of the federal law cannot otherwise be accomplished; the federal act does not preempt § 4(a) of the

Michigan Medical Marihuana Act, MCL 333.26424(a) (which provides that registered qualifying patients shall not be subject to arrest, prosecution, or penalty in any manner for certain medical use of marijuana in accordance with the act) on either ground.

2. MUNICIPAL ORDINANCES — STATUTES — PREEMPTION — MICHIGAN MEDICAL MARIHUANA ACT.

Under Const 1963, art 7, § 22, a municipality's power to adopt resolutions and ordinances relating to its municipal concerns is subject to the Constitution and the law; a municipality is therefore precluded from enacting an ordinance if the ordinance directly conflicts with the state's statutory scheme or if the statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even if there is no direct conflict between the two schemes of regulation; a direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits; § 4(a) of the Michigan Medical Marihuana Act, MCL 333.26424(a), which provides that registered qualifying patients shall not be subject to arrest, prosecution, or penalty in any manner for certain medical use of marijuana in accordance with the act, preempts a municipal zoning ordinance that generally prohibits uses that are contrary to federal law, state law, or local ordinance and permits punishment of violations by means of civil sanctions.

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Sluiter, Van Gessel & Carlson, PC (by *Jack R. Sluiter*), for the city of Wyoming.

Amici Curiae:

Gerald A. Fisher for the Public Corporation Law Section of the State Bar of Michigan.

Christopher J. Forsyth for the Prosecuting Attorneys Association of Michigan.

Cunningham Dalman, PC (by *Andrew J. Mulder* and *Vincent L. Duckworth*) for the Michigan Municipal League.

Donald L. Knapp, Jr. Corporation Counsel, and *Michael E. Fisher*, Assistant Corporation Counsel, for the city of Livonia.

McLellan Law Offices (by *Richard McLellan*) for the Cato Institute, the Drug Policy Alliance, and Law Enforcement Against Prohibition.

Denise A. Pollicella, Esq., PLLC (by *Denise Pollicella*) for Cannabis Attorneys of Michigan.

MCCORMACK, J. The Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., enacted pursuant to a voter initiative in November 2008, affords certain protections under state law for the medical use of marijuana in the state of Michigan. Among them is § 4(a) of the MMMA, which immunizes registered qualifying patients from "penalty in any manner" for specified MMMA-compliant medical marijuana use. MCL 333.26424(a). At issue here is the relationship between this immunity, the federal prohibition of marijuana under the controlled substances act (CSA), 21 USC 801 *et seq.*, and a local zoning ordinance adopted by the city of Wyoming which prohibits and subjects to civil sanction any land "[u]ses that are contrary to federal law." City of Wyoming Code of Ordinances, § 90-66. As set forth below, we agree with the Court of Appeals that the ordinance directly conflicts with, and is preempted by, § 4(a) of the MMMA, and that § 4(a) is not preempted by the federal CSA. Accordingly, we affirm the Court of Appeals' judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2010, approximately two years after the MMMA went into effect, defendant, the city of Wyoming (the

City), adopted an ordinance (the Ordinance) amending the zoning chapter of the Wyoming city code to add the following provision:

> Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited.

City of Wyoming Code of Ordinances, § 90-66. Under the city code, violations of the Ordinance constitute municipal civil infractions punishable by "civil sanctions, including, without limitation, fines, damages, expenses and costs," City of Wyoming Code of Ordinances, § 1-27(a) to (b), and are also subject to injunctive relief, City of Wyoming Code of Ordinances, § 1-27(g).

Plaintiff, John Ter Beek, lives in the City and is a qualifying patient under the MMMA who possesses a state-issued registry identification card.[1] Upon the City's adoption of the Ordinance, Ter Beek filed the instant lawsuit in circuit court. Ter Beek alleges that he wishes to grow, possess, and use medical marijuana in his home in accordance with the MMMA. The Ordinance, however, by its incorporation of the CSA's federal prohibition of marijuana, prohibits and penalizes such conduct. This, Ter Beek contends, impermissibly contravenes § 4(a) of the MMMA, which provides that registered qualifying patients "shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with" the MMMA. Accordingly, Ter Beek seeks a declaratory judgment that the Ordinance is preempted by the MMMA and a corresponding injunction prohibiting the City

[1] The MMMA specifies the circumstances under which a person can register with the state as a qualifying medical marijuana patient. Upon satisfaction of these criteria, the state issues a registry identification card to the qualifying patient. See MCL 333.26426.

from enforcing the Ordinance against him for the medical use of marijuana in compliance with the MMMA.[2]

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10), disputing whether the Ordinance is preempted by the MMMA and whether the MMMA is preempted by the CSA. The circuit court granted summary disposition in favor of the City, concluding that the MMMA is preempted by the CSA. Ter Beek appealed by right in the Court of Appeals, which reversed the circuit court's grant of summary disposition in favor of the City and remanded the case for entry of summary disposition in favor of Ter Beek. *Ter Beek v Wyoming*, 297 Mich App 446; 823 NW2d 864 (2012). The Court of Appeals first concluded that the Ordinance directly conflicts with, and is thus preempted by, § 4(a) of the MMMA, because it purports to penalize the medical use of marijuana in contravention of § 4(a)'s grant of immunity from such penalties. The Court of Appeals then concluded that § 4(a) is not preempted by the federal CSA, reasoning that it is possible to comply with both statutes simultaneously and that § 4(a)'s state-law immunity for certain medical marijuana patients does not stand as an obstacle to the CSA's federal regulation of marijuana use or to the federal enforcement of same. The City sought leave to appeal, which we granted, to address the questions of state and federal preemption. *Ter Beek v Wyoming*, 493 Mich 957 (2013).[3]

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[2] Ter Beek has not been charged with violating the Ordinance or subjected to any enforcement action in connection with it. The City unsuccessfully challenged his standing before the circuit court, and has abandoned that challenge on appeal.

[3] We also granted permission for interested persons or groups to move to submit briefs amicus curiae. The City of Livonia, the Michigan Municipal League, the Prosecuting Attorneys Association of Michigan,

II. STANDARD OF REVIEW

Whether § 4(a) of the MMMA preempts the Ordinance, and whether the CSA preempts § 4(a), are questions of law which we review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Mich Coalition For Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). We also review de novo the decision to grant or deny summary disposition, *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998), and review for clear error factual findings in support of that decision, *Ambassador Bridge*, 481 Mich at 35.

As we have recently explained, the intent of the electors governs the interpretation of voter-initiated statutes such as the MMMA, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent. If the statutory language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed. *Id.*

III. ANALYSIS

A. KEY PROVISIONS OF THE MMMA, THE CSA, AND THE ORDINANCE

The questions of state and federal preemption in this case arise from the differing treatment of medical

and the State Bar of Michigan Public Corporation Law Section submitted briefs in support of the City; the Cannabis Attorneys of Mid-Michigan, and the Cato Institute, the Drug Policy Alliance, and Law Enforcement Against Prohibition submitted briefs in support of Ter Beek.

marijuana use under the MMMA and the CSA. As noted, § 4(a) of the MMMA provides, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . . [MCL 333.26424(a).]

The MMMA defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f).

The CSA, meanwhile, contains no such immunity. Rather, it makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 USC 841(a)(1). The CSA classifies marijuana as a Schedule I controlled substance, 21 USC 812(c)(c)(10), and thus largely prohibits its manufacture, distribution, or possession.[4]

The parties do not dispute that the Ordinance, by prohibiting all "[u]ses that are contrary to federal law," incorporates the CSA's prohibition of marijuana and makes certain violations of that prohibition both pun-

[4] The only exception to this prohibition is for research projects approved by the federal government. See 21 USC 823(f); *United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 490; 121 S Ct 1711; 149 L Ed 2d 722 (2001).

ishable by civil sanctions and subject to injunctive relief. Thus, an individual whose medical use of marijuana falls within the scope of § 4(a)'s immunity from "penalty in any manner" may nonetheless be subject to punishment under the Ordinance for that use.

B. THE CSA DOES NOT PREEMPT § 4(a) OF THE MMMA

As noted, the circuit court rejected Ter Beek's challenge to the Ordinance because it held that § 4(a) of the MMMA is preempted by the CSA. The Court of Appeals disagreed. Although raised under the particular circumstances of this case as a defense, we address this question first, and hold that the CSA does not preempt § 4(a).

Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, which "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Co v Automated Med Labs, Inc*, 471 US 707, 712; 105 S Ct 2371; 85 L Ed 2d 714 (1985), quoting *Gibbons v Ogden*, 22 US (9 Wheat) 1, 211; 6 L Ed 23 (1824). When a state law is preempted by federal law, the state law is "without effect." *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981).

" '[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.' " *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009), quoting *Medtronic, Inc v Lohr*, 518 US 470, 485; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Furthermore, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 US

at 565 (citations and quotation marks omitted). See also *Maryland*, 451 US at 746 ("Consideration under the Supremacy Clause starts with the basic presumption that Congress did not intend to displace state law."). The areas of public health and safety are among those traditionally left to the states. *Gonzales v Oregon*, 546 US 243, 270; 126 S Ct 904; 163 L Ed 2d 748 (2006). If the federal statute contains a clause expressly addressing preemption, "we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.' " *Chamber of Commerce v Whiting*, 563 US ___, ___; 131 S Ct 1968, 1977; 179 L Ed 2d 1031 (2011), quoting *CSX Transp, Inc v Easterwood*, 507 US 658, 664; 113 S Ct 1732; 123 L Ed 2d 387 (1993). Where such a clause is ambiguous, and the federal statute at issue pertains to an area of traditional state regulation, we "have a duty to accept the reading [of the clause] that disfavors pre-emption." *Bates v Dow Agrosciences LLC*, 544 US 431, 449; 125 S Ct 1788; 161 L Ed 2d 687 (2005). Tie, in that case, goes to the state.

With those principles in mind, we look to the CSA, which expressly provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. [21 USC 903.]

Accordingly, in assessing whether § 4(a) of the MMMA is preempted by the CSA, the relevant inquiry is whether there is a "positive conflict" between the two statutes such that they "cannot consistently stand together."

Such a conflict can arise when it is impossible to comply with both federal and state requirements, *Mut Pharm Co, Inc v Bartlett*, 570 US ___, ___; 133 S Ct 2466, 2473; 186 L Ed 2d 607 (2013), or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hillsborough*, 471 US at 713. See also *Wyeth*, 555 US at 567-581 (applying this preemption standard to a federal statute providing that it did not preempt state law unless there was a "direct and positive conflict" between it and state law). We find neither such conflict here.

First, we do not find it impossible to comply with both the CSA and § 4(a) of the MMMA. "Impossibility pre-emption is a demanding defense," *Wyeth*, 555 US at 573, and requires more than "[t]he existence of a hypothetical or potential conflict," *Rice v Norman Williams Co*, 458 US 654, 659; 102 S Ct 3294; 73 L Ed 2d 1042 (1982). Such impossibility results when state law requires what federal law forbids, or vice versa. See, e.g., *Mut Pharm*, 570 US at ___; 133 S Ct at 2476-2477; *PLIVA, Inc v Mensing*, 564 US ___, ___; 131 S Ct 2567, 2577-2578; 180 L Ed 2d 580 (2011); *Geier v American Honda Motor Co, Inc*, 529 US 861, 873; 120 S Ct 1913; 146 L Ed 2d 914 (2000); *Barnett Bank of Marion Co, NA v Nelson*, 517 US 25, 31; 116 S Ct 1103; 134 L Ed 2d 237 (1996).

The CSA criminalizes marijuana, making its manufacture, distribution, or possession a punishable offense under federal law. Section 4(a) of the MMMA does not require anyone to commit that offense, however, nor does it prohibit punishment of that offense under federal law. Rather, the MMMA is clear that, if certain individuals choose to engage in MMMA-compliant medical marijuana use, § 4(a) provides them with a

limited *state-law* immunity from "arrest, prosecution, or penalty in any manner"—an immunity that does not purport to prohibit federal criminalization of, or punishment for, that conduct. See MCL 333.26427(a) ("The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act."); see also MCL 333.26422 (noting that "approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law," that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana," and that "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law"). Nor, of course, could the MMMA prohibit such federal regulation and enforcement. See *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010) ("It is indisputable that state medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana."), citing, *inter alia*, *Gonzales v Raich*, 545 US 1, 29; 125 S Ct 2195; 162 L Ed 2d 1 (2005).[5]

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[5] The City contends that these cases, as well as *Oakland Cannabis*, 532 US 483, support a finding of federal preemption in this case. These cases, however, indicate that state medical marijuana laws cannot be used to inhibit federal enforcement of the CSA; none of them suggests that such laws cannot exempt from penalty under state law certain conduct that remains illegal under federal law. See *Raich*, 545 US at 15-33 (holding that the federal government had constitutional authority to prohibit and prosecute under federal law the cultivation of marijuana, regardless of whether such activity violated state law); *Oakland Cannabis*, 532 US at 486-495 (holding that, in a federal prosecution under the CSA, there was no medical necessity defense available under federal law, regardless of whether that defense would be available under state law); *Hicks*, 722 F Supp 2d at 832-834 (holding that the federal defendant's compliance with

The City objects that § 4(a) forces it, as well as the state of Michigan and every other municipality therein, to "ignore" the CSA. But that is not the precise question. While, as discussed at greater length below, § 4(a) does prevent the City from fully incorporating the CSA's prohibition of marijuana into its own local enforcement scheme, it does not require that the City violate that federal prohibition. Neither does the CSA require that the City, or the state of Michigan, enforce that prohibition. In fact, it is well established that, " '[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts.' " *Printz v United States*, 521 US 898, 924; 117 S Ct 2365; 138 L Ed 2d 914 (1997), quoting *New York v United States*, 505 US 144, 166; 112 S Ct 2408; 120 L Ed 2d 120 (1992). We do not find it impossible to comply with both the CSA and § 4(a) of the MMMA.

We likewise hold that § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. *Hillsborough*, 471 US at 713. A state law presents such an obstacle to a federal law " '[i]f the purpose of the [federal law] cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect.' " *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 373; 120 S Ct 2288; 147 L Ed 2d 352 (2000), quoting *Savage v Jones*, 225 US 501, 533; 32 S Ct 715; 56 L Ed 1182 (1912). As the United States Supreme Court has stated, "[w]hat is a sufficient obstacle is a matter of judgment," to be assessed under

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the MMMA did not excuse his violation of the conditions of his federal supervised release). This line of authority thus fully comports with our holding here.

the circumstances of the given case and "to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 US at 373.

According to the Supreme Court in *Raich*, "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." 545 US at 12. "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id*. at 13. As noted, in devising that scheme, Congress categorized marijuana as a Schedule I controlled substance, thereby designating it "as contraband for *any* purpose" and indicating that it "has no acceptable medical uses." *Id*. at 27.

Michigan also designates marijuana as a Schedule 1 drug, and its possession, manufacture, and delivery remain punishable offenses under Michigan law. *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012). See also MCL 333.7212(1)(c), MCL 333.7401(2)(d), and MCL 333.7403(2)(d). In enacting the MMMA, however, the people of the State of Michigan chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana, allowing "a limited class of individuals" to engage in certain such use in "an 'effort for the health and welfare of [Michigan] citizens.' " *Kolanek*, 491 Mich at 393-394, quoting MCL 333.26422(c).

While the MMMA and CSA differ with respect to medical use of marijuana, § 4(a)'s limited state-law immunity for such use does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accom-

plished. *Crosby*, 530 US at 373. As the Court of Appeals duly recognized and the MMMA itself makes clear, see MCL 333.26422 and MCL 333.26427(a), this immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition. The CSA, meanwhile, by expressly declining to occupy the field of regulating marijuana, 21 USC 903, "explicitly contemplates a role for the States" in that regard, *Oregon*, 546 US at 251, and there is no indication that the CSA's purpose or objective was to require states to enforce its prohibitions. Indeed, as noted, Congress lacks the constitutional authority to impose such an obligation. As a result, we fail to see how § 4(a) creates, as the City claims, "significant and unsolvable obstacles to the enforcement of the" CSA, such that the former is preempted by the latter.

In reaching the opposite conclusion, both the City and the circuit court rely heavily on *Mich Canners & Freezers Ass'n v Agricultural Marketing & Bargaining Bd*, 467 US 461; 104 S Ct 2518; 81 L Ed 2d 399 (1984), and *Emerald Steel Fabricators, Inc v Bureau of Labor & Indus*, 348 Or 159; 230 P3d 518 (2010). Such reliance, however, is misplaced. At issue in *Michigan Canners* was whether Michigan's Agricultural Marketing and Bargaining Act (the Michigan Act) was preempted by the federal Agricultural Fair Practices Act (AFPA). In order to protect individual producers of agricultural commodities from coercion by associations of producers, the AFPA prohibited those associations from "engag[ing] in practices that interfere with a producer's freedom to choose whether to bring his products to market himself or to sell them through" an association. *Mich Canners*, 467 US at 464. The Michigan Act, however, provided that, under certain circumstances, a producers' association could

receive state accreditation to become the exclusive bargaining agent for all producers of a given commodity; when an association was so accredited, "all producers of that commodity, regardless of whether they have chosen to become members of the association, must pay a service fee to the association and must abide by the terms of the contracts the association negotiates with processors." *Id*. at 467-468. The United States Supreme Court concluded that the Michigan Act was preempted by the AFPA because the Michigan Act, by compelling individual producers to effectively join and be bound by the actions of accredited associations, "empowers producers' associations to do precisely what the federal Act forbids them to do" and "imposes on the producer the same incidents of association membership with which Congress was concerned in enacting" the AFPA. *Id*. at 478. In other words, the AFPA guaranteed individual producers the freedom to choose whether to join associations; the Michigan Act, however, denied them that right.

Such circumstances are not present here. Section 4(a) simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a). Unlike in *Michigan Canners*, the state law here does not frustrate or impede the federal mandate.

Emerald Steel is also distinguishable, never mind nonbinding. At issue in that case was whether the

plaintiff's medical use of marijuana constituted an "illegal use of drugs" under a state statutory provision governing his claim for employment discrimination. The statute, in turn, provided that "illegal use of drugs" did not include "uses authorized under the [CSA] or under other provisions of state or federal law." *Emerald Steel*, 348 Or at 170, quoting Or Rev Stat 659A.122(2). The plaintiff argued that his medical marijuana use was not an "illegal use of drugs" under the statute because it was authorized under the Oregon Medical Marijuana Act, which provided that certain individuals, under certain circumstances, "may engage in . . . the medical use of marijuana." Or Rev Stat 475.306(1). The Oregon Supreme Court rejected this position, concluding that, to the extent the Oregon Medical Marijuana Act authorized the use of marijuana, it was preempted by the CSA. *Emerald Steel*, 348 Or at 190. The decision made clear, however, that it did "not hold that the [CSA] preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability." *Id*. See also, e.g., *id*. at 171-172 nn 11 and 12. Thus, *Emerald Steel* addresses a substantively different question than the one presently before us—whether the CSA preempts § 4(a)'s limited state-law immunity from penalty for certain medical marijuana use—and we see nothing in its answer that would alter our own.[6]

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[6] Furthermore, we have misgivings, mildly put, about *Emerald Steel*'s reasoning. In particular, in finding preemption, the Oregon Supreme Court characterized *Michigan Canners* as a case of "state law permit-[ting] what federal law prohibits," and reasoned by analogy that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the" CSA. *Emerald Steel*, 348 Or at 177-178. *Michigan Canners*, however, does not stand for the broad proposition that, if a state law permits something a federal law prohibits, it is preempted. Instead, *Michigan Canners* involved a state law that not only permitted what

In sum, there is no "positive conflict" between the CSA and § 4(a) of the MMMA such that the two "cannot consistently stand together," 21 USC 903: it is not impossible to comply with both the CSA's federal prohibition of marijuana and § 4(a)'s limited state-law immunity for certain medical marijuana use, and § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. *Mut Pharm*, 570 US at ___, ___; 133 S Ct at 2473, 2476-2477; *Hillsborough*, 471 US at 713. As such, the CSA does not preempt § 4(a) of the MMMA.

C. THE ORDINANCE IS PREEMPTED BY § 4(a) OF THE MMMA

Having found that the CSA does not preempt § 4(a) of the MMMA, we turn next to whether the Ordinance, as applied to Ter Beek, is preempted by § 4(a). We agree with the Court of Appeals that it is. The required analysis on this point is not complex.

Under the Michigan Constitution, the City's "power to adopt resolutions and ordinances relating to its municipal concerns" is "subject to the constitution and the law." Const 1963, art 7, § 22. As this Court has previously noted, "[w]hile prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). The City, therefore, "is precluded from enacting an ordinance if . . . the ordinance is in direct conflict with the state statutory scheme, or . . . if the state statutory

federal law prohibited, but also required that certain federal guarantees be denied. Indeed, the Oregon Supreme Court has since moderated this aspect of its analysis, clarifying that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." *Willis v Winters*, 350 Or 299, 310 n 6; 253 P3d 1058 (2011).

scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977) (footnotes omitted). A direct conflict exists when "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* at 322 n 4. Here, the Ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a "penalty in any manner" on a registered qualifying patient whose medical use of marijuana falls within the scope of § 4(a)'s immunity.

The City disputes this characterization of the Ordinance, noting that while it permits the imposition of civil sanctions, it does not require them; instead, a violation of the Ordinance can be enforced through equitable relief such as a civil injunction. We agree with the Court of Appeals, however, that enjoining a registered qualifying patient from engaging in MMMA-compliant conduct unambiguously falls within the scope of penalties prohibited by § 4(a). For § 4(a) makes clear that individuals who satisfy the statutorily specified criteria "shall not be subject to . . . penalty in any manner," a prohibition which expressly includes "civil penalt[ies]." As the Court of Appeals noted, the MMMA does not define "penalty," but that term is commonly understood to mean a "punishment imposed or incurred for a violation of law or rule . . . something forfeited." *Random House Webster's College Dictionary* (2000). See, e.g., *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999) ("Where, as here, the Legislature has not expressly defined terms used within a statute, we may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings."). Under the

Ordinance, individuals are subject to civil punishment for engaging in the medical use of marijuana in accordance with the MMMA; by the plain terms of § 4(a), the manner of that punishment—be it requiring the payment of a monetary sanction, or denying the ability to engage in MMMA-compliant conduct—is not material to the MMMA's immunity from it.

Nor do we agree with the City that our decision in *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013), mandates a different outcome. In *McQueen*, this Court held that, because the defendants' business, a medical marijuana dispensary, was not being operated in accordance with the MMMA, it was properly enjoined as a public nuisance under MCL 600.3801.[7] *McQueen*, 493 Mich at 140. The City contends that, because the growth and cultivation of marijuana is a violation of the Ordinance, and violations of zoning ordinances constitute nuisances per se under the Michigan Zoning Enabling Act (MZEA), MCL 125.3407, *McQueen* permits the City's regulation through injunction. *McQueen*, however, affirmed the injunction of the defendants' business not simply because it was a nuisance, but because it was a nuisance that fell outside the scope of conduct permitted under the MMMA. *McQueen* does not, as the City contends, authorize a municipality to enjoin a registered qualifying patient from engaging in medical use of marijuana in compliance with the MMMA, simply by characterizing that conduct as a zoning violation.

Furthermore, contrary to the City's suggestion, the fact that the Ordinance is a local zoning regulation enacted

[7] MCL 600.3801(1)(c) provides that "[a] building, vehicle, boat, aircraft, or place is a nuisance if . . . [i]t is used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of a controlled substance."

pursuant to the MZEA does not save it from preemption. The City stresses that the MZEA affords local municipalities a broad grant of authority to use their zoning powers to advance local interests, such as "public health, safety, and welfare." MCL 125.3201. The MMMA, however, provides in no uncertain terms that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with" the MMMA, MCL 333.26427(a), and that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana," MCL 333.26427(e). The City contends that the MMMA does not express a sufficiently clear intent to supersede the MZEA, but we see no ambiguity in the MMMA's plain language to this effect. See *Bylsma*, 493 Mich at 26 (explaining that the MMMA's plain language provides the most reliable evidence of intent and that if this language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed). It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision. See, e.g., *Crane v Reeder*, 22 Mich 322, 334 (1871). Accordingly, the City cannot look to the MZEA to authorize or excuse the Ordinance's contravention of the specific immunity for medical marijuana use provided under § 4(a) of the MMMA.[8]

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[8] No more availing is the City's attempt to import certain zoning-related standards into our preemption analysis. The City, for instance, points to *Kyser v Kasson Twp*, 486 Mich 514, 521; 786 NW2d 543 (2010), which states that, when a citizen challenges a zoning ordinance on due process grounds, the "ordinance is presumed to be reasonable." The City also cites the MZEA's exclusionary zoning provision, MCL 125.3207, which requires a showing of "demonstrated need" for a certain land use in order to overcome a zoning ordinance's "effect of totally prohibiting the establishment of a land use within a local unit of government"—a need, the City contends, that Ter Beek cannot show, since he can likely procure marijuana for medical use

The City also points to *Riverside v Inland Empire Patients Health & Wellness Ctr, Inc*, 56 Cal 4th 729; 156 Cal Rptr 3d 409; 300 P3d 494 (2013), in support of its position. In that case, the California Supreme Court found certain state medical marijuana laws did not preempt a local zoning ordinance. *Riverside*, however, is beside the point. At issue there was whether a local zoning ordinance prohibiting medical marijuana dispensaries within city limits was preempted by California's Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMP). The California Supreme Court concluded that there was no preemption, as the CUA and MMP offered only a limited immunity from sanction under certain specified state criminal and nuisance statutes, thereby "signal[ing] that the *state* declines to regard the described acts as nuisances or criminal violations, and that the *state's* enforcement mechanisms will thus not be available against these acts." *Id*. at 762. As such, these "limited provisions" were found to "neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders." *Id*. The scope of § 4(a)'s immunity, however, is not similarly circumscribed; in prohibiting certain individuals from being "subject

in other municipalities. We do not see how these standards impact our assessment of whether the Ordinance is preempted by the state-law immunity from penalty provided by § 4(a) of the MMMA. The City seems to suggest that, for this immunity to attach, a registered qualifying patient must show a "demonstrated need" under MCL 125.3207 for his or her MMMA-compliant medical marijuana use. Neither § 4(a) nor any other provision of the MMMA, however, imposes or betrays a tolerance for such a condition with respect to the availability of its protections. Thus, to the extent the MZEA may be read to require such a showing for an individual to claim the immunity provided under § 4(a), it is inconsistent with and superseded by the MMMA. MCL 333.26427(e).

to . . . penalty in any manner," § 4(a) draws no distinction between state and local laws or penalties. We thus do not find *Riverside*'s reasoning instructive.

Lastly, the City stresses that the MMMA does not create an absolute right to grow and distribute marijuana. Correct. See *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012) ("The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law."); *Bylsma*, 493 Mich at 32 (discussing *Kolanek*); *People v Koon*, 494 Mich 1, 5; 832 NW2d 724 (2013) ("The MMMA, rather than legalizing marijuana, functions by providing registered patients with immunity from prosecution for the medical use of marijuana."). Ter Beek, however, does not seek to assert any such general or absolute right. Nor does our conclusion recognize one. The Ordinance directly conflicts with the MMMA not because it generally pertains to marijuana, but because it permits registered qualifying patients, such as Ter Beek, to be penalized by the City for engaging in MMMA-compliant medical marijuana use. Section 4(a) of the MMMA expressly prohibits this. As such, the MMMA preempts the Ordinance to the extent of this conflict.[9]

IV. CONCLUSION

For the foregoing reasons, we hold that the Ordinance is preempted by § 4(a) of the Michigan Medical

[9] Contrary to the City's concern, this outcome does not "create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana." Ter Beek does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana; nor does this case require us to reach whether and to what extent the MMMA might occupy the field of medical marijuana regulation.

Marijuana Act, which in turn is not preempted by the federal controlled substances act. Accordingly, we affirm the judgment of the Court of Appeals, reverse the circuit court's grant of summary disposition in favor of the City, and remand for entry of summary disposition in favor of Ter Beek.

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, ZAHRA and VIVIANO, JJ., concurred with MCCORMACK, J.

NACG LEASING v DEPARTMENT OF TREASURY

Docket No. 146234. Argued November 7, 2013 (Calendar No. 4). Decided February 6, 2014. Rehearing denied at 495 Mich 959.

NACG Leasing filed a petition in the Michigan Tax Tribunal (MTT), challenging the Department of Treasury's assessment of $414,000 in use tax and a $103,500 penalty for failure to file and pay the tax. Petitioner purchased an aircraft from one company and immediately executed a five-year lease of the aircraft to another company that already had possession of the aircraft. Respondent assessed the use tax based on the lease transaction. The MTT ultimately upheld the assessment. Petitioner appealed. The Court of Appeals, FITZGERALD, P.J., and METER and BOONSTRA, JJ., reversed the decision of the MTT in an unpublished opinion per curiam, issued October 16, 2012 (Docket No. 306773). The panel concluded that petitioner had not used the aircraft because it had ceded total control of the aircraft to the lessee and the lessee had uninterrupted possession of the aircraft before and during the lease. The Supreme Court granted respondent's application for leave to appeal. 494 Mich 851 (2013).

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

Under the Use Tax Act (UTA), MCL 205.91 *et seq*., a 6% tax is levied for the privilege of using, storing, or consuming tangible personal property in this state. MCL 205.92(b) of the UTA defines "use" as the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. A corollary of a property owner's right to the use and enjoyment of his or her property is the right to allow others to use his or her property in exchange for consideration. Because the right to allow others to use one's personal property is a right incident to ownership, and a lease is an instrument by which an owner exercises that right, it follows that the execution of a lease is an exercise of a right or power over tangible personal property incident to the ownership of the property. Therefore, it constitutes "use" for purposes of the UTA. Accordingly, petitioner "used" the

aircraft in question for purposes of the UTA when it executed a lease of the aircraft in Michigan, regardless of whether it ever had actual possession of the aircraft.

Reversed and remanded to the Court of Appeals for consideration of petitioner's alternative challenge to the amount assessed.

TAXATION — PERSONAL PROPERTY — EXECUTION OF A LEASE — USE TAX.

The execution in Michigan of a lease of tangible personal property is the exercise of a right incident to property ownership and constitutes "use" for purposes of the Use Tax Act, MCL 205.91 *et seq*.

Clark Hill PLC (by *David M. Hayes*, *Thomas S. Nowinski*, and *Michael M. Antovski*) for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Aaron D. Lindstrom*, Assistant Solicitor General, and *Jessica A. McGivney*, Assistant Attorney General, for respondent.

VIVIANO, J. The issue in this case is whether the execution of a lease of tangible personal property in Michigan constitutes "use" for purposes of the Use Tax Act (UTA).[1] Petitioner, a Michigan corporation, purchased an aircraft from one company and immediately executed a five-year lease to another company that already had possession of the aircraft. The Department of Treasury assessed a use tax against petitioner based on the lease transaction, and the Michigan Tax Tribunal ultimately upheld the assessment. The Court of Appeals reversed, holding that petitioner did not "use" the aircraft because it ceded total control of the aircraft to the lessee by virtue of the lease and the lessee had uninterrupted possession of the aircraft before and during the lease.[2] We granted leave, directing the

[1] MCL 205.91 *et seq*.

[2] *NACG Leasing v Dep't of Treasury*, unpublished opinion per curiam of Court of Appeals, issued October 16, 2012 (Docket No. 306773), unpub op at 4.

parties to "address the applicability of the use tax to a transaction where tangible personal property is purchased by one party and leased to another party when the purchaser/lessor does not obtain actual possession of the property."[3] We reverse and remand.

This case requires us to interpret and apply the pertinent statutory provisions of the UTA. When interpreting a statute, this Court's primary goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language."[4] When the words of a statute are unambiguous, we must enforce them as written and no further judicial construction is permitted.[5]

Under the UTA, a 6% tax is levied "for the privilege of using, storing, or consuming tangible personal property in this state . . . ."[6] The UTA defines "use," in pertinent part, as:

> [T]he exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given.[7]

In light of this statutory definition, we must determine whether petitioner exercised a right or power incident to ownership in Michigan when it executed a lease of the aircraft in question.

It is a basic precept of property law that a property owner has the right to the use and enjoyment of his or

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[3] *NACG Leasing v Dep't of Treasury*, 494 Mich 851 (2013).

[4] *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013).

[5] *Id.* at 249.

[6] MCL 205.93(1).

[7] MCL 205.92(b).

her personalty.[8] A corollary to this right is the property owner's right to allow others to use his or her property in exchange for consideration.[9] One way in which a property owner exercises this right is by executing a lease.[10] Therefore, because the right to allow others to use one's personal property is a right incident to ownership, and a lease is an instrument by which an owner exercises that right, it follows that the execution of a lease is an "exercise of a right or power over tangible personal property incident to the ownership of that property . . . ."[11]

In arriving at the opposite conclusion, the Court of Appeals relied on *WPGP1, Inc v Dep't of Treasury*,[12] and *Czars, Inc v Dep't of Treasury*,[13] two cases that distinguished between partial and total relinquishment of control of an aircraft for purposes of assessing the use

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[8] See, e.g., *Daugherty v Thomas*, 174 Mich 371, 375; 140 NW 615 (1913); *Continental Motors Corp v Muskegon Twp*, 376 Mich 170, 182; 135 NW2d 908 (1965) (ADAMS, J., dissenting) ("Property, as the word is commonly used, denotes an entire object. In its legal sense the object is broken down into various attributes—such as the right to use, the right to mortgage, the right to lease, et cetera. These rights, viewed together, are referred to as the bundle of rights involved in the ownership of property."); 20 Mich Civ Jur, Personal Property, § 6, pp 153-154.

[9] *Attorney General v Pere Marquette R Co*, 263 Mich 431, 433; 248 NW 860 (1933) ("An incident of ownership is the right to sell or lease or use the property in any lawful way."). See also *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 348; 820 NW2d 242 (2012) ("Important rights flowing from property ownership include the right to exclusive possession, the right to personal use and enjoyment, the right to manage its use by others, and the right to income derived from the property.").

[10] Black's Law Dictionary (9th ed) (defining "lease" as "[a] contract by which a rightful possessor of personal property conveys the right to use and occupy the property in exchange for consideration . . .").

[11] MCL 205.92(b).

[12] *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414; 612 NW2d 432 (2000).

[13] *Czars, Inc v Dep't Treasury*, 233 Mich App 632; 593 NW2d 209 (1999).

tax.[14] According to those cases, when an out-of-state owner allows another person to use his or her aircraft, and that person uses the aircraft in Michigan, the owner is subject to Michigan use tax unless the owner can show that he or she previously relinquished total control.[15] However, we find those cases factually distinguishable because, unlike the present case, neither involved the execution of a lease in Michigan. In applying *Czars* and *WPGP1* to the facts of this case, the Court of Appeals failed to recognize that the act of ceding control of an aircraft can, itself, be an exercise of a right incident to ownership.[16] In this case, petitioner relinquished control of its property by executing a lease in Michigan. As previously discussed, that act, alone, is sufficient to constitute "use" under the UTA.

The Court of Appeals also maintained that "a transfer of property unaccompanied by a transfer of possession is simply not 'use' that is subject to the tax."[17] The basis for this conclusion was the emphasized portion of the statutory definition of "use":

> [T]he exercise of a right or power over tangible personal property incident to the ownership of that property *including transfer of the property in a transaction where possession is given*.[18]

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[14] *NACG Leasing*, unpub op at 3, citing *WPGP1*, 240 Mich App at 417-419, and *Czars*, 233 Mich App at 639.

[15] *WPGP1*, 240 Mich App at 418-419 (holding that the out-of-state plaintiff did not "use" the aircraft because a preexisting lease executed out of state gave the lessee total control of the aircraft, including their routes and flight schedules); *Czars*, 233 Mich App at 639 (upholding the use-tax assessment and noting the lack of evidence showing that the plaintiff "totally or permanently relinquished control of the aircraft" to an out-of-state entity).

[16] See *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207, 212-213; 769 NW2d 740 (2009) ("Entering into a contract to give up some of one's rights to possession or control is, itself, an exercise of those rights.").

[17] *NACG Leasing*, unpub op at 5.

[18] MCL 205.92(b) (emphasis added).

The statutory language on which the Court of Appeals relied is introduced by the term "including." As we have stated previously, "including" is a term of enlargement, not limitation.[19] Thus, a transaction in which possession is transferred is but one way to satisfy "use" under the UTA; it is not the only way, as the Court of Appeals erroneously held.[20]

The execution of a lease in Michigan is the exercise of a right incident to property ownership and, therefore, falls squarely within the statutory definition of "use." We hold that petitioner "used" the aircraft in question for purposes of the UTA when it executed a lease of the aircraft in Michigan, regardless of whether it ever had actual possession of the aircraft. We reverse the judgment of the Court of Appeals and remand the case to that Court to consider petitioner's alternative claim challenging the calculation of the assessment amount.[21]

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[19] *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994).

[20] Furthermore, the panel's interpretation of § 92(b) in this regard implicitly assumes that the word "possession" in the statutory definition means "actual possession." However, there is no indication that the statutory language contemplates, much less requires, transfer of actual possession. In addition, the Legislature's reference to "actual" possession elsewhere in the UTA is a strong textual indication that the term "possession" in MCL 205.92(b) does not refer to actual possession. See MCL 205.94(k) (exempting from the use tax "[p]roperty purchased for use in this state where *actual personal possession* is obtained outside this state, the purchase price or actual value of which does not exceed $10.00 during 1 calendar month") (emphasis added). Reading "possession" in § 92(b) to mean "actual possession" would render the Legislature's use of "actual possession" in other statutory provisions mere surplusage, something courts must avoid when interpreting statutory language. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

[21] Because the Court of Appeals held that petitioner was not subject to the use tax, it declined to address petitioner's challenge to the amount of the final assessment. Petitioner requests a remand to the Tax Tribunal so that this claim can be litigated. However, the Department counters that,

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, ZAHRA, and MCCORMACK, JJ., concurred with VIVIANO, J.

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among other things, petitioner failed to challenge the assessment amount in the Tax Tribunal. On remand, the Court of Appeals will have the opportunity to weigh both parties' arguments and determine whether the case should be remanded to the Tax Tribunal.

PEOPLE v EARL

Docket No. 145677. Argued October 8, 2013 (Calendar No. 3). Decided March 26, 2014.

Ronald L. Earl was convicted by a jury in the Oakland Circuit Court of bank robbery and two counts of possession of less than 25 grams of a controlled substance. At the time defendant committed the offenses, MCL 780.905 required that all defendants convicted of a felony pay a $60 crime victim's rights assessment. The statute was amended effective December 16, 2010, to raise the assessment for convicted felons to $130. At defendant's sentencing on February 15, 2011, the court, Leo Bowman, J., ordered defendant to pay the $130 crime victim's rights assessment under MCL 780.905(1)(a). Defendant appealed. The Court of Appeals, K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ., affirmed. 297 Mich App 104 (2012). The Supreme Court granted defendant's application for leave to appeal. 493 Mich 945 (2013).

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

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar retroactive application of a law if the law (1) punishes an act that was innocent when the act was committed, (2) makes an act a more serious criminal offense, (3) increases the punishment for a crime, or (4) allows the prosecution to convict on less evidence. Determining whether application of a law violates the Ex Post Facto Clauses by increasing the punishment for a crime is a two-step inquiry. The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. If the Legislature's intent was to impose a criminal punishment, retroactive application of the law violates the Ex Post Facto Clauses and the analysis is over. If the Legislature intended to enact a civil remedy, the court must ascertain whether the statutory scheme is so punitive in purpose or effect as to negate the Legislature's intent to deem it civil. The crime victim's rights assessment is a civil remedy. The Legislature's use of the term "assess" in MCL 780.905 indicates a nonpunitive intent. That intent is underscored by the fact that the statute imposes a flat fee that is not dependent on the facts of the case. The fee also has a nonpunitive purpose: funding

crime victim's services, thereby promoting public safety and welfare. Nor is the assessment so punitive in purpose or effect as to negate the Legislature's intent to deem it a civil remedy: the sanction does not impose an affirmative disability or restraint, imposition of the assessment has not historically been deemed a form of criminal punishment, imposition of the assessment does not promote the traditional aims of punishment, the assessment has a rational connection to a nonpunitive purpose, and the assessment is not excessive with respect to that purpose. Accordingly, imposition of the increased crime victim's rights assessment did not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions.

Affirmed.

CONSTITUTIONAL LAW — EX POST FACTO LAWS — GREATER PUNISHMENTS — CRIME VICTIM'S RIGHTS ASSESSMENT — INCREASED FEES.

Effective December 16, 2010, the Crime Victim's Rights Act was amended to increase the statutory crime victim's rights assessment on convicted felons from $60 to $130; imposition of the increased assessment does not violate the Ex Post Facto Clauses of the Michigan and United States Constitutions even when the offense at issue occurred before the effective date of the increase (US Const, art I, § 10; Const 1963, art 1, § 10; MCL 780.905).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Louis F. Meizlish*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Amicus Curiae:

Kym L. Worthy, *William A. Forsyth*, and *Timothy K. McMorrow* for the Prosecuting Attorneys Association.

CAVANAGH, J. This case requires us to determine whether the imposition of an increased Crime Victim's Rights Fund assessment violates the Ex Post Facto Clauses of the Michigan and United States Constitu-

tions. US Const, art I, § 10; Const 1963, art 1, § 10. We hold that it does not. Specifically, we hold that the trial court's order requiring defendant to pay a $130 crime victim's rights assessment does not violate the bar on ex post facto laws. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

On March 18, 2010, defendant robbed a bank in Southfield, Michigan. He was arrested six days later, and heroin and crack cocaine were found on his person at the time of the arrest. Defendant was charged with and convicted of bank robbery and two counts of possessing less than 25 grams of a controlled substance. At the time defendant committed the offenses, MCL 780.905 required that all defendants found guilty of a felony pay a $60 crime victim's rights assessment. 1996 PA 344. The statute was amended effective December 16, 2010, however, to raise the crime victim's rights assessment for convicted felons to $130. 2010 PA 281. Defendant was sentenced on February 15, 2011, and was ordered to pay $130 for the crime victim's rights assessment. Defendant appealed and claimed, among other things, that the increased assessment was an increased punishment in violation of the Ex Post Facto Clauses of the Michigan and United States Constitutions. The Court of Appeals affirmed the $130 assessment, holding that it is not punitive, and, therefore, does not violate the bar on ex post facto laws. *People v Earl*, 297 Mich App 104, 114; 822 NW2d 271 (2012). Defendant sought leave to appeal in this Court, which we granted. *People v Earl*, 493 Mich 945 (2013).

II. STANDARD OF REVIEW

"Whether a statutory scheme is civil or criminal is . . . a question of statutory construction." *Smith v*

Doe, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (citation and quotation marks omitted). The interpretation of a statute is a question of law that this Court reviews de novo. *Herman v Berrien Co*, 481 Mich 352, 358; 750 NW2d 570 (2008).

III. ANALYSIS

A. THE CRIME VICTIM'S RIGHTS FUND

The Crime Victim's Rights Fund is contained within the Crime Victim's Rights Act, MCL 780.751 *et seq*. The Crime Victim's Rights Act was enacted in response to the growing recognition of the concerns regarding disproportionate treatment of crime victims and a perceived insensitivity to their plight. *People v Grant*, 455 Mich 221, 239-240; 565 NW2d 389 (1997). In 1989, the Crime Victim Services Commission was established as part of the Crime Victim's Rights Act and was given the following duties:

> (a) Investigate and determine the amount of revenue needed to pay for crime victim's rights services.
>
> (b) Investigate and determine an appropriate assessment amount to be imposed against convicted criminal defendants and juveniles for whom the probate court or the family division of circuit court enters orders of disposition for juvenile offenses to pay for crime victim's rights services.
>
> (c) By December 31 of each year, report to the governor, the secretary of the senate, the clerk of the house of representatives, and the department the commission's findings and recommendations under this section. [MCL 780.903.]

The Legislature established the Crime Victim's Rights Fund to pay for crime victim's rights services. MCL 780.904(1). The Crime Victim's Rights Fund is funded

by the crime victim's rights assessment. MCL 780.904. Currently, a convicted felon is assessed $130, those convicted of misdemeanors are assessed $75, and juveniles are assessed $25 when the court enters an order of disposition for a juvenile offense. MCL 780.905(1) and (3). Money remaining in the Crime Victim's Rights Fund after victim's services have been paid for may be used for crime victim compensation. MCL 780.904(2). See, also, MCL 18.351 to MCL 18.368. Excess revenue that has not been used for crime victim compensation may be used to establish and maintain a statewide trauma system. MCL 780.904(2).

B. EX POST FACTO CLAUSE[1]

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence. *Calder v Bull*, 3 US (3 Dall) 386, 390; 1 L Ed 648 (1798). At issue in this case is whether an increase in the crime victim's rights assessment increases the punishment for a crime.

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[1] The language contained in the Michigan Constitution's Ex Post Facto Clause, Const 1963, art 1, § 10, is nearly identical to the language contained in the federal constitution, US Const, art I, § 10. Neither party addressed whether our Ex Post Facto Clause provides greater protections than its federal counterpart. See *Wortman v R L Coolsaet Constr Co*, 305 Mich 176, 179; 9 NW2d 50 (1943) (stating that if an issue is not briefed, it is generally considered abandoned). In any event, decisions of our Court of Appeals indicate that "Michigan's Ex Post Facto Clause is not interpreted more expansively than its federal counterpart," *In re Contempt of Henry*, 282 Mich App 656, 682; 765 NW2d 44 (2009), citing *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003), and, thus, for purposes of this case, we treat the two provisions as coextensive.

Determining whether a law violates the Ex Post Facto Clause is a two-step inquiry. *Smith*, 538 US at 92. The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. *Id*. If the Legislature's intention was to impose a criminal punishment, retroactive application of the law violates the Ex Post Facto Clause and the analysis is over. *Id*. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* (citations and quotation marks omitted). Stated another way, even if the text of the statute indicates the Legislature's intent to impose a civil remedy, we must determine whether the statute nevertheless functions as a criminal punishment in application. Because we conclude that the Legislature did not intend the crime victim's rights assessment to be a criminal punishment, we will address both issues.

C. WHETHER THE LEGISLATURE INTENDED THE CRIME VICTIM'S RIGHTS ASSESSMENT TO BE PUNITIVE

When determining whether the Legislature intended for a statutory scheme to impose a civil remedy or a criminal punishment, a court must first consider the statute's text and its structure. *Smith*, 538 US at 92. Specifically, a court must ask whether the Legislature, "indicated either expressly or impliedly a preference for one label or the other." *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997) (citation and quotation marks omitted). In considering whether a law is a criminal punishment, a court "generally bases its determination on the purpose of the statute." *Trop v Dulles*, 356 US 86, 96; 78 S Ct 590; 2 L Ed 2d 630 (1958). "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the

wrongdoer, to deter others, etc., it has been considered penal." *Id*. However, a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose. *Id*. "The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id*. When giving effect to the Legislature's intent, we first focus on the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012) (citations and quotation marks omitted).

Cole, 491 Mich at 336-337, concluded that imposing lifetime electronic monitoring for a conviction of first or second-degree criminal sexual conduct constituted a criminal punishment.[2] In support of that conclusion, *Cole* noted that the Legislature included monitoring as part of the sentence. *Id*. at 336 ("The use of the directive 'shall *sentence*' indicated that the Legislature intended to make lifetime electronic monitoring part of the sentence itself.") (emphasis added). While the crime victim's rights assessment is imposed *at the time of sentencing*, MCL 769.1k(1)(*iv*), in contrast to *Cole*, the Legislature did not expressly manifest an explicit intent to make the assessment *part of the sentence itself*. Rather, the Crime Victim's Rights Act statutory scheme leads to the opposite conclusion—that the crime victim's rights assessment does not have a label, function, or purpose that is consistent with a criminal sentence or penalty.

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[2] While *Cole* was not an ex post facto case, and instead considered whether due process mandates that a criminal defendant is informed of the lifetime electronic monitoring requirement before pleading guilty or no contest for criminal sexual conduct, *Cole*, 491 Mich at 327, *Cole*'s analysis is relevant to this case because the analysis used to determine whether the law imposes a criminal penalty is the same. *Id*. at 334, citing *Smith*, 538 US at 92.

Specifically, nothing on the face of the Crime Victim's Rights Act expressly indicates that the Legislature intended the crime victim's rights assessment to be a criminal punishment. However, the use of the label "assessment," as opposed to "fine" or "penalty," is instructive. The Legislature is aware that a fine is generally a criminal punishment. Indeed, the Michigan Penal Code defines "crime" as an act or omission forbidden by law that is punishable upon conviction by a "[f]ine not designated a civil fine." MCL 750.5. Accordingly the Legislature's decision to use the term "assess" as opposed to "fine" or another similar term within the Crime Victim's Rights Act implies a nonpunitive intent.

While labels alone do not determine whether a statutory provision is a criminal punishment or civil remedy, *Smith*, 538 US at 94 ("[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one"), the function of the crime victim's rights assessment is true to its label as an assessment. "Assessment" is defined as "the action or instance of assessing," and "assess" is defined as "to impose according to an established rate." *Merriam-Webster's Collegiate Dictionary* (8th ed). On the other hand, a criminal fine is generally imposed as a punishment in response to criminal conduct. See *Southern Union Co v United States*, 567 US ___, ___; 132 S Ct 2344, 2350; 183 L Ed 2d 318 (2012) (explaining that "[c]riminal *fines* . . . are penalties inflicted by the sovereign for the commission of offenses") (emphasis added). Therefore, the terms "fine" and "assessment" have different and distinct meanings: criminal fines are generally responsive to the conduct which they intend to punish, while assessments are imposed in accordance with a predetermined flat rate.

Specifically, the crime victim's rights assessment levies a flat fee against a convicted criminal defendant, irrespective of the number or severity of the charges. The monetary value of the assessment depends only on whether the crimes constituted a misdemeanor or a felony, and whether the defendant is a juvenile. MCL 780.905. Moreover, MCL 780.905(2) imposes only one assessment per criminal case, contrary to the manner in which punitive fines are usually imposed, i.e., where the amount of the fine generally depends on the specific facts of the case. *Southern Union Co*, 567 US at ___; 132 S Ct at 2350. Therefore the crime victim's rights assessment does not have the label of, nor does it function like, a criminal punishment.

Additionally, the crime victim's rights assessment has a nonpunitive purpose: to provide funding for crime victim's services. The Legislature made it clear that funding crime victim's services is the primary goal of the Crime Victim's Rights Act. Specifically, MCL 780.907(2), which governs the disbursement of the Crime Victim's Rights Fund monies, states that the Department of Community Health "shall make the implementation of crime victim's rights" a priority. Further, MCL 780.908, which governs the use of disbursed funds, requires a court, department, or local agency receiving a distribution under the act to use the distribution to "maintain or enhance crime victim's rights services." Only after the crime victim's rights services have been paid for may money from the fund be used for other purposes under the Crime Victim's Rights Act. See MCL 780.904(2) (implying that the fund first must disburse the amount that the Crime Victims' Services Commission determined was necessary to fund crime victim's services).

Although the crime victim's rights assessment places a burden on convicted criminal defendants, the assessment's purpose is not to punish but to fund programs that support crime victims. See *Trop*, 356 US at 96 (explaining that while a statute may have both penal and nonpenal attributes, the "controlling nature" depends on the Legislature's purpose). As the Legislature envisioned, the crime victim's rights assessment primarily provides funding for crime victim's services. Included among the services supported by the fund are "comprehensive mandatory rights of crime victims to participate in and be notified of all pertinent proceedings in the criminal justice process, compensation for crime related losses, and training of advocates to better assist victims." Michigan Department of Community Health, *Crime Victims Services Commission Annual Report FY 2012* (2012), p 5. The crime victim's rights assessment, therefore, funds a variety of programs that benefit the health and safety of crime victims and other community members.

Finally, more generally, the crime victim's rights assessment is an exercise of the Legislature's power to protect the health and safety of Michigan citizens, indicating that it is a civil remedy. In this regard we find the facts of *Smith* instructive. *Smith*, 538 US at 93, considered whether the Alaskan Sex Offender Registry Act imposes a criminal punishment or a civil remedy. The United States Supreme Court held that the Alaskan Legislature expressed a civil objective in the act itself, explaining that " '[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.' " *Id*., citing *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997). The Court further explained that "where a legislative restriction 'is an incident of the State's

power to protect the health and safety of its citizens,' it will be considered as 'evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.' " *Smith*, 538 US at 93-94, quoting *Flemming v Nestor*, 363 US 603, 616; 80 S Ct 1367; 4 L Ed 2d 1435 (1960). The Court also determined that the goal was "plainly more remedial than punitive" and "even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive." *Smith*, 538 US at 94 (citations and quotation marks omitted).

Like *Smith*'s consideration of the Alaskan Legislature's purpose, we conclude that the Michigan Legislature's goal in crafting the Crime Victim's Rights Act was to promote public safety and welfare by providing notification and support services to crime victims. And, even if the assessment in some ways resembles a criminal fine, as *Smith* explained, the Crime Victim's Rights Act's regulatory purpose to protect the health and safety of Michigan crime victims controls over any punitive effect the act may otherwise have. Therefore, we hold that the Legislature intended the crime victim's rights assessment to be a civil remedy.

D. WHETHER THE CRIME VICTIM'S RIGHTS ASSESSMENT IS PUNITIVE IN PURPOSE OR EFFECT

Because we conclude that the Legislature intended that the crime victim's rights assessment be civil in nature, we must determine whether it is nevertheless "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 US at 92 (citations and quotation marks omitted). When analyzing whether an act has the purpose or effect of being punitive, courts consider seven factors noted in

Kennedy v Mendoza-Martinez, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 664 (1963). *Smith*, 538 US at 97. The factors as considered in *Mendoza-Martinez* are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. [*Mendoza-Martinez*, 372 US at 168-169.]

The factors are "neither exhaustive nor dispositive . . . but useful guideposts." *Id.* (citations and quotation marks omitted). Further, courts will "reject the legislature's manifest intent [to impose a civil remedy] only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect to negate the . . . intention to deem it civil." *Hendricks*, 521 US at 361 (citations and quotation marks omitted). See, also, *Smith*, 538 US at 105.

Turning to the *Mendoza-Martinez* factors, the first factor weighs against finding a punitive purpose or effect because the crime victim's rights assessment does not impose an affirmative disability or restraint. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects of the [a]ct are felt by those subject to it." *Smith*, 538 US at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. The assessment—a maximum of $130—is " 'certainly nothing approaching the "infamous punishment" of imprisonment.' " *Hudson*, 522 US at 104, quoting

Flemming, 363 US at 617. See, also, *Smith*, 538 US at 100 ("The act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.") (citation omitted). Although the crime victim's rights assessment might have some punitive effects on defendants, to hold that any governmental regulation that has indirect punitive effects constitutes a punishment would undermine the government's ability to engage in effective regulation. *Smith*, 538 US at 102, quoting *Hudson*, 522 US at 105 (stating that "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation," and explaining that many government programs may deter crimes without imposing a punishment).

Likewise, the second factor does not weigh in favor of the crime victim's rights assessment being punitive in purpose or effect because the crime victim's rights assessment has not been regarded in our history and traditions as a form of criminal punishment. While, as explained earlier, criminal *fines* have been regarded as punishment, the crime victim's rights assessment does not share the characteristics of punitive fines because it imposes a flat fee irrespective of the underlying criminal conduct. Additionally, charging convicted criminal defendants a fee in order to pay for victim's services is a relatively new concept that was first introduced by 1989 PA 196, which created the Criminal Assessments Commission, the predecessor of the Crime Victim Services Commission, MCL 780.901 to MCL 780.911. The general nature of the assessment's legislative scheme has not changed and the aim of the assessment has always been to provide crime victim's services. Therefore, the assessment is not now, nor has it ever been, regarded as a punishment.

The fourth factor also fails to indicate a punitive purpose or effect because the crime victim's rights assessment does not promote the traditional aims of punishment: retribution and deterrence. *Hendricks*, 521 US at 361-362. The assessment is not retributive because it does not consider the underlying factual nature of the crimes committed nor the number of convictions in determining the fee assessed. And, while the fees assessed under the act depend on the type of conviction or adjudication—i.e., felony, misdemeanor, or juvenile—that distinction is reasonably related to the goal of requiring convicted criminal defendants to bear the cost of crime victim's services. Cf. *Smith*, 538 US at 102 (explaining that "[t]he broad categories [used to distinguish classes of offenders in Alaska's Sex Offender Registration Act] and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective"). Nor can the act be said to promote the aims of deterrence, given that any deterrent effect is minimal. The small fee imposed by the assessment is unlikely to have a *significant* deterrent effect in light of the other potential consequences of criminal punishment, such as additional and greater fines and costs and incarceration.

The sixth factor also does not imply a punitive purpose or effect because the crime victim's rights assessment has a rational connection to a nonpunitive purpose. It is "most significant" that while the assessment might have some punitive aspects, it serves "important nonpunitive goals." *United States v Ursery*, 518 US 267, 290; 116 S Ct 2135; 135 L Ed 2d 549 (1996). The notion of crime victim's rights is of such importance that it is mandated by the Michigan Constitution. Const 1963, art 1, § 24. As previously discussed, the goal of the Crime Victim's Rights Fund, and, therefore, of

the crime victim's rights assessment, is to fund crime victim's services to help protect crime victim's rights. Indeed, the Crime Victim's Rights Fund provides funding for mandatory services required by art 1, § 24 of the Michigan Constitution and other services mandated by crime victim's rights legislation.[3] Any punitive effects are incidental to the goal of funding crime victim's services, which is rationally connected to the assessment itself. The decision to place the burden of funding the Crime Victim's Rights Fund on those who are convicted of a crime or adjudicated and on those juveniles who are responsible for a crime is simply a rational policy decision.

Finally, the seventh factor also fails to show a punitive purpose or effect because the crime victim's rights assessment is not excessive with respect to its purpose. As noted, each criminal defendant is subject to the assessment, irrespective of the number of convictions, and the cost imposed is relatively low in relation to other fines imposed within the criminal process. Although the increase in the assessment amount may impose a hardship on some, the assessment is set at the rate that the Crime Victims' Services Commission determines is necessary to adequately fund the crime victim's services programs. MCL 780.903(b). Because of the operation of inflation and other unavoidable cost increases, it is necessary that the amount of the crime victim's rights assessment be periodically increased in order to fund the same level of services. The increased

[3] The Crime Victim's Rights Fund provides funding to implement and support services required by the Crime Victim's Rights Act, 1985 PA 87, for costs associated with supporting the Michigan Crime Victim Notification Network and its automated victim notification system, fulfilling the notification requirements of Const 1963, art 1, § 24, and crime victim compensation pursuant to 1976 PA 223. See *Crime Victims Services Commission Annual Report FY 2012*, pp 3-8.

assessment, therefore, was not the result of a policy choice to impose a harsher punishment on defendants for their conduct, but instead was necessary in order to provide the services mandated under the Crime Victim's Rights Act. The amount imposed ensures that there is adequate funding to provide the services required by law. There is no evidence that the assessment is excessive in relation to its purpose.

Smith found the remaining two *Mendoza-Martinez* factors—the third, whether the crime victim's rights assessment only comes into play on a finding of scienter and the fifth, whether the behavior the crime victim's rights fund applies to is already a crime—generally unhelpful in its ex post facto analysis, and we agree.[4] The underlying conduct of the defendant will always constitute a crime, but, as explained, the assessment is not responsive to that specific conduct. Instead, the assessment only applies a flat fee determined by the level of criminal conduct—i.e., whether the underlying conviction constitutes a misdemeanor or felony. Likewise, a finding of scienter is unhelpful because regardless whether the underlying conduct constitutes a strict liability felony (requiring no criminal intent) or a crime requiring the most depraved criminal intent (such as premeditated murder) the assessment treats the conduct exactly the same by imposing a flat fee. Therefore, both of these factors carry little weight in our analysis.

Overall, when considering the *Mendoza-Martinez* factors as analyzed in *Smith*, there is not the "clearest proof" that the crime victim's rights assessment is "so

[4] *Smith* found the factors unhelpful because Alaska's Sex Offender Registration Act was designed to address criminal recidivism, and, therefore, the underlying conduct must always be a crime and involve scienter. *Smith*, 538 US at 94.

punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Smith*, 538 US at 92 (citations and quotation marks omitted).[5]

IV. CONCLUSION

We conclude that an increase in the crime victim's rights assessment does not violate the bar on ex post facto laws because the Legislature's intent in enacting the assessment was civil in nature. Additionally, the purpose and effect of the assessment is not so punitive as to negate the Legislature's civil intent. Therefore, we affirm the judgment of the Court of Appeals that the increase in the crime victim's rights assessment does

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[5] We acknowledge that several federal courts of appeal have concluded that a retroactive assessment of an increased "special assessment" similar to the crime victim's rights assessment at issue in this case constitutes a violation of the Ex Post Facto Clause. See, e.g., *United States v Prather*, 205 F3d 1265, 1272 (CA 11, 2000); *United States v Labeille-Soto*, 163 F3d 93, 101-102 (CA 2, 1998). We decline to follow those cases because the parties in those cases agreed that imposition of the increased assessment violated the Ex Post Facto Clause. *Prather*, 205 F3d at 1272 (stating that both parties agreed that the district court had erred by levying a special assessment of $100 per count against Prather because the Ex Post Facto Clause of the Constitution forbids retroactive application of criminal sanctions); *Labeille-Soto*, 163 F3d at 101-102 ("The government, which sat mute when the court imposed the $100 assessment at the sentencing hearing, concedes the correctness of this [Ex Post Facto] challenge.").

Later cases reaching the same conclusion simply cite *Prather* and *Labeille-Soto* for the proposition that retroactively applying the increased assessment would violate the Ex Post Facto Clause without engaging in any analysis. See, e.g., *United States v Jones*, 489 F3d 243, 254 n 5 (CA 6, 2007). Likewise, state courts addressing similar issues as those presented in this case that have found ex post facto violations have relied on concessions or simply stated that conclusion with little supporting analysis. See, e.g., *People v Sullivan*, 6 AD3d 1175, 1175-1176; 775 NYS2d 696 (2004); *Taylor v State*, 586 So 2d 964, 965 (Ala Crim App, 1991). Accordingly, we find these cases unpersuasive and unhelpful.

not violate the Ex Post Facto Clauses of the Michigan and United States Constitutions.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with CAVANAGH, J.

In re McCREE

Docket No. 146826. Argued December 11, 2013 (Calendar No. 1). Decided March 26, 2014.

The Judicial Tenure Commission (JTC) petitioned for the interim suspension of Wayne Circuit Court Judge Wade H. McCree without pay. The Supreme Court granted the petition. 493 Mich 935 (2013). The JTC subsequently filed a formal complaint against respondent, alleging five counts of misconduct: that respondent had engaged in improper conduct in two criminal cases before him, falsely reported a felony, exhibited improper bench conduct and demeanor, and made misrepresentations to the JTC. The Supreme Court appointed retired Jackson Circuit Court Judge Charles A. Nelson to act as master. After a hearing, the master concluded that respondent had committed misconduct as alleged in Counts I through III of the complaint. With respect to Count I, the master concluded that respondent should have disqualified himself from a felony nonsupport case as soon as he began a sexual relationship with Geniene LaShay Mott, who was the complaining witness in the case. With respect to Count II, Judge Nelson found that respondent had lied to the prosecuting attorney's office when he reported that Mott was stalking him and trying to extort money from him. With respect to Count III, the master concluded that respondent had improperly acted in another criminal case, one that involved Mott's uncle. With respect to Count IV, the master found that although many of the text messages that respondent exchanged with Mott while he was on the bench were inappropriate, they were used in a private context and did not rise to the level of judicial misconduct. Finally, the master found that the misrepresentations alleged in Count V did not warrant action by the JTC. The JTC concluded that respondent had engaged in judicial misconduct and conduct prejudicial to the administration of justice as alleged in Counts I through III. With respect to Count V, the JTC did not adopt the master's findings and found instead that respondent had engaged in a pervasive pattern of dishonesty that included lying under oath to the commission and to the master. The JTC recommended that respondent be removed from office, conditionally suspended without pay for six years beginning on

January 1, 2015 (with the suspension becoming effective only if he is reelected to judicial office in November 2014), and ordered to pay $11,645.17 in costs.

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

The cumulative effect of respondent's misconduct required his removal from judicial office and imposition of a conditional suspension.

1. The evidence established that respondent had a sexual relationship with a complaining witness in a case pending before him without recusing himself for several months and engaged in numerous ex parte communications with her concerning the case, as well as concerning another case in which her uncle was a party. Respondent violated various courthouse policies by permitting Mott to enter the facility through an employee entrance without going through security, allowing her to remain alone in his chambers while he was on the bench, arranging for her to park her vehicle in an area reserved for judges, and sneaking her cell phone into the courthouse for her. While he was on the bench, respondent sent Mott numerous text messages that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him. Respondent lied about when and why he finally did recuse himself from the case in which his mistress was the complaining witness and sought to use the prosecuting attorney's office as leverage against Mott by concocting the stalking and extortion charges. He also lied under oath during the JTC proceedings.

2. Respondent's actions constituted misconduct in office and conduct clearly prejudicial to the administration of justice within the meaning of Const 1963, art 6, § 30 and MCR 9.205. He violated MCR 9.104(1) through (4) by engaging in conduct prejudicial to the proper administration of justice; conduct that exposed the legal profession or the court to obloquy, contempt, censure, or reproach; conduct that was contrary to justice, ethics, honesty, or good morals; and conduct that violated the standards or rules of professional conduct adopted by the Supreme Court. Respondent violated MCR 2.003 by failing to disqualify himself in the criminal cases and violated MCL 750.423 by testifying falsely under oath. He violated Canon 1 of the Code of Judicial Conduct by failing to maintain high standards of conduct so that the integrity and independence of the judiciary may be preserved. He violated Canon 2 by failing to avoid all impropriety and appearance of impropriety, failing to promote public confidence in the integrity and impartiality of the judiciary, and allowing a social relationship

to influence his judicial conduct or judgment. He violated Canon 3 by failing to be faithful to the law, engaging in ex parte communications, and failing to raise the issue of disqualification.

3. In *In re Brown*, 461 Mich 1291 (2000), the Supreme Court set forth seven considerations to guide the formation of judicial-discipline recommendations. The JTC properly concluded that six of the *Brown* factors weighed in favor of a more serious sanction. Removing respondent from office and conditionally suspending him without pay for six years beginning on January 1, 2015 (with the suspension becoming effective only if respondent is reelected to judicial office in November 2014) was necessary to sufficiently redress the harm done to the integrity and reputation of the judiciary. Lying under oath is entirely incompatible with judicial office and warrants removal, but respondent did far more than lie under oath and committed most of his misconduct while the JTC was investigating him for other misconduct for which he has since been sanctioned.

4. Const 1963, art 6, §§ 4 and 30 grant the Supreme Court authority to sanction a judge. Section 4 gives the Supreme Court general superintending authority over courts and the power to determine that a person is unfit for judicial office and prevent the person from exercising judicial power in this state for as long as the person is, in the Court's judgment, judicially unfit. Const 1963, art 6, § 30(2) authorizes removal and suspension as sanctions. The power to suspend is not limited to cases in which the judge currently holds office. The Supreme Court has constitutional authority to issue conditional suspensions that foreclose the exercise of the prerogatives inhering in any judicial office to which the disciplined person might be elected or appointed in the future, the condition being reelection or appointment to judicial office. A conditional suspension disengages the disciplined person from judicial power only if the person occupies judicial office again during the term of the suspension and do not permanently enjoin the person from holding judicial office. The Supreme Court has issued conditional suspensions when other sanctions could not fully and adequately address the effect of particular misconduct on the integrity of the judicial system. In this case, removal of respondent alone would be an insufficient sanction. If he were to be reelected in 2014, his total period of suspension would be less than two years (including his interim suspension), which would be insufficient given the seriousness of his misconduct.

5. Because respondent engaged in conduct involving deceit or intentional misrepresentation, he was ordered to pay the JTC costs of $11,645.17 under MCR 9.205(B).

Removal from office, conditional suspension, and payment of costs ordered.

Justice CAVANAGH, concurring in part and dissenting in part, agreed with the majority's factual findings and analysis of the factors from Brown, but disagreed with the decision to conditionally suspend respondent. Const 1963, art 6, § 30 provides four possible sanctions, allowing the Supreme Court to censure, suspend with or without salary, retire, or remove a judge. Removal is the most serious sanction and is, therefore, the means by which judges guilty of serious misconduct are divested of office. Because respondent's misconduct was of a grave and serious nature, Justice CAVANAGH agreed with removing respondent from office, but disagreed that removal alone would not sufficiently address the seriousness of respondent's conduct. The majority overlooked the fact that other institutions, such as the press, serve the public's interest in being informed and may be expected to do so in this case. In any event, the Supreme Court always retains the power to determine that a person is unfit for judicial office and prevent that person from exercising judicial power in this state for as long as he or she is in the Court's judgment judicially unfit.

JUDGES — MISCONDUCT — CONDITIONAL SUSPENSIONS.

The Michigan Constitution grants the Supreme Court the power to determine that a person is unfit for judicial office and prevent the person from exercising judicial power in this state for as long as the person is, in the Court's judgment, judicially unfit; while removal from office and suspension are authorized sanctions, the Supreme Court also has the authority under Const 1963, art 6, §§ 4 and 30 to issue conditional suspensions that foreclose the exercise of the prerogatives inhering in any judicial office to which the disciplined party might be elected or be appointed in the future, the condition being reelection or appointment to judicial office; a conditional suspension is appropriate when other sanctions could not fully and adequately address the effect of particular misconduct on the integrity of the judicial system; it disengages the disciplined party from judicial power only if that person occupies judicial office again during the term of the suspension and does not permanently enjoin the person from holding judicial office.

Paul J. Fischer and *Margaret Rynier* for the Judicial Tenure Commission.

Collins Einhorn Farrell, PC (by *Brian D. Einhorn* and *Colleen H. Burke*), for respondent.

MARKMAN, J. The Judicial Tenure Commission (JTC) has recommended that respondent, Wayne Circuit Judge Wade H. McCree, be removed from office and conditionally suspended without pay for six years beginning on January 1, 2015—with the suspension becoming effective only if respondent is reelected to judicial office in November 2014—and that he be ordered to pay costs in the amount of $11,645.17. Respondent has filed a petition asking this Court to reject that recommendation. We affirm almost all of the JTC's factual findings and conclusions of law, and we adopt its recommendation. The evidence establishes that respondent (a) had a sexual relationship with a complaining witness in a case pending before him without recusing himself for several months, (b) engaged in numerous ex parte communications with her concerning the case, as well as concerning another case in which one of her relatives was a party, (c) violated various policies of the courthouse by permitting his mistress to enter the facility through an employee entrance without going through security, allowing her to remain alone in his chambers while he was on the bench, arranging for her to park her vehicle in an area reserved for judges, and sneaking her cell phone into the courthouse for her, (d) transmitted numerous text messages to her while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him, (e) lied about when and why he finally did recuse himself from the case in which his mistress was the complaining witness, (f) sought to use the prosecuting attorney's office as leverage against his then ex-mistress by concocting charges of stalking and extortion against her, and (g) lied under oath

during the JTC proceedings. The cumulative effect of respondent's misconduct convinces this Court that respondent should not remain in judicial office, and we therefore remove him from office and conditionally suspend him without pay for six years beginning on January 1, 2015, with the suspension becoming effective only if respondent is reelected to judicial office in November 2014. In addition, because respondent engaged in conduct involving "deceit, or intentional misrepresentation," pursuant to MCR 9.205(B) we order respondent to pay costs of $11,645.17 to the JTC.

In respondent's words in his own defense, "Wade should have recused himself," but the failure to do so resulted in "no harm no foul." We disagree. The "harm" done was to the parties' rights to a fair legal process and the public's right to an impartial judiciary, and the "foul" committed was the resulting violation of Michigan's Code of Judicial Conduct.

I. FACTS AND HISTORY

On January 7, 2013, pursuant to MCR 9.219(A)(2), the JTC filed a petition for the interim suspension without pay of respondent. By order of February 8, 2013, this Court granted the petition, effective immediately. *In re McCree*, 493 Mich 935 (2013).[1] On March 12, 2013, the JTC filed Formal Complaint No. 93 against respondent, alleging five counts of misconduct. It asserted that respondent had engaged in (a) "improper conduct [in] *People v King*" (Wayne Circuit Court Case No. 12-003141-01-FH); (b) the "false report of a felony"; (c) "improper conduct [in] *People v Tillman*" (Wayne Circuit Court Case No. 12-000686-01-FH); (d) "im-

[1] This Court ordered "respondent's salary [to] be held in escrow pending the final resolution of these disciplinary proceedings." *McCree*, 493 Mich at 935.

proper bench conduct and demeanor"; and (e) "misrepresentations to the Commission."

With regard to Count I, the complaint alleged that between May and November 2012, respondent had a sexual relationship with Geniene LaShay Mott, who was the complaining witness in *People v King*. Robert King, the father of one of Mott's children, was the defendant in that case, which pertained to his failure to pay Mott child support. Respondent and Mott repeatedly engaged in ex parte communications about the *King* case. For example, in response to Mott's texted suggestion to impose a jail sentence until King paid $2,500, respondent texted back:

> I figured if [he] hasn't come current by his courtdate, he gets jail 2 pay. If he says he can bring me the $$, I'll put him on a tether till he brings the receipt 2 FOC or do 'double time'.[2]

Respondent asked Mott to keep their relationship confidential because of the then-pending JTC investigation regarding respondent's previous conduct of having texted a photograph of himself without a shirt to a female deputy sheriff and telling a reporter in response to questions about his actions that "there is no shame in my game."[3] For example, on June 20, 2012, respondent included the following in an email to Mott:

> My Judicial Tenure Commission matter has me nervous, as you might expect. I have to be real careful until this matter is put to rest. I can only ask humbly for your indulgence. Sorry. Second, you are the complaining witness on a case that is before me. Naturally if it got out that we

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[2] Presumably, "FOC" means "Friend of the Court."

[3] As a result of that JTC investigation, this Court adopted the JTC's recommendation to publicly censure respondent. *In re McCree*, 493 Mich 873 (2012).

> were seeing each other before your B.D.'s[4] case closed, everybody could be in deep shit.[5]

Respondent did not transfer the *King* case to another judge until September 18, 2012, at which point respondent sent the following text message to Mott:

> DONE DEAL!!!!:-) I told a story so well, I had me believing it!! Brother King is on his way 2 'hangin' Judge [James A.] Callahan. He fuck up ONCE & he's through!![6]

With regard to Count II, the complaint alleged that respondent later made a false stalking/extortion complaint against Mott with the Wayne County Prosecuting Attorney's Office. He also falsely told the prosecutor's office that he had transferred the *King* case immediately upon starting his relationship with Mott and that Mott had demanded $10,000 in return for terminating her pregnancy and not revealing respondent's affair with her to respondent's wife.

With regard to Count III, the complaint alleged that respondent was involved in another failure-to-pay-child-support case in which Mott had an interest—*People v Tillman*. The defendant in that case was a relative of Mott's. Respondent and Mott engaged in ex parte communications regarding this case as well. Off the record, and in the absence of any motion being filed, respondent signed an order for the reduction of bond relating to Mott's relative.

With regard to Count IV, the complaint alleged that respondent transmitted numerous text messages to

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[4] Presumably, "B.D." means "baby's daddy."

[5] This e-mail message demonstrates that respondent was clearly cognizant that he should have recused himself from the *King* case well before he did.

[6] This text message appears to suggest that respondent was untruthful about his reasons for recusing himself from the *King* case.

Mott while he was on the bench. Many of these text messages contained inappropriate and sexually explicit comments. For example, respondent texted Mott:

> Oh yeah, I text from the bench. After last nite, its all I can do not 2 jerk off 'under' the bench:-). U know U have a magnificent pair of legs!

Numerous text messages respondent transmitted from the bench contained inappropriate and derogatory personal references to defendants, litigants, and witnesses appearing before him. For example, he texted:

> C'mon, U'r talking about the 'docket from Hell'; filled w/tatted up, overweight, half-ass English speaking, gap tooth skank hoes....and then U walk N.

He also texted:

> 2 funny, I just had Monica Conyers'[7] nephew B4 me (ignorant shit...as usual).

Finally, with regard to Count V, the complaint alleged that respondent made several misrepresentations to the JTC. For example, respondent told the JTC that he had irrevocably terminated his relationship with Mott on October 31, 2012, although he actually continued his affair with Mott into November 2012. Respondent also told the JTC that he did not take any action on the *Tillman* case in November 2012, but he actually signed an order for reduction of bond in that month. In addition, respondent told the JTC that he did not know of any familial relationship between Tillman and Mott, but he did, in fact, know that they were relatives.[8]

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[7] Monica Conyers is a former Detroit City Council member.

[8] The complaint also alleged that "[t]he sexual acts between Respondent and Mott took place at various locations, including Respondent's judicial chambers"; "[o]n numerous occasions, Respondent escorted Mott into the courthouse through the building's back entrance, reserved for

Also on March 12, 2013, the JTC filed a request for the appointment of a master. Three days later, on March 15, 2013, this Court appointed the Honorable Charles A. Nelson, a former circuit judge in Jackson County, as the master, and hearings began on May 20, 2013, and concluded on May 29, 2013. On June 23, 2013, the master filed his findings of fact and conclusions of law with the JTC.

With regard to Count I, the master found that respondent should have disqualified himself from the *King* case as soon as he started a relationship with Mott and that "[f]or McCree to claim in sworn testimony during these proceedings that it was an OVERSIGHT or it didn'[t] DAWN on him that he should recuse himself is not credible. In short he lied to the JTC." Respondent intentionally used his judicial position to advance his own interests by holding on to the *King* case in order to keep Mott interested in him. According to the master, "He had a hot young lady who was in his words 'eye candy' and a way to keep her interested was to keep her case and be of assistance in the collection of money."[9] Respondent also continuously engaged in ex parte communications with Mott about the case, which

judges, court employees and members of the Wayne County Sheriff's Department"; "[o]n numerous occasions between May and mid-November of 2012, Respondent permitted Mott to remain in his judicial chambers while he was on the bench adjudicating his criminal docket"; and "Respondent assisted Mott in bringing her cell phone into his courtroom, in violation of a 'no cell phones' security policy of the Frank Murphy Hall of Justice."

[9] The defendant in the *King* case owed Mott about $15,000 in child support, and the master found that "the Examiner's theory that some of [respondent's] motivation in having looked after this case and transferring it to a judge of his choice so it would ensure payment of the support and, thus, take off some of the financial pressure that was building for McCree in looking after two families is, by a preponderance, true" as respondent had "advanced money to Mott possibly as much as $6,000."

led her to believe that she could influence his judicial decisions. "Mott was providing input, without objection by McCree, as to how King should be dealt with," and this "social relationship gave Mott the belief that she was able to influence his judicial duties."

With regard to Count II, the master found that respondent lied to the prosecutor's office when he told them that Mott was stalking him and trying to extort money from him and that he had recused himself from the *King* case when he found out that a child of Mott's had interacted with one of his children.[10] "It is clear that he was improperly seeking to get the prosecutor and her office involved with alleged crimes that were not existent."[11]

With regard to Count III, the master found that when respondent signed the order reducing Tillman's bond, he was just "confirming in the order what had already been done by [Judge Kevin F.] Robbins." However, the master further concluded:

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[10] Respondent also told the prosecutor's office that there was no way that he could have gotten Mott pregnant because he was the "king of latex" and that "Wade was being played."

[11] Although the JTC found that respondent failed to tell the Wayne County Prosecuting Attorney that Mott had been a complaining witness in a case before him and that he falsely told the investigators that he had immediately recused himself from the case once he realized the conflict, the JTC did not otherwise address Count II. We agree with the master that respondent's claims regarding stalking and extortion are not credible given the communications between respondent and Mott during this period. For example, on November 6, 2012, which according to respondent was during the period that Mott was stalking and extorting him, Mott sent the following text message to McCree: "being held in ur arms this afternoon meant so much to me[.]" In addition, although there is evidence of numerous communications between respondent and Mott during this period, none of the communications in any way suggest that Mott was stalking or extorting respondent. For instance, none of the messages refers to Mott's alleged demand for $10,000 in order to keep their affair a secret and obtain an abortion.

> [Respondent and Mott] were communicating with texts. He was advising what had to be done when the order was signed and how they would get Tillman out of jail.
>
> The main import of the matter to me is that he again had a case in which Mott had an interest. He was ethically not to be involved and should not have been signing any orders pertaining to the case. McCree's actions were beyond an appearance of impropriety — they were in violation of the ethical standards.

With regard to Count IV, the master found that although many of the text messages that respondent sent while he was on the bench were inappropriate, they were "used in a private context and when used there was no reason to believe that the statements would become public"[12] and "[t]he fact that he may have sent some messages from the bench (as in Tillman) does not mean that he was not performing as a judge." Therefore, the master concluded that

> [t]here is no showing that the sending of the texts in any way interfered with his duties as a judge. I do not believe that this count rises to the level of judicial misconduct.[13]

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[12] This finding seems to be inconsistent with the master's earlier finding that "[o]f all people who should have known how allegedly private matters (the photo to the deputy) can get into the public domain it would be McCree."

[13] Although the JTC, for reasons not known, did not address Count IV, we feel compelled to note that we respectfully disagree with the master's conclusion that respondent's transmission of numerous text messages to Mott while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him did not constitute judicial misconduct. Canon 2 of the Code of Judicial Conduct provides, in pertinent part:

> A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Finally, with regard to Count V, the master found that respondent did not falsely tell the JTC that he had irrevocably terminated his relationship with Mott on October 31, 2012, because "there is no indication that a sexual relationship continued after that date."[14] And although respondent lied to the JTC about not knowing that Mott and Tillman were relatives and not taking any action on the *Tillman* case, this "does not appear to be a material misrepresentation as the Examiner had all of the texts and had an accurate picture when the answer was filed."[15] Therefore, the master concluded that "these alle-

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> B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

It can fairly be said that at least several of respondent's text messages to Mott did not "promote public confidence in the integrity and impartiality of the judiciary" and did not treat the subjects of those messages with "courtesy and respect."

[14] To the contrary, we find that the evidence *does* indicate that respondent lied to the JTC about irrevocably terminating his relationship with Mott on October 31, 2012, because there is evidence of communications between respondent and Mott after October 31, 2010, that indicate that they were still romantically involved. For example, on November 6, 2012, Mott sent the following text message to McCree, "being held in ur arms this afternoon meant so much to me" and, on November 8, 2012, respondent sent the following text message to Mott, "I'll C U 2morrow, & WE'LL 'HAVE FUN":-)" We note that this finding is consistent with the JTC's finding that "Respondent's relationship with Mott began on May 21, 2012, and lasted approximately through mid-November, 2012."

[15] Contrary to the master's conclusion, whether the JTC had sufficient evidence before it to know that respondent was lying when he said that he did not know that Mott and Tillman were relatives and that he did not take any action on the *Tillman* case is irrelevant to whether respondent committed judicial misconduct when he lied to the JTC. Lying to the JTC is judicial misconduct regardless of whether the JTC knows that you are lying or not.

gations are not such as to warrant action by the JTC." In conclusion, the master stated:

> In final summary there is Shame in the McCree game: shame to the good name of McCree and shame brought upon the judiciary of the State of Michigan.[16]

The JTC then held a hearing on August 5, 2013, and issued its decision and recommendation for discipline on September 10, 2013. With regard to Count I, the JTC found that respondent had a sexual affair with Mott, who was a complaining witness in a case before him, and that respondent regularly engaged in ex parte communications with Mott regarding the case, even while he was sitting on the bench. For example, respondent and Mott exchanged the following text messages regarding the case:

> *Mott*: Just keep in mind thur ill be in ur courtroom & need 2 bring in my phone so I can text U what I want done incase he makes payment that morning..... otherwise lock his ass up until he pays 2500 in cash directly 2 me via FOC... u seem 2 always call his case last so ill show up late & we can leave 2gether.

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[16] The master made the following additional findings of fact: (1) respondent and Mott had sexual relations in respondent's judicial chambers; (2) "Mott was allowed on a number of occasions to use the judicial parking lot and to use the judges' entry door"; (3) "McCree assisted Mott in bringing a cell phone into court so that she could communicate with him while King's case was reviewed" and "[t]his was accomplished by Mott putting her cell phone in McCree's truck, him bringing it into the court-house and then McCree putting it into an envelope so that a deputy could deliver it to Mott in the courtroom"; (4) Mott told McCree that she was pregnant with his child; (5) McCree told Mott that he would divorce his wife if Mott obtained an abortion; and (6) Mott told McCree that she would obtain an abortion if he divorced his wife. Finally, the master noted:

> Whether Mott is pregnant or not and who is the baby's father are not of concern, we leave that for the Jerry Springer show. But the events over the October 30 through late November period show a pattern of lies and deception by McCree in his dealings with Mott (not to say that she was an innocent party in those events).

Respondent: Likewise, my truck will B unlocked so U can set anything out of sight N my car. We'll hold the case till U get there, or B sure 2 call Sharon Grier ahead of time so she'll know U (the 'C.P.')[17] will B N the courtroom. I figured if [he] hasn't come current by his courtdate, he gets jail 2 pay. If he says he can bring me the $$, I'll put him on a tether till he brings the receipt 2 FOC or do 'double time'.

Mott: Huh??? Teether? 4 how long and how much??

* * *

Respondent: Oooops, did I misspell 'tether'. No, some guys say if they get locked up they can't bring the $$, but if let out they can. So here's the deal: go 2 jail (150 days), release upon payment of $1500. OR, get a tether & bring back w/n 30 days $2500 or serve 9 months! BONUS: pay w/n the 30 days, remove tether

* * *

Mott: He's about 15k behind... 2500 is asking much plus YOU only ordered him 2 pay $50 bucks a month towards arrage . .@ that rate ill be getting CS[18] til Racheal is 26

* * *

Respondent: OK, the math will be based on his failures since being placed on probation, but if U'r righ the threat of jail will loosen his purse strings!

Mott: ok so let's go with what u proposed..... go to jail (150 days), release upon payment of $1500. OR, get a tether & bring back w/n 30 days $2500 or serve 9 months! BONUS: pay w/n 30 days, remove tether

Mott: He will pay cause they won't let him go 2 jail PLUS u sending him 2 jail would violate his oakland county probation and he gets 10yrs.

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[17] Presumably, "C.P." means "complaining party."

[18] Presumably, "C.S." means "child support."

Respondent: Cool. I'll run it by the prosecutor.

Mott: Make sure she's aware they already let him off by accepting 400 for probation when they told him 1000

* * *

Respondent: Will do. That's good 2 know.

Then, on the morning of the review hearing in the *King* case, respondent and Mott exchanged the following text messages:

Respondent: I think Ur B.D. is here!!

Mott: Did the prosecuter agree wit our deal since she cut him a break .last time??

Respondent: Look 4 'my girl' Sharon Grier, she's our prosecutor & she's been 'prepped'.

With regard to Count II, the JTC found that "Respondent reported to Wayne County Prosecuting Attorney Kym Worthy that he was being stalked and extorted by Mott," but "Respondent did not tell Worthy that Mott had been a complainant in a case before him." In addition, "[w]hile Respondent did tell Worthy's investigators that Mott had been a complainant in a case before him, he falsely told the investigators that he immediately recused himself from the case once he realized the conflict."

With regard to Count III, the JTC found that "Respondent's ex parte communications with Mott regarding *People v Tillman* and Respondent's failure to immediately recuse himself from *People v Tillman* upon learning that Tillman was Mott's relative constituted judicial misconduct."

Finally, with regard to Count V,[19] the JTC found that "Respondent engaged in a pervasive pattern of dishon-

[19] As discussed earlier, the JTC did not address Count IV.

esty that included lying under oath to the Commission and to the Master." For example, respondent testified that it did not "dawn" on him to recuse himself from the *King* case and that his failure to recuse himself was a mere "oversight." However, his e-mails and text messages to Mott reveal otherwise. Indeed, they reveal that respondent knew very early on that what he was doing was wrong and that he would be in serious trouble if anybody found out. For example, in one e-mail he said:

> Second, you are the complaining witness on a case that is before me. Naturally if it got out that we were seeing each other before your B.D.'s case closed, everybody could be in deep shit.

And in a text message, he said:

> Yeah, I'm DEEPLY concerned that certain levels of 'us' remain COMPLETELY UNDETECTED as long as U'r still a litigant N case B4 me & while my nuts R still on a chopping block B4 the JTC.[20]

The JTC finally concluded that "[a] preponderance of the evidence at the formal hearing shows that Respondent breached the standards of judicial conduct . . . ." More specifically, the JTC concluded that respondent engaged in "[m]isconduct in office . . . [and] [c]onduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as

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[20] The JTC also found that

> [d]uring his relationship with Mott, Respondent used his chambers to engage in sexual intercourse with Mott, permitted Mott to enter the courthouse through an employee entrance without going through security, allowed Mott to remain alone in his chambers while he was on the bench, arranged for Mott to park her vehicle in an area reserved for judges, and brought Mott's cell phone into the courthouse for her, in violation of the court's security policy, so that she could communicate with him while he was on the bench.

amended, Article 6, Section 30 and MCR 9.205" and violated MCR 9.104(1), (2), (3), and (4); MCR 2.003; MCR 2.103; MCR 2.114; and MCL 750.423, as well as Canons 1; 2(A), (B), and (C); and 3(A)(1) and (4) and (C) of the Code of Judicial Conduct.

In determining an appropriate sanction, the JTC considered the factors that this Court set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000). Finding that respondent's misconduct implicated six of the seven *Brown* factors and that his "misconduct affected not only the litigants in the *King* and *Tillman* cases, but harmed the integrity of the judicial system as a whole," the JTC recommended that respondent be removed from office and conditionally suspended without pay for six years beginning on January 1, 2015, with the suspension becoming effective only if respondent is reelected to judicial office in November 2014, and that he be ordered to pay costs in the amount of $11,645.17.[21]

II. STANDARD OF REVIEW

This Court reviews de novo the JTC's factual findings, conclusions of law, and disciplinary recommendations. *In re James*, 492 Mich 553, 560; 821 NW2d 144 (2012); *In re Halloran*, 466 Mich 1219, 1219; 647 NW2d 505 (2002). "Findings of misconduct must be supported by a preponderance of the evidence." *In re Haley*, 476 Mich 180, 189; 720 NW2d 246

[21] MCR 9.205(B) provides:

> In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(2006). MCR 9.225 provides that "[t]he Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction." "Although we review the JTC's recommendations de novo, this Court generally will defer to the JTC's recommendations when they are adequately supported." *Haley*, 476 Mich at 189.

III. ANALYSIS

A. FACTUAL FINDINGS

After reviewing the record and hearing oral arguments, we agree with and adopt almost all the factual findings of the JTC. Indeed, most of the JTC's factual findings are not even in dispute. That is, respondent does not dispute that he engaged in a sexual relationship with Mott, who was a complaining witness in a case before him, and that he regularly engaged in ex parte communications with Mott regarding the case.[22] Respondent also does not dispute that when he told the Wayne County Prosecuting Attorney that he was being stalked and extorted by Mott, he did not tell the prosecutor that Mott had been a complainant in a case before him; that he falsely told investigators that he had immediately recused himself from the case once he

[22] Respondent also does not dispute that he and Mott had sexual intercourse in his judicial chambers, that he permitted Mott to enter the courthouse through an employee entrance without going through security, that he allowed Mott to remain alone in his chambers while he was on the bench, that he arranged for Mott to park her vehicle in an area reserved for judges, and that he brought Mott's cell phone into the courthouse for her, in violation of the court's security policy, so that they could communicate with one another while he was on the bench.

realized the conflict;[23] that he knew that the defendant in the *Tillman* case was one of Mott's relatives; that he engaged in ex parte communications with Mott about the *Tillman* case; and that he signed an order in the *Tillman* case. Finally, respondent does not dispute that he testified that it did not "dawn" on him to recuse himself from the *King* case and that his failure to recuse himself was a mere "oversight," nor does he dispute that his e-mails and text messages to Mott reveal that he had given thought to his obligation to recuse himself from the case long before he finally did so. Although respondent argues about the significance of some of these facts and what the appropriate sanction should be in light of them, he does not dispute the above facts.[24]

In addition to the factual findings that we adopt from the JTC, we also find that respondent lied to the prosecutor's office about Mott stalking and extorting him and about why he eventually recused himself in the *King* case. In addition, we find that respondent lied to

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[23] Although in his brief respondent's counsel questions why respondent would lie about when he recused himself from the case, he does not expressly assert that respondent did not tell the investigators that he had immediately recused himself, but instead argues that "[w]hether Judge McCree told the investigators that he 'immediately' recused himself once he realized the conflict is irrelevant . . . ."

[24] The JTC also found that (a) "[o]n August 17, 2012, Respondent called the office of Wayne Circuit Judge Susan Borman to check on a landlord-tenant matter Mott had before Judge Borman" and (b) "[o]n October 11, 2012, in violation of MCR 2.114, Respondent prepared and filed a divorce complaint against his wife even though, as he admitted at the formal hearing, he had no intention of going through with the divorce." Respondent argues that "[b]ecause the JTC failed to give Judge McCree notice and an opportunity to respond to allegations concerning the phone call and filing the divorce complaint, they cannot be considered as a basis for discipline." Because we conclude that the JTC's recommended sanction is appropriate even without considering these additional allegations, it is not necessary for us to address whether it was appropriate for the JTC in this matter to consider the uncharged conduct.

the JTC about irrevocably terminating his relationship with Mott on October 31, 2012, and about whether he knew that Mott and Tillman were related and whether he took any action in the *Tillman* case. Finally, we find that respondent sent numerous text messages to Mott while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him.[25]

Although we believe that the sanctions recommended by the JTC, and adopted by this Court today, would be warranted even without considering these additional findings of fact, we believe that these additional findings provide relevant background and context and demonstrate more fully the nature and magnitude of respondent's misconduct. Furthermore, it is important to emphasize that, unlike the additional findings of fact made by the JTC and discussed in note 24 of this opinion, the additional findings of this Court do not relate to uncharged conduct, and thus respondent does not argue that we cannot consider these additional allegations.

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[25] Although we agree with the examiner that "[m]any of these text messages are in clear violation of the Michigan Code of Judicial Conduct," we question the examiner's authority to argue before this Court that we should consider this misconduct when the JTC itself did not consider this misconduct. As this Court recently stated in *In re Adams*, 494 Mich 162, 186 n 19; 833 NW2d 897 (2013), "after the JTC has made its findings and its recommendation and the respondent has filed a petition to reject or modify the [JTC's] recommendation, the role of the examiner is to represent the JTC before this Court." See also MCR 9.202(G)(1) ("The commission shall employ an executive director . . . to perform the duties that the commission directs . . . .") and MCR 9.202(G)(2)(a) ("The executive director . . . shall not be present during the deliberations of the commission or participate in any other manner in the decision to file formal charges or to recommend action by the Supreme Court . . . ."). It does not appear that the examiner was "represent[ing] the JTC before this Court" when he argued that we should find that respondent committed misconduct by sending these inappropriate messages to Mott when the JTC itself did not make such a finding.

B. CONCLUSIONS OF LAW

The JTC concluded that respondent engaged in "[m]isconduct in office . . . [and] [c]onduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205" and violated MCR 9.104(1), (2), (3), and (4); MCR 2.003; MCR 2.103; MCR 2.114; and MCL 750.423, as well as Canons 1; 2(A), (B), and (C); and 3(A)(1) and (4) and (C) of the Code of Judicial Conduct. After reviewing the record and hearing oral arguments, we agree with and adopt almost all of the JTC's conclusions of law. We agree with the JTC that respondent engaged in misconduct in office and conduct clearly prejudicial to the administration of justice within the meaning of Const 1963, art 6, § 30 and MCR 9.205. More specifically, we agree that respondent violated MCR 9.104(1) through (4) by engaging in "conduct prejudicial to the proper administration of justice"; "conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach"; "conduct that is contrary to justice, ethics, honesty, or good morals"; and "conduct that violates the standards or rules of professional conduct adopted by the Supreme Court[.]" He violated MCR 2.003 by failing to disqualify himself in both the *King* and *Tillman* cases.[26] He violated MCL 750.423 by testifying falsely under oath. He violated Canon 1 by failing to maintain "high standards of conduct so that the integrity and independence of the judiciary may be preserved."[27] He violated Canon 2 by failing to "avoid all impropriety and appear-

[26] The fact that respondent was aware that the defendant in the *Tillman* case was Mott's relative and that he nonetheless engaged in ex parte communications with Mott about the case without recusing himself at the very least created an appearance of impropriety.

[27] Canon 1 provides:

ance of impropriety," failing to "promote public confidence in the integrity and impartiality of the judiciary," and allowing a social relationship "to influence judicial conduct or judgment."[28] Finally, we agree that respondent violated Canon 3[29] by failing to "be faithful to the

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An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

[28] Canon 2 provides, in pertinent part:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.

[29] Canon 3 provides, in pertinent part:

A Judge Should Perform the Duties of Office Impartially and Diligently

* * *

A. Adjudicative Responsibilities.

law," engaging in ex parte communications, and failing to "raise the issue of disqualification."[30]

C. SANCTIONS

The purpose of the judicial disciplinary process is to "protect the people from corruption and abuse on the part of those who wield judicial power." *In re Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991). "In determining appropriate sanctions, we seek to 'restore and maintain the dignity and impartiality of the judiciary and to protect the public.' " *James*, 492 Mich at 569, quoting *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998). We agree with the JTC's assessment of the *Brown* factors—the considerations that this Court set forth to guide the formation of judicial-discipline recommendations.

The first *Brown* factor states that "misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct[.]" *Brown*,

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(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

* * *

(4) 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 . . . .

* * *

C. Disqualification. 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).

[30] Given that we do not address the uncharged allegations, see note 24 of this opinion, we do not address the JTC's conclusions of law that pertain to the uncharged allegations, i.e., the JTC's conclusion that respondent violated MCR 2.103 and MCR 2.114.

461 Mich at 1292.[31] We agree with the JTC that respondent engaged in a pattern of misconduct when he maintained a sexual relationship with a complaining witness in a case before him for several months and repeatedly engaged in ex parte communications with her about the case as well as in another case in which her relative was a party. Respondent also engaged in a pattern of texting messages to Mott while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him. Furthermore, respondent engaged in a practice of violating various security policies of the courthouse by permitting Mott to enter the courthouse through an employee entrance without going through security, allowing Mott to remain alone in his chambers while he was on the bench, arranging for Mott to park her vehicle in an area reserved for judges, and sneaking Mott's cell phone into the courthouse for her.

Finally, as the JTC explained, "the evidence revealed a pattern of dishonesty that included lying under oath to the Commission and to the Master." Respondent lied to the Wayne County Prosecuting Attorney's office about, among other things, when and why he recused himself from the *King* case, and he lied to the JTC and the master about, among other things, why it took him so long to finally recuse himself from the *King* case. As the master explained:

> For McCree to claim in sworn testimony during these proceedings that it was an OVERSIGHT or it didn'[t]

[31] The *Brown* factors are nonexclusive and are prefaced by the language "everything else being equal[.]" *Brown*, 461 Mich at 1292. Respondent admits that consideration of the first *Brown* factor "indicates more serious misconduct."

DAWN on him that he should recuse himself is not credible. In short he lied to the JTC. . . .[32]

* * *

McCree's problem with the truth is also shown in his contact with law enforcement officials in seeking to have pressure brought to bear on Mott. He told Prosecutor Worthy that a lady with whom he had a relationship was stalking him. There was no indication [made to Worthy] that he and his wife had been engaged in a plan of deception which resulted in continuing contacts between the parties, i.e., calls to secure the abortion, to complete negotiations for the divorce, etc. . . .

He told [investigator] Robert Donaldson that he had recused himself from the King case when he found out that a child of Mott's had interacted with one of his children. A lie.

He told Detective Timothy Matlock that Mott had been stalking him by showing up at Belle Isle. He did not tell [him] that he got in the car and had a conversation with her. He was also a witness to the statement as to the basis for the transfer of the case which was a lie.

Sharon Greer, the prosecutor who worked in McCree's courtroom, was also told the same lie as to the basis for the transfer of the King case.

. . . [T]he events over the October 30 through late November period show a pattern of lies and deception by McCree . . . .

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[32] As then Justice YOUNG explained in *In re Noecker*:

> Where a respondent judge readily acknowledges his [or her] shortcomings and is completely honest and forthcoming during the course of the Judicial Tenure Commission investigation, . . . the sanction correspondingly can be less severe. However, where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater. [*In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (YOUNG, J., concurring).]

As explained by the JTC, respondent also "falsely told the investigators that he immediately recused himself from the case once he realized the conflict." Respondent's pattern of dishonesty is perhaps best summed up in a text message from Mott to respondent: "guess I shoulda believd u in church when u said u can't go 1 day without lien[.]" For all these reasons, we agree with the JTC that "[t]his factor weighs in favor of a more serious sanction."

The second *Brown* factor states that "misconduct on the bench is usually more serious than the same misconduct off the bench[.]" *Id*.[33] Again, we agree with the JTC that respondent engaged in misconduct on the bench when he had a sexual relationship with a complaining witness in a case before him for several months without recusing himself and by engaging in ex parte communications with her about the case while he was on the bench. We also find that respondent engaged in misconduct on the bench when he transmitted numerous text messages to Mott while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him. For these reasons, we agree with the JTC that this factor weighs in favor of a more serious sanction.

The third *Brown* factor states that "misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety[.]" *Id*. at 1293. As the JTC explained:

> A neutral and impartial judge is one of the central tenets of our judicial system. Respondent wholly disregarded his duty to remain a detached, impartial figure by engaging in a personal relationship with a litigant in a case before him

[33] Respondent "admits that his decision to go forward with the August 16 hearing in *King* was misconduct on the bench."

> and by regularly engaging in ex parte discussions regarding the litigant's case, as well as another case in which the litigant had an interest. In addition, Respondent's misrepresentations to the Commission and the Master were prejudicial to the actual administration of justice because they brought deceptive evidence before the Commission and the Master.

We agree with the JTC that respondent's misconduct was prejudicial to the actual administration of justice. Indeed, there is not much, if anything, that is more prejudicial to the actual administration of justice than having a sexual relationship with a complaining witness without recusing oneself, engaging in ex parte communications with this mistress/complaining witness, attempting to use the prosecutor's office as leverage against this now ex-mistress by concocting charges of stalking and extortion against her, and then lying under oath about these matters.[34] Accordingly, we agree with the JTC that this factor weighs in favor of a more serious sanction.

Similarly, the fourth *Brown* factor states that "misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does[.]" *Id*.[35] For the

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[34] Respondent argues that his "failure to recuse himself in *King* is 'prejudicial only to the appearance of propriety' " because "King was treated exactly the same as any other felony nonsupport defendant who fails to meet his payment obligations under a delayed sentence agreement . . . ." No one, of course, can ever know with certainty whether respondent would have treated King in exactly the same manner had he not been engaged in an affair with the mother of King's child. However, even assuming that respondent's relationship with Mott, including his ex parte communications with her about the case, had no effect on respondent's treatment of King, and thus was somehow not prejudicial to the actual administration of justice, respondent's other misconduct, including lying under oath and falsely accusing Mott of stalking and extorting him, was certainly prejudicial to the actual administration of justice.

[35] Respondent "admits that his failure to recuse himself before the August 16 hearing in *King* implicates the appearance of impropriety."

reasons already discussed, we agree with the JTC that respondent's misconduct implicated the actual administration of justice. Therefore, we agree with the JTC that this factor supports the imposition of a more serious sanction.

The fifth *Brown* factor states that "misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated[.]" *Id*.[36] We agree with the JTC that respondent's misconduct was premeditated or deliberated. Respondent's sexual affair with Mott lasted for several months, giving respondent more than sufficient time to carefully reflect on his behavior. In addition, his e-mails and text messages to Mott demonstrate that he was well aware that what he was doing was unethical, and yet he continued to proceed with the relationship for a considerable period of time without recusing himself from the case in which his mistress was the complaining witness. Accordingly, we agree with the JTC that this factor weighs in favor of a more serious sanction.

The sixth *Brown* factor states that "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery[.]" *Id*. Lying under oath-- conduct in which respondent engaged-- is certainly "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy." In addition, failing to recuse oneself from a case in which one's mistress is the complaining witness, as respondent did in this case, is also misconduct that undermines the

[36] Respondent admits that his "failure to recuse himself in *King* cannot be considered 'spontaneous.' "

ability of the justice system "to reach the most just result in such a case." As the JTC explained:

> [T]he ability of the justice system to reach the most just result in a case is undermined when one party has an intimate relationship with the judge and continually engages in ex parte communications regarding that party's case while the other party is required to follow the rules and procedures governing the admission of evidence and the making of arguments to the court.

Therefore, we agree with the JTC that this factor weighs in favor of a more serious sanction.

Finally, the seventh *Brown* factor states that "misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship." *Id*. We agree with the JTC that there is no evidence that respondent did anything to "disparage the integrity of the system on the basis of a class of citizenship" and that this factor does not weigh in favor of a more serious sanction.

Finding that six of the *Brown* factors weigh in favor of a more serious sanction, and that "Respondent's misconduct affected not only the litigants in the *King* and *Tillman* cases, but harmed the integrity of the judicial system as a whole," the JTC concluded that removing respondent from office and conditionally suspending him without pay for six years beginning on January 1, 2015, with the suspension becoming effective only if respondent is reelected to judicial office in November 2014, would be a sufficient sanction.[37] We

[37] Respondent agrees "that discipline is warranted," and he concedes that four of the *Brown* factors weigh in favor of a more serious sanction. However, he argues that this Court should merely "sus-

agree. We believe that this sanction is necessary in order to sufficiently redress the harm done to the integrity and reputation of the judiciary.

Just last term, this Court held that lying under oath " 'is entirely incompatible with judicial office and warrants removal.' " *In re Adams*, 494 Mich 162, 184-185; 833 NW2d 897 (2013), quoting *In re Justin*, 490 Mich 394, 419; 809 NW2d 126 (2012).[38] In the instant case, as already set forth at length, respondent has done far more than lie under oath. And he committed most of

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pend[] him for the duration of his interim suspension." For the reasons discussed throughout this opinion, we do not believe that such a suspension, which would amount to a little over a one-year suspension, would sufficiently address the harm that respondent has done to the integrity and reputation of the judiciary. Respondent argues that his misconduct is analogous to Judge Susan R. Chrzanowski's misconduct and that Judge Chrzanowski was only suspended for 1 year and was given credit for 6 months of her 17-month interim suspension. See *In re Chrzanowski*, 465 Mich 468, 489; 636 NW2d 758 (2001). However, respondent fails to acknowledge that his misconduct was far more extensive than Judge Chrzanowski's misconduct. Judge Chrzanowski appointed an attorney with whom she was having an affair to represent indigent defendants, presided over those cases without disclosing this relationship, and initially made false statements to the police who were investigating the death of this attorney's wife. Although there are some similarities between Judge Chrzanowski's and respondent's misconduct, respondent did far more than have an affair with an interested person in a case pending before him and then initially lie about it. He also engaged in numerous ex parte communications, violated various security policies of the courthouse, transmitted numerous inappropriate text messages, concocted charges of stalking and extortion, and lied under oath during the JTC proceedings.

[38] As this Court explained in *Adams*, 494 Mich at 186, "[t]his Court has consistently imposed the most severe sanction by removing judges for testifying falsely under oath." See *In re Ryman*, 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514, 516, 535-536; 384 NW2d 9 (1986); *Ferrara*, 458 Mich at 372-373; *In re Noecker*, 472 Mich 1, 12-13; 691 NW2d 440 (2005); *In re Nettles-Nickerson*, 481 Mich 321, 322-323; 750 NW2d 560 (2008); *Justin*, 490 Mich at 396-397; *James*, 492 Mich at 568-570.

this misconduct while being investigated by the JTC for *other* misconduct for which he has since been sanctioned. As explained by the master:

> [Respondent's] actions in the *King* case show, however, a gross dereliction of judicial duties. His standard of conduct, for his own sexual gratification, has severely damaged the public's view of the judiciary. His irresponsible conduct could only lead to the public having no confidence in the judiciary. He clearly knew he was especially subject to public scrutiny when he had a case pending before the JTC when he began his escapade with Mott. He knew he was on the "chopping block". Yet he continued to engage in activities which would bring even greater scrutiny. He was using his judicial position to advance his own interests by keeping the *King* case. His social relationship gave Mott the belief that she was able to influence his judicial duties. He continuously engaged in *ex* [*parte*] communications with Mott about the case.
>
> Having already received substantial publicity over his photo sent to the deputy and his remarks to the press regarding same he should have been aware that when the story would break about his relationship with Mott and his handling of the *King* case all of his duplicity would be revealed. That the public's trust in an independent and honorable judiciary would be put to the test.

That respondent was prepared to engage in this conduct while already undergoing a pending JTC investigation demonstrates the extent of his disregard for the rules of judicial conduct. The people of this state need to know that this Court will not tolerate such disregard for even minimal ethical standards of conduct.

Respondent questions this Court's authority to remove him and conditionally suspend him. This Court's authority to sanction a judge can be found in Const 1963, art 6, §§ 4 and 30. Section 4 provides this Court's general superintending authority over courts:

> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

As this Court has explained:

> "The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted. This power is not limited by forms of procedure or by the writ used for its exercise." [*In re Huff*, 352 Mich 402, 418; 91 NW2d 613 (1958) (citation omitted).]

While "§ 4 does not comprehend the power to permanently enjoin a person from holding juridical office," it does "invest[] this Court with the power to determine that a person is unfit for judicial office and to prevent him from ever exercising judicial power in this state for as long as he is, in our judgment, judicially unfit." *In re Probert*, 411 Mich 210, 231, 233; 308 NW2d 773 (1981).[39]

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[39] Contrary to respondent's contention, this Court's exercise of the superintending power is not impermissibly "at odds with the right of Michigan voters to choose their judicial officers," but rather upholds the authority of that same people, as they have exercised it in Const 1963, art 6, to invest in this Court the obligation to define standards of judicial conduct and, in coordination with the JTC, impose sanctions for their violation. Just as the people have chosen in their Constitution to establish standards of judicial fitness in terms of legal experience and age

In addition, Const 1963, art 6, § 30(2) provides, in pertinent part:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

Removal and suspension are sanctions that are expressly listed in § 30(2). Finally,

> [t]he power to suspend is also not limited to cases in which the judge currently holds judicial office. As this Court noted in *Probert* [411 Mich at 224], we possess the author-

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maximums, Const 1963, art 6, § 19(2) and (3), "we the people" have chosen to do the same with regard to ethical standards of conduct:

> [T]he elective nature of the judicial office does not relieve this Court of its duty to preserve the integrity of the judiciary, nor does the fact of popular election insulate or immunize a judge from the consequences of his or her misconduct, any more than an elected public official is insulated or immunized by election to office from being held to account for criminal law violations. To be sure, the elective power of the people does include the responsibility to ensure the qualifications of those elected, but they do not bear this responsibility alone. Our Constitution provides that in addition to this responsibility on the part of the electorate, this Court has a separate and distinct duty to uphold the integrity of the judiciary. The people's discharge of their duty through election does not discharge this Court's separate duty to preserve the integrity of the judiciary. Rather, this Court's obligation to maintain the integrity of the judicial branch is indissoluble, and the fact of election does not dispel the harmful effects of judicial misconduct, either within or beyond the boundaries of the election district.
>
> . . . The people are entitled to a judiciary of the highest integrity, in both appearance and in fact, and this Court always bears the obligation under the constitution adopted by "we the people" to maintain and enforce standards of judicial fitness. [*James*, 492 Mich at 573-574 (MARKMAN, J., concurring in part and dissenting in part).]

> ity under the constitution to issue conditional suspensions that "foreclose[] the exercise of the prerogatives inhering in any judicial office to which the disciplined party might have been elected or appointed in the future, the condition being, of course, re-election or appointment to judicial office."
>
> Such conditional suspensions "disengage the disciplined party from judicial power" only if the person occupies judicial office again during the term of the suspension and do not permanently enjoin the person from holding judicial office. This Court has historically issued conditional suspensions when other sanctions could not fully and adequately address the effect of particular misconduct on the integrity of the judicial system. Although often the greatest danger will pass once "an unfit or incompetent judge is separated from judicial power," this Court should not refuse to consider other sanctions, such as conditional suspensions, when removal alone cannot sufficiently protect the integrity of the judiciary. [*James*, 492 Mich at 576-577 (MARKMAN, J., concurring in part and dissenting in part) (citations omitted).]

In *Probert*, 411 Mich at 222, this Court censured and conditionally suspended Judge Charles V. Probert for five years, "regardless of any possible intervening election or appointment to judicial office." This Court could not remove Judge Probert because he had already left office as the result of his term ending and his defeat in his efforts at reelection. In *Probert*, this Court recognized that we had on three previous occasions "issued conditional suspensions that would have foreclosed the exercise of the prerogatives inhering in any judicial office to which the disciplined party might have been elected or appointed in the future, the condition being, of course, re-election or appointment to judicial office." *Id.* at 223-224. This Court explained that "[t]he effect of those suspensions would have been to disengage the disciplined party from judicial power, but only had that person come to occupy judicial office again during the

term of the suspension, and only to the extent that the terms of office and suspension coincided." *Id.* at 224. See also *In re Bennett*, 403 Mich 178, 200; 267 NW2d 914 (1978), in which this Court suspended Judge Earl Warren Bennett for one year without pay "regardless of Judge Bennett's election to another judicial office"; *In re Del Rio*, 400 Mich 665, 672; 256 NW2d 727 (1977), in which this Court suspended Judge James Del Rio for five years without pay "regardless of respondent's possible intervening re-election to office or election to any other state court"; and *In re Mikesell*, 396 Mich 517, 549; 243 NW2d 86 (1976), in which we suspended Judge Willard L. Mikesell for 1½ years without pay "regardless of respondent's possible intervening reelection to office or election to any other state court."

We agree with the JTC that a removal, without more, would be an insufficient sanction in this case. If we were to remove respondent and he were to be reelected in 2014, that would amount to a less than one-year suspension (less than two years including his interim suspension), which we believe is clearly insufficient given the seriousness of his misconduct. This Court has a duty to preserve the integrity of the judiciary. Allowing respondent to serve as a judge after only a one-year suspension will not, in our judgment, adequately preserve the integrity of our state's judiciary. Respondent was just recently publicly censured by this Court and yet continued to engage in misconduct, with his attitude toward the instant JTC investigation perhaps being best summarized by his remark that although "Wade should have recused himself," "no harm no foul." This is strongly suggestive that respondent has not yet learned from his mistakes and that the likelihood of his continuing to commit judicial misconduct is high. Such a cavalier attitude about serious misconduct is disturb-

ing, and respondent's apparent failure to comprehend fully the magnitude of his wrongdoing is equally troublesome.

In summary, respondent had an affair with a complaining witness in a case pending before him, had numerous ex parte communications with that witness about the case, extended to her special treatment concerning the case, and caused her reasonably to believe that she was influencing how he was handling her case. When their relationship subsequently went sour, he sought to employ the prosecuting attorney's office as leverage against her by concocting charges of stalking and extortion. And he lied repeatedly to the JTC and the master while under oath. Respondent is now unfit to serve as a judge, and he will remain unfit to do so one year from now.

IV. CONCLUSION

The cumulative effect of respondent's misconduct convinces this Court that respondent should not remain in judicial office, and we therefore remove him from that office and conditionally suspend him without pay for six years beginning on January 1, 2015, with the suspension becoming effective only if respondent is reelected to judicial office in November 2014.[40] In addition, because respondent engaged in conduct involving "deceit" or "intentional misrepresentation," pursuant to MCR 9.205(B) we order respondent to pay costs of $11,645.17 to the JTC. The Clerk of the Court is directed to issue the judgment order forthwith in accordance with this opinion and MCR 7.317(C)(3).

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[40] Respondent is no longer a judicial officer and will not be an incumbent at the time of the 2014 3rd Circuit Court election. See *In re Nettles-Nickerson*, 481 Mich 321, 323; 750 NW2d 560 (2008).

YOUNG, C.J., and KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the majority's factual findings and analysis of the factors from *In re Brown*, 461 Mich 1291, 1292-1293 (2000). However, I disagree with the majority's decision to conditionally suspend respondent. Const 1963, art 6, § 30(2) provides four possible sanctions: the Court may censure, suspend with or without salary, retire, or remove a judge. The potential sanctions are listed in order of increasing severity, indicating that the proper discipline should be imposed according to the severity of the respondent judge's conduct. See *In re Probert*, 411 Mich 210, 243; 308 NW2d 773 (1981) (LEVIN, J., dissenting). Under the Constitution's scheme of increasing sanctions, removal is the most serious sanction and is, therefore, "the means by which judges guilty of serious misconduct are divested of office." *Id*. at 241 n 7; see, also, *In re Callanan*, 419 Mich 376, 388-389; 355 NW2d 69 (1984) (explaining that through removal, we completely terminate all of a respondent's ties to his office).

Because respondent's misconduct is of a grave and serious nature, I would impose the most serious sanction—removal. "[I]n view of the egregiousness of [respondent's misconduct], the public attention to it, and the sanctions meted out by . . . this Court," I am "not so cynical about the electoral or appointive process" that I am "concerned about the respondent's re-entry upon the judicial scene." *Callanan*, 419 Mich at 389. The majority claims that respondent's removal alone would not sufficiently address the seriousness of his conduct; however, the majority overlooks the fact that "[o]ther institutions, notably the press, serve the public's interest in being informed and may be expected

to do so . . . ." *Probert*, 411 Mich at 250. In any event, "we always retain the power to determine that a person is unfit for judicial office and to prevent him from ever exercising judicial power in this state for as long as he is, in our judgment, judicially unfit." *In re Jenkins*, 437 Mich 15, 29-30; 465 NW2d 317 (1991) (quotation marks and citation omitted). Accordingly, I would remove respondent from office and assess costs, but would not impose a conditional suspension.

ADDISON TOWNSHIP v BARNHART

Docket No. 145144. Argued April 11, 2013. Decided April 1, 2014.

Addison Township issued Jerry Barnhart a misdemeanor citation for operating a shooting range without a zoning compliance permit. The case proceeded to a bench trial in the 52-3 District Court, Julie A. Nicholson, J. After the township presented its case, the court granted defendant's motion for a directed verdict dismissing the case, ruling that defendant's activities were protected under MCL 691.1542a(2). The Oakland Circuit Court, Steven N. Andrews, J., affirmed. In an unpublished opinion per curiam (*Barnhart I*), the Court of Appeals, WILDER, P.J., and CAVANAGH and FORT HOOD, JJ., reversed the dismissal of the citation and remanded the case to the district court for reconsideration in light of the panel's interpretation of the term "sport shooting range" and for a determination whether defendant was in compliance with "generally accepted operation practices" as required by the statute. On remand, the township moved to enforce the ordinance, and defendant moved for a declaratory judgment and dismissal. The district court granted defendant's motion, concluding that defendant was operating a sport shooting range in compliance with generally accepted operation practices. The circuit court, Leo Bowman, J., remanded the case to the district court to examine the provisions of the sport shooting ranges act (SSRA), MCL 691.1541 *et seq*., as a whole and to consider whether MCL 691.1542a(2) applies to all local ordinances or only those attempting to regulate shooting ranges. On remand, the district court again ruled in favor of defendant. The circuit court reversed, holding that defendant's activities were not protected under MCL 691.1542a. The Court of Appeals, WILDER, P.J., and O'CONNELL and WHITBECK, JJ., affirmed in an unpublished opinion per curiam (*Barnhart II*). The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 493 Mich 860 (2012).

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

In determining whether a range is a sport shooting range under the SSRA, the focus is on the design and operation of the range,

not on the intentions of individual shooters in using the range; a range owner's commercial purpose for operating the range is also irrelevant.

1. Under MCL 691.1542a(2), a sport shooting range that was in existence as of July 5, 1994, that operates in compliance with the generally accepted operation practices—even if not in compliance with an ordinance of a local unit of government—shall be permitted within its preexisting geographic boundaries to undertake additional actions that are authorized under the generally accepted operation practices, including (1) expanding or increasing its membership or opportunities for public participation, and (2) expanding or increasing events and activities. Under MCL 691.1541(d), a "sport shooting range" is an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting. In determining whether a range is a sport shooting range under the SSRA, the focus is on the design and operation of the range, not on the intentions of individual shooters in using the range. A range owner's commercial purpose for operating the range is also irrelevant. In this case, the parties stipulated that defendant's property was used for recreational and business shooting range purposes before July 5, 1994. Recreational shooting uses started before the business uses, but both came before July 5, 1994. A shooting range designed and operated for recreational shooting activities plainly falls within the scope of sport shooting ranges as contemplated by MCL 691.1541(d). Accordingly, defendant's shooting range existed as a sport shooting range before July 5, 1994. Further, the range continued to meet the definition of a sport shooting range when the township cited defendant in 2005 for operating the range without a zoning compliance permit. To the extent that any evidence could be construed as defendant facilitating individuals' use of his shooting range in a manner that did not involve sport shooting, that evidence was insufficient to conclude that defendant's shooting range ceased to be designed and operated for sport shooting purposes.

2. Generally accepted operation practices are those practices adopted by the Natural Resources Commission that are established by a nationally recognized nonprofit membership organization that provides voluntary firearm safety programs that include training individuals in the safe handling and use of firearms, which practices are developed with consideration of all information reasonably available regarding the operation of shooting ranges. The Natural Resources Commission has stated that the

manual developed by the National Rifle Association concerning generally accepted operation practices is advisory and should be considered as providing guidelines for operation rather than absolute requirements. Accordingly, defendant's admitted failure to comply with every provision of the manual does not effectively refute the evidence that defendant's shooting range was in compliance with the generally accepted operation practices. Considering the record evidence, defendant's shooting range was entitled to protection under MCL 691.1542a(2).

Judgment of the Court of Appeals in *Barnhart I* reversed; judgment of the Court of Appeals in *Barnhart II* vacated. Case remanded to the district court for entry of an order dismissing the case.

STATUTES — SPORT SHOOTING RANGES — DEFINITION.

Under MCL 691.1541(d), a "sport shooting range" is an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting; in determining whether a range is a sport shooting range, the focus is on the design and operation of the range, not on the intentions of individual shooters in using the range; a range owner's commercial purpose for operating the range is also irrelevant.

Robert Charles Davis for Addison Township.

Dickinson Wright PLLC (by *K. Scott Hamilton*) for Jerry Barnhart.

Amici Curiae:

The Law Offices of Steven W. Dulan PLC (by *Steven W. Dulan*) for the Michigan Coalition of Responsible Gun Owners.

Terrance J. Odom for the Michigan United Conservation Clubs.

Michael T. Jean for the National Rifle Association of America.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, PC (by *John H. Bauckham*), for the Michigan Townships Association and the Michigan Municipal League.

CAVANAGH, J. In this case, at issue is the definition of "sport shooting range" under MCL 691.1541(d) of the sport shooting range act (SSRA), MCL 691.1541 *et seq*. Section 2a(2) of the act, MCL 691.1542a(2), permits certain sport shooting ranges to, among other things, expand opportunities for public participation, even if the range is not in compliance with a local ordinance. We hold that, for MCL 691.1542a(2) to apply to a shooting range, the shooting range must be a "sport shooting range" as defined by MCL 691.1541(d) that also existed as a "sport shooting range" as of the effective date of MCL 691.1542a. Further, a "sport shooting range" under MCL 691.1541(d) must operate in compliance with generally accepted operation practices to be protected under the SSRA. See MCL 691.15471(a).

The Court of Appeals' interpretation of MCL 691.1541(d) erroneously injected a commercial purpose analysis into the determination whether a shooting range was designed and operated as a sport shooting range. We reverse the judgment of the Court of Appeals in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), and vacate the judgment of the Court of Appeals in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2012 (Docket No. 301294) (*Barnhart II*). Additionally, considering the record evidence, we hold that defendant's shooting range is entitled to protection under MCL 691.1542a(2), and we remand to the district court for entry of an order dismissing the case.

I. FACTUAL AND PROCEDURAL HISTORY

This dispute arose out of defendant's operation of a shooting range on his property, allegedly in violation of

a local zoning ordinance.[1] In 1993, Addison Township (the Township) approved defendant's request to build a shooting range on his 80-acre property after concerns about defendant's construction of the range were brought to the Township's attention at a public township meeting. Andrew Koski, the Township supervisor, testified that permission had been granted to defendant to build the shooting range because it was agreed that only defendant and his family would use the shooting range. Defendant contends that, during 1993 and 1994, he used the range for competition and other recreational shooting involving family and friends, and that one individual paid him for a class. Defendant admits that, in the following years, he began teaching firearms lessons. Eventually, in 2005, the Township issued defendant a misdemeanor citation for operating the shooting range without a zoning compliance permit.

The case proceeded to trial, and, after the Township presented its case,[2] the district court granted defendant's motion for a directed verdict dismissing the case. The district court ruled that defendant's activities were

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[1] Defendant was allegedly operating the shooting range in violation of Addison Township's zoning code, Ordinance No. 300, § 27.05, which requires a zoning compliance permit before constructing, altering, or repairing any structure and before changing the use of land or the use of any building. The parties do not dispute that defendant would be subject to the ordinance if MCL 691.1542a(2) does not apply to defendant's shooting range.

[2] At trial, Koski testified that around 2004, the Township began receiving complaints regarding defendant's shooting range and that he was shown defendant's advertisements for military training and was aware that people other than defendant and his family were using the shooting range. Koski also testified that defendant had indicated that he might "test[] rifles and other firearm[s] for various different companies . . . ." Sergeant Peter Burkett testified that he and a small group would occasionally use defendant's range for training purposes, but that he had never paid defendant. Specifically, he testified that the sheriff's department used defendant's range only about a dozen times between

protected under MCL 691.1542a(2) because it was undisputed that defendant's shooting range was in existence before the effective date of MCL 691.1542a, and defendant was entitled to expand or increase the use of the shooting range for public participation under MCL 691.1542a(2)(c). The circuit court affirmed. The Court of Appeals reversed and remanded the case to the district court for reconsideration in light of the panel's interpretation of "sport shooting range," as defined under MCL 691.1541(d), and to determine whether defendant was in compliance with "generally accepted operation practices" under MCL 691.1541(a), as required by MCL 691.1542a(2). *Barnhart I*, *supra*.

On remand, the Township moved to enforce the ordinance, and defendant moved for dismissal, arguing that "[s]ince the day his range was opened, [d]efendant, his family and his invited guests have used the range and continue to do so."[3] The district court granted defendant's motion, concluding that the range was protected under the SSRA because defendant operated a sport shooting range. The district court relied on the parties' stipulation that defendant used his property for business and recreational uses. After an evidentiary hearing on the matter, the district court also concluded that defendant was in compliance with generally accepted operation practices. On appeal, the circuit court reversed and remanded the case. On remand, the dis-

1999 and 2002. Also, Burkett stated that when he issued defendant the citation, defendant told him that he and "some military friends" were using the shooting range.

[3] At this stage in the litigation, pages from defendant's website were admitted into evidence. The pages advertised defendant's availability to teach tactical shooting classes "in Michigan or [defendant] can travel to your range." The pages from the website also show that defendant was offering to teach "Competition Classes" to students at his range in Michigan and at other facilities provided by the students.

trict court again ruled in favor of defendant, and, on appeal, the circuit court reversed and applied *Barnhart I*'s interpretation of "sport shooting range" to conclude that defendant's activities were not protected under MCL 691.1542a. The circuit court also concluded that, as a result, whether defendant was in compliance with generally accepted operation practices did not need to be decided. Defendant appealed, and the Court of Appeals affirmed on the basis that the district court did not follow the law of the case when applying *Barnhart I*'s interpretation of "sport shooting range." *Barnhart II*, *supra*.

We heard oral argument to help us decide whether we should grant defendant's application for leave to appeal or take other action. Specifically, we asked the parties to address "whether the Court of Appeals erred in [*Barnhart I*] when it held that, 'to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls.' " *Addison Twp v Barnhart*, 493 Mich 860 (2012).

II. ANALYSIS

A. STANDARD OF REVIEW

The interpretation of the SSRA presents a question of law that we review de novo. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). See, also, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

B. THE SPORT SHOOTING RANGE ACT

The SSRA was enacted in 1989 as a way to address the tension between shooting range owners and their

neighbors, which became heightened as a result of urban sprawl. *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 727; 575 NW2d 63 (1997). Originally, the SSRA provided various immunities to shooting range owners. *Id*., citing MCL 691.1542. In 1994, the Legislature amended the SSRA to expand the protections afforded to shooting ranges. MCL 691.1542a. Section 2a provides two avenues of protection against local ordinances: MCL 691.1542a(1) and MCL 691.1542a(2).

At issue in this case is the protection against local ordinances established for shooting ranges under MCL 691.1542a(2), which states in relevant part:

> A *sport shooting range that is in existence as of the effective date of this section* and *operates in compliance with generally accepted operation practices*, even if not in compliance with an ordinance of a local unit of government, shall be permitted to do all of the following within its preexisting geographic boundaries if in compliance with generally accepted operation practices:
>
> * * *
>
> (c) Do anything authorized under generally accepted operation practices, including, but not limited to:
>
> (*i*) Expand or increase its membership or opportunities for public participation.
>
> (*ii*) Expand or increase events and activities. [Emphasis added.]

Interpreting these provisions, for a shooting range to fall within the purview of subsection (2) of the SSRA amendment, it must be a "sport shooting range," as defined by MCL 691.1541(d), that also existed as of the effective date of the SSRA amendment, July 5, 1994. Additionally, the sport shooting range must operate in compliance with generally accepted operation practices.

MCL 691.1542a(2).[4] See *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996) ("First and foremost, we must give effect to the Legislature's intent" when interpreting a statute, and if the language is clear and unambiguous, "the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted").

In this case, instead of addressing the district court's conclusion that defendant's activities on the shooting range were protected under MCL 691.1542a(2)(c), the Court of Appeals in *Barnhart I* shifted the focus of the case, interpreting the definition of "sport shooting range" under MCL 691.1541(d). Under MCL 691.1541(d), "sport shooting range" or "range" means "an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting." "[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc*, 451 Mich at 136. Accordingly, we note that, in order for a shooting range to be a sport shooting range, it must have been "designed and operated" for the use of the firearm-related activities that the Legislature referred to in MCL 691.1541(d) of the SSRA. Thus, it is clear that the focus of the Legislature

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[4] MCL 691.1541(a) defines "generally accepted operation practices" as

> those practices adopted by the commission of natural resources that are established by a nationally recognized nonprofit membership organization that provides voluntary firearm safety programs that include training individuals in the safe handling and use of firearms, which practices are developed with consideration of all information reasonably available regarding the operation of shooting ranges. The generally accepted operation practices shall be reviewed at least every 5 years by the commission of natural resources and revised as the commission considers necessary. The commission shall adopt generally accepted operation practices within 90 days of the effective date of section 2a.

when defining the term "sport shooting range" was on the shooting range's design and operation, which does not turn on individual shooters' intentions for using the shooting range.

Further, because MCL 691.1541(d) defines a "sport shooting range" as "an area designed and operated for the *use of*" various sport shooting activities, a shooting range owner's commercial purpose for operating a shooting range is irrelevant. (Emphasis added.) If a shooting range owner receives or did receive a fee or profit, the shooting range may nevertheless have been designed and operated as a "sport shooting range." Stated differently, a shooting range may meet the statutory definition of a "sport shooting range" under MCL 691.1541(d) despite the fact that the owner of the shooting range profits from operating the shooting range. It is of no consequence in determining the *nature of shooting activities for which the range is designed and operated* that the shooting range owner profits from its operation. Thus, the Court of Appeals erred by concluding that defendant's pecuniary purpose was relevant, let alone dispositive, to the determination whether his shooting range was a sport shooting range as defined by MCL 691.1541(d).

C. APPLICATION

We must now consider whether defendant's shooting range is entitled to protection under MCL 691.1542a(2). There is no dispute that defendant's shooting range existed before the Legislature enacted MCL 691.1542a.[5] However, as previously stated, in order for a shooting range to be protected under MCL 691.1542a(2), it must

[5] Indeed, Koski testified that the shooting range was constructed "[a]bout 1993."

be a sport shooting range, as defined under MCL 691.1541(d), that also existed as a sport shooting range as of the July 5, 1994, effective date of MCL 691.1542a. Further, the "sport shooting range" must operate in compliance with the generally accepted operation practices for such ranges.

We find defendant's range satisfies these criteria. On remand, the parties entered into a stipulated order, stating that "the defendant's property was used for recreational and business shooting range purposes, prior to the [SSRA]. Recreational shooting uses started before the business use but both came before the act." (Capitalization altered.) As the district court duly recognized, a shooting range designed and operated for the use of recreational shooting activities plainly falls within the scope of sport shooting ranges contemplated by MCL 691.1541(d).[6] Accordingly, we hold that defendant's shooting range existed as a sport shooting range before the effective date of MCL 691.1542a. See *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963) ("A party must be able to rest secure on the premise that the stipulated facts and stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based."); *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007) ("The parties may enter into a stipulation to avoid delay, trouble, and expense. When the

[6] From the parties' various arguments presented in the lower courts, it is clear that when referring to "business" purposes the parties were stipulating that defendant used his range for commercial profit. For example, at a motion hearing in the circuit court after remand, the Township's attorney stated that the shooting range was "operating for a commercial purpose," and defendant's attorney stated that the parties had stipulated to "a business use, a commercial use if you defined it as money." Because we hold that defendant's commercial purpose has no bearing on whether his shooting range was a sport shooting range under MCL 691.1541(d), that aspect of the stipulation is immaterial.

parties stipulate a set of facts, the stipulated facts are binding on the court, but stipulations of law are not binding.").

The district court, relying solely on the stipulated order, concluded that defendant's shooting range was entitled to protection under MCL 691.1542a(2), implicitly concluding that defendant's shooting range continued to meet the statutory definition of "sport shooting range" when the Township issued defendant a citation in 2005. While the district court may have misinterpreted the scope of the stipulation, we nevertheless agree with its conclusion. We simply do not believe that there is enough evidence indicating that defendant's shooting range stopped being operated within the framework of MCL 691.1541(d) such that defendant's range should be deprived of protection under MCL 691.1542a(2). For example, the Township appears to have never contested that defendant continued to make his shooting range available to his family and friends to engage in sport shooting. Also, the record shows that defendant has used his range to offer various shooting-related classes, including competitive shooting classes that comprise sport shooting activities contemplated by MCL 691.1541(d). To the extent that any evidence could be construed as defendant facilitating individuals' use of his shooting range in a manner that does not involve sport shooting, that evidence is insufficient to conclude that defendant's shooting range ceased to be designed and operated for sport shooting purposes.[7]

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[7] Moreover, while we recognize that not every member of this Court finds all the varying forms of legislative history particularly relevant in ascertaining legislative intent, in this particular case, it is still worth noting that our holding is consistent not only with the language of the SSRA, but also with the legislative history of MCL 691.1542a. See, e.g., House Legislative Analysis, SB 788 and SB 789, June 14, 1994 (noting in the section of the analysis outlining arguments for the bill that "[s]hoot-

Furthermore, we recognize that the issue whether defendant's shooting range was in compliance with the generally accepted operation practices has not received appellate review. However, we find no reason to hold that the district court erred by concluding that defendant's range was in compliance with such practices. Like the district court, we find persuasive Acting Lt. Andrew Turner's affidavit and letter stating that defendant was in compliance with the generally accepted operation practices. Also, the Township appears to have merely asserted that because defendant testified that he failed to meet several technical, and some discretionary, requirements in the National Rifle Association's Manual (the Manual), defendant was not operating his shooting range in compliance with generally accepted operation practices. However, the district court considered defendant's testimony and nonetheless found in favor of defendant. The court relied heavily on the Department of Natural Resources' memorandum to the Natural Resources Commission (the body charged with adopting generally accepted operation practices under MCL 691.1541(a)), which stated, in part, that the Manual was "designed to provide guidance and direction to a broad variety of the sport/recreational shooting community," and the "information contained within [the Manual] is advisory and should be considered guidelines rather than absolute requirements . . . ." We agree that this evidence suggests that defendant's admitted failure to comply with every provision of the

ing ranges are often the sites of gun and hunter safety courses and shooting instruction, and law enforcement training"). We also again note that the focus of MCL 691.1541(d) is on how the shooting range was designed and operated. As such, it matters little whether any individuals used or use defendant's shooting range to engage in activities contemplated under MCL 691.1541(d) for reasons that they themselves may not consider "sport," such as self-defense training.

Manual does not effectively refute the evidence that defendant's shooting range was in compliance with the generally accepted operation practices.

III. CONCLUSION

We hold that in order for MCL 691.1542a(2) to apply to a shooting range, it must (1) be a sport shooting range that also existed as a sport shooting range as of July 5, 1994, and (2) the sport shooting range must operate in compliance with the generally accepted operation practices. The Court of Appeals erred in interpreting MCL 691.1541(d) when it held that a shooting range owner cannot have a commercial purpose in operating a sport shooting range. We reverse the judgment of the Court of Appeals in *Barnhart I* and vacate the judgment of the Court of Appeals in *Barnhart II*. After considering the evidence in the record, we hold that defendant's shooting range is entitled to protection under MCL 691.1542a(2). Accordingly, we remand to the district court for entry of an order dismissing the case.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with CAVANAGH, J.

FRADCO, INC v DEPARTMENT OF TREASURY

SMK, LLC v DEPARTMENT OF TREASURY

Docket Nos. 146333 and 146335. Argued October 9, 2013 (Calendar Nos. 4 and 10). Decided April 1, 2014.

Fradco, Inc., filed an appeal on July 28, 2010, in the Tax Tribunal, contesting a final assessment issued by the Department of Treasury that disallowed a sales tax deduction following an audit. Through its resident agent, Fradco had requested that the department send all information regarding tax matters to the certified public accountant (CPA) that Fradco designated. The department mailed a copy of its January 22, 2009 preliminary decision and order of determination to Fradco's CPA. It sent the final assessment dated September 17, 2009, only to Fradco's place of business. Fradco's CPA inquired about the final assessment and was informed in an April 21, 2010 letter that a final assessment had been issued, that no appeal had been taken, and that the matter was now subject to collection. The letter did not include a copy of the assessment. After several requests, Fradco and its CPA received a copy of the final assessment on July 20, 2010. The department sought summary disposition under MCR 2.116(C)(4) in Fradco's appeal, arguing that the tribunal lacked jurisdiction because the appeal had not been filed within 35 days after the final assessment as required by MCL 205.22(1). The tribunal denied the motion, concluding that MCL 205.8 provides a parallel notice requirement whenever a taxpayer properly filed a request that notices be sent to a representative and that notice to Fradco alone had not been sufficient to start the 35-day period because notice to Fradco's representative was also required. Accordingly, the tribunal concluded that it had jurisdiction and canceled the final assessment. The department appealed, asserting that the 35-day appeal period under MCL 205.22(1) began from the issuance date printed on the face of a final assessment, which needed to be sent only to the individual taxpayer. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., affirmed, reading the relevant sections of the revenue collection act *in pari materia* and holding that MCL 205.8 (requiring notice to the taxpayer's representative) imposed on the department a notice obligation parallel to that in MCL 205.28(1)(a) (which requires notice to the taxpayer) and that

both requirements must be satisfied before the appeal period begins to run. 298 Mich App 292 (2012). The Supreme Court granted the department leave to appeal. 493 Mich 948 (2013).

SMK, LLC, filed an appeal on July 29, 2010, in the Tax Tribunal, contesting a final assessment issued by the Department of Treasury that disallowed a sales tax deduction following an audit. SMK had hired a CPA and designated him to represent it for purposes of the sales tax audit, giving him limited authorization to inspect or receive confidential information, represent SMK, and receive mail from the department. The department faxed the CPA a notice on April 23, 2010, stating that the audit package had been submitted. It sent a final assessment dated June 15, 2010, to SMK via certified mail, although SMK claimed that it did not receive the final assessment. The CPA made several inquiries to the department in July 2010, inquiring whether a final assessment had been issued, and received no answers from the department. On July 23, 2010, five days after the appeal period had allegedly run, the department sent SMK's CPA the final assessment and a letter stating that the deadline for appeal had passed. Rather than responding to SMK's appeal in the tribunal, the department moved for summary disposition under MCR 2.116(C)(4), arguing that the tribunal lacked jurisdiction because the appeal had not filed within 35 days after issuance of the final assessment. SMK opposed the motion on the ground that the appeal period had not been triggered because the department failed to give notice to its appointed representatives as required by MCL 205.8. The tribunal denied the motion, reaching the same conclusion regarding a parallel notice requirement as it had in Fradco's appeal. Accordingly, the tribunal canceled SMK's final assessment. The department appealed, asserting the same argument that it asserted in Fradco's appeal. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., affirmed, reaching the same conclusions that it had in Fradco's appeal. 298 Mich App 302 (2012). The Supreme Court granted the department leave to appeal and ordered that the appeals be heard together. 493 Mich 948 (2013).

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

If a taxpayer has appointed a representative, the Department of Treasury must issue notice to both the taxpayer and the taxpayer's official representative before the taxpayer's 35-day appeal period under MCL 205.22(1) begins to run.

1. The General Sales Tax Act, MCL 205.51 *et seq*., directs the department to administer the sales tax in part pursuant to the revenue collection act, MCL 205.1 to 205.31. Under the latter act,

when the department conducts an audit and ultimately issues a final assessment stating that a taxpayer owes sales tax, it has two notice obligations. MCL 205.28(1)(a) requires the department to give notice to the taxpayer, and MCL 205.8 requires the department to give notice to the taxpayer's designated representative. MCL 205.8 is mandatory notwithstanding the greater specificity of MCL 205.28(a)(1) with respect to details of service on the taxpayer. MCL 205.8 unambiguously directs the department to furnish a taxpayer's representative copies of notices and letters whenever the taxpayer is entitled to receive those documents.

2. MCL 205.22, which dictates procedures surrounding a taxpayer's appeal, does not refer to either MCL 205.8 or MCL 205.28(1)(a). Rather, MCL 205.22(5) states that the appeal period begins to run upon issuance of the assessment, decision, or order. If the department fails to comply with MCL 205.28(1)(a), which requires notice to the taxpayer, issuance does not occur. Because the two notice statutes are on equal footing, issuance likewise does not occur if the department fails to comply with MCL 205.8, which requires notice to the taxpayer's representative. Both notice requirements must be satisfied before issuance of the assessment is deemed to have occurred and the appeal period begins. Because the department delayed issuing the notices to the taxpayers' representatives in both cases, the running of the appeal periods were also delayed. Fradco's and SMK's appeals were therefore timely, and the tribunal retained jurisdiction.

3. The appeal period begins when the department complies with MCL 205.28(1)(a) by giving the taxpayer notice of the final assessment through personal service or certified mail and MCL 205.8 by sending a copy of the notice of the final assessment to the representative's address provided by the taxpayer in its written request. Because MCL 205.28(1)(a) and MCL 205.8 do not require the department to show that the taxpayer or its representative actually received the notice, the Supreme Court vacated portions of the Court of Appeals' opinions to the extent that they could be read to mean that the appeal period begins when a taxpayer's representative receives notice.

Court of Appeals' judgments affirmed in part and vacated in part.

TAXATION — SALES TAX — NOTICE OF ASSESSMENTS —TAXPAYER'S REPRESENTATIVE — APPEAL PERIOD.

When the Department of Treasury issues a final assessment stating that a taxpayer owes sales tax, MCL 205.28(1)(a) requires the department to give notice to the taxpayer, and MCL 205.8 requires

the department to give notice to the taxpayer's representative if the taxpayer has designated one; under MCL 205.22(5), the period to appeal the final assessment begins to run upon issuance of the assessment, decision, or order; both notice requirements must be satisfied before issuance of the assessment is deemed to have occurred and the appeal period begins; for purposes of this determination, however, neither MCL 205.28(1)(a) nor MCL 205.8 requires the department to show that the taxpayer or its representative actually received the notice.

The Novis Law Firm, PLLC (by *James H. Novis*), for Fradco, Inc., and SMK, LLC.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Scott L. Damich*, Assistant Attorney General, for the Department of Treasury.

Amici Curiae:

Dykema Gossett PLLC (by *Wayne D. Roberts* and *Elisa J. Lintemuth*) for the Michigan Association of Certified Public Accountants.

Michele L. Halloran and *Christina Thompson* for the Alvin L. Storrs Low-Income Taxpayer Clinic at Michigan State University College of Law.

YOUNG, C.J. Michigan's revenue collection act[1] provides that, when the Michigan Department of Treasury (the department) issues a final assessment of tax deficiency, a taxpayer has 35 days to appeal that adverse tax decision to the department or 90 days to appeal to the Court of Claims.[2] The act also requires that the department provide a copy of a notice of the final assessment to the taxpayer's duly appointed representative, if one was appointed.[3] These companion cases pose the same

[1] MCL 205.1 *et seq*.

[2] MCL 205.22(1).

[3] MCL 205.8.

question: Does the time within which a taxpayer must appeal a final assessment of tax deficiency begin to run when the department issues the final assessment to the taxpayer as required, but fails to give the mandatory statutory notice to a taxpayer's official representative?

We hold that, if a taxpayer has appointed a representative, the department must issue notice to both the taxpayer and the taxpayer's official representative to trigger the running of the appeal period. Thus, the taxpayer's 35-day appeal period does not begin to run until the department issues notice to the representative, in addition to the taxpayer. Accordingly, we affirm in part and vacate in part the decisions of the Court of Appeals panels in each of these companion cases.

I. FACTS AND PROCEDURAL HISTORY

Appellees are Michigan corporations that operate convenience stores in Michigan. Petitioner Fradco, Inc. (Fradco) is located in Ada, and petitioner SMK, LLC (SMK) is located in Midland. The parties are unrelated to each other, but the legal issues presented in each appeal are identical.

A. FRADCO, INC.

In October 2004, Fradco retained the services of a certified public accountant (CPA) to handle its accounting and tax matters. On October 19, 2004, Fradco's resident agent executed a power of attorney authorization and provided copies thereof to respondent department, directing the department to provide the CPA "[a]ll [department] billings and payment notices" and allowing the CPA to "receive information and represent me (Fradco) in all [department] tax matters." The power of attorney remained in effect at all times relevant to this case.

In May 2008, the department completed a sales tax audit of Fradco and disallowed a food deduction. Fradco's CPA appealed the audit determination at an informal conference,[4] and provided the power of attorney authorization to the hearing referee. The department issued a preliminary decision and order of determination dated January 22, 2009, a copy of which was mailed to Fradco's CPA. The final assessment was dated September 17, 2009 and sent only to Fradco's place of business via certified mail.

On April 19, 2010, Fradco's representative inquired about the final assessment. The representative was informed by letter dated April 21, 2010, that "a Final Assessment was issued September 17, 2009" and that "[n]o appeal was made with respect to this Final Assessment as provided by statute and the matter is now shown as subject to collection." This letter did not provide a copy of the assessment. After several requests, Fradco and its CPA received a copy of the final assessment on July 20, 2010, ten months after the date printed on the face of the assessment. Fradco claims that this was the first and only copy received, by it or its representative.

Fradco filed its appeal with the Tax Tribunal on July 28, 2010—eight days after its representative received the final assessment. The department moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal lacked jurisdiction because the appeal was not filed within 35 days after issuance of the final assessment.

B. SMK, LLC

In April 2010, the department completed an audit of SMK and disallowed a food deduction. SMK hired

[4] See MCL 205.21(2)(b) through (d).

Edward Kisscorni, a CPA. Through a power of attorney authorization form executed on March 26, 2010, and provided to the department shortly thereafter, SMK designated Kisscorni to represent it for the purposes of the sales tax audit and gave him limited authorization to "[i]nspect or receive confidential information," "[r]epresent [SMK] and make oral or written presentation of fact or argument," and "[r]eceive mail from Treasury . . . (includ[ing] forms, billings, and notices)." On April 23, 2010, the department faxed Kisscorni a notice stating that the "audit package was submitted." A final assessment dated June 15, 2010 was sent to SMK via certified mail. However, SMK claims that it did not receive the final assessment.

According to SMK's petition, Kisscorni made several phone calls to the department in July, inquiring whether a final assessment had been issued. He received no answers from the department. Thereafter, on July 23, 2010 (five days after the appeal period had allegedly run), the department sent SMK's representative the final assessment and a letter stating that the deadline for appeal had passed.

On July 29, 2010, SMK filed an appeal of the final assessment. As occurred in Fradco's case, rather than responding to the petition before the Tax Tribunal, the department filed a motion for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal lacked jurisdiction because the appeal was not filed within 35 days after issuance of the final assessment. Both Fradco and SMK opposed the respective motions on the ground that the appeal period had not been triggered because the department failed to give the statutory notice to their appointed representatives as required by MCL 205.8.

C. TAX TRIBUNAL AND COURT OF APPEALS DECISIONS

The Tax Tribunal denied the department's motion for summary disposition in both cases, holding that MCL 205.8 provides a parallel notice requirement when a taxpayer properly files a written request that notices be sent to a representative.[5] Therefore, the Tax Tribunal reasoned, notice to the taxpayer alone was not sufficient to initiate the 35-day appeal period because notice to the taxpayer's representative was also required. Inasmuch as the final assessment was not issued to both the taxpayer and its representative, the Tax Tribunal retained jurisdiction over the petitioners' appeals. The Tax Tribunal then decided petitioners' appeals on the merits and in each case canceled the tax assessments.[6]

The department appealed by right to the Court of Appeals, asserting that the 35-day appeal period under MCL 205.22(1) began from the "issuance date" printed on the face of a final assessment, which needed only to be sent to the individual taxpayer. The Court of Appeals affirmed the Tax Tribunal in separate opinions dated October 30, 2012.[7] In both cases, the Court held that, reading the relevant sections of the revenue collection act *in pari materia*, MCL 205.8 (notice to the taxpayer representative) imposed on the department a notice obligation parallel to MCL 205.28(1)(a) (notice to the

[5] *Fradco Inc v Dep't of Treasury*, MTT Docket No. 409506 (Mich Tax Jan 20, 2011); *SMK LLC v Dep't of Treasury*, MTT Docket No. 409504 (Mich Tax Jan 20, 2011).

[6] *Fradco Inc v Dep't of Treasury*, MTT Docket No. 409506 (Mich Tax Sept 26, 2011); *SMK LLC v Dep't of Treasury*, MTT Docket No. 409504 (Mich Tax Sept 26, 2011).

[7] *SMK, LLC v Dep't of Treasury*, 298 Mich App 302; 826 NW2d 186 (2012); *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292; 826 NW 2d 181 (2012).

taxpayer), both of which must be satisfied before the appeal period may begin to run.[8]

II. STANDARD OF REVIEW

Our review of the Tax Tribunal's decisions is limited. In the absence of fraud, we review a Tax Tribunal decision for a misapplication of the law or the adoption of a wrong principle.[9] We consider the Tax Tribunal's factual findings conclusive if they are "supported by competent, material and substantial evidence on the whole record."[10]

Statutory interpretation is a question of law, which we review de novo.[11] When interpreting a statute, courts must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute."[12] This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[13]

III. ANALYSIS

These cases involve appeals of sales tax deficiency assessments, which are administered pursuant to the General Sales Tax Act (GSTA).[14] The GSTA directs the

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[8] *SMK*, 298 Mich App at 308-310; *Fradco*, 298 Mich App at 299-301.

[9] *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994), citing Const 1963, art 6, § 28.

[10] Const 1963, art 6, § 28; *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

[11] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[12] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[13] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[14] MCL 205.51 *et seq*.

department to in part administer the sales tax pursuant to the revenue collection act.[15] Under this act, when the department conducts an audit and ultimately issues a final assessment stating that a taxpayer owes sales tax, it potentially has two notice obligations: it must provide notice to the taxpayer and, if the taxpayer has appointed a representative, the department must provide the representative with copies of "letters and notices regarding a dispute" between the taxpayer and the department. MCL 205.8.

MCL 205.28 establishes the department's notice obligations to the taxpayer:

> (1) The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, *shall be given* either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.[16]

MCL 205.8 establishes the department's notice obligations to the taxpayer's designated representative:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department *shall send* the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.[17]

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[15] In administering taxes generally, the department must adhere to MCL 205.21 to 205.30, "[u]nless otherwise provided by specific authority in a taxing statute." MCL 205.20. The GSTA is a taxing statute, and it dictates that the department follow the revenue collection act, MCL 205.1 to 205.31, in administering the sales tax. MCL 205.59(1).

[16] MCL 205.28(1)(a) (emphasis added).

[17] MCL 205.8 (emphasis added).

The department argues that MCL 205.8 is a nonbinding obligation—a mere "courtesy" provision, of which the taxpayer is simply the beneficiary. Alternatively, the department argues that MCL 205.8 operates to protect department employees from liability that would otherwise befall them if they disclosed a taxpayer's information to the taxpayer's representative without permission.[18]

It is not clear how either of these arguments obviates the department's obligation to provide the notice the statute requires, and the statutory text belies these claims. The Legislature's use of the word "shall" in both MCL 205.8 and MCL 205.28(1)(a) indicates a mandatory and imperative directive.[19] The two notice provisions are, by their terms, both compulsory, as each states that the department "shall" provide the required notice. Further, the GSTA states that the department "shall" administer the sales tax—including its assessment of sales tax deficiencies—pursuant to the revenue collection act, which encompasses both notice statutes.[20]

We conclude that MCL 205.8 is mandatory notwithstanding the greater specificity of MCL 205.28(a)(1), which requires personal service or notice by certified mail, because that specificity has no bearing on the elements of the statute that impose a mandatory obligation to provide notice to a designated taxpayer representative. Similarly, it is irrelevant that MCL 205.8 requires that "copies" of notices and letters be provided to a taxpayer's representative. Applying the plain meaning of "shall," there can be no doubt that MCL 205.8 unambiguously directs the

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[18] See MCL 205.28(1)(f).

[19] *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

[20] MCL 205.59(1).

department to furnish a taxpayer's representative with these documents whenever the taxpayer is entitled to receive the same.

Reading the notice statutes *in pari materia* with MCL 205.22 confirms the notice statutes' parity. Statutes that relate to the same subject matter or share a common purpose must be read together as constituting one law, even if they contain no reference to one another and were enacted on different dates.[21] Conflicting provisions of such statutes must be read together to produce a harmonious whole and to reconcile any inconsistencies wherever possible.[22] The purpose of this interpretive rule is to give effect to the legislative purpose as found in statutes on a particular subject.[23]

MCL 205.22, which dictates procedures surrounding a taxpayer's appeal, does not refer to either MCL 205.8 or MCL 205.28(1)(a). MCL 205.22 merely states that the appeal period begins to run upon "issuance of the assessment, decision, or order."[24] Just as MCL 205.22 does not refer to either notice requirement, neither of the notice-requirement statutes refers to MCL 205.22. Accordingly, there is no statutory indication suggesting that we hold MCL 205.8's taxpayer representative no-

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[21] *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994); *Crawford Co v Secretary of State*, 160 Mich App 88, 95; 408 NW2d 112 (1987).

[22] *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999).

[23] *Jennings*, 446 Mich at 137.

[24] MCL 205.22(5). Specifically, MCL 205.22(5) states that "[a]n assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order . . . ." This reflects the outer bound of an appeal's timeliness, as MCL 205.22(1) permits an appeal to the Tax Tribunal within 35 days after the assessment or to the Court of Claims within 90 days after the assessment. In reading MCL 205.22 as a whole, it is apparent that both appeal periods begin to run upon "issuance" of the assessment.

tice requirement in lower esteem than the MCL 205.28(1)(a) taxpayer notice requirement. When notice is required, the department must notify the taxpayer and any representative duly appointed by the taxpayer.

Having determined that the Legislature intended MCL 205.8 to apply to the department coextensively with MCL 205.28(1)(a), we turn to the relationship between notice and issuance of the assessment. By statute, the appeal period cannot begin to run until "issuance of the assessment" occurs.[25] The department concedes that if it fails to comply with MCL 205.28(1)(a), issuance does not occur.[26] Because the two notice statutes stand on equal footing, the department's concession compels the same consequence for its failure to comply with MCL 205.8, namely, that issuance does not occur.

Furthermore, MCL 205.21(2)(f) provides a textual link between issuance of the final assessment and provision of the required notices.[27] Under that section, a final assessment of a tax deficiency "is final and subject to appeal as provided in [MCL 205.22]. The final notice of assessment shall include a statement advising the person of a right to appeal."[28] The statute equates "final assessment" with "final *notice* of assessment" by using the terms inter-

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[25] MCL 205.22(5).

[26] At oral argument, counsel for the department conceded that if the department does not comply with MCL 205.28(1)(a), it does not provide notice, and the consequence of not providing notice is that an assessment was never issued.

[27] MCL 205.21(2)(f) reads in full:

> If the taxpayer does not protest the notice of intent to assess within the time provided in subdivision (c), the department may assess the tax and the interest and penalty on the tax that the department believes are due and payable. An assessment under this subdivision or subdivision (e) is final and subject to appeal as provided in section 22. *The final notice of assessment shall include a statement advising the person of a right to appeal.* [Emphasis added.]

[28] *Id.*

changeably.[29] The notice and the assessment are one and the same. It follows that the assessment cannot issue if the notices do not issue. Given its plain meaning, "issuance" requires actual distribution; the root word, "issue," is defined as "the act of sending out or putting forth; promulgation; distribution."[30] Thus, in addition to our determination that the two statutory notice requirements apply to the department with equal force, we further conclude that satisfaction of both notice requirements is required before issuance of the assessment is deemed to have occurred, starting the appeal period. Because the department delayed issuing the notices of assessment to the taxpayers' representatives in both cases before us, the running of the appeal periods were also delayed. The taxpayers' appeals were therefore timely, and the Tax Tribunal retained jurisdiction.[31]

IV. CONCLUSION

The Tax Tribunal and Court of Appeals correctly interpreted MCL 205.8 as imposing upon the depart-

[29] Indeed, "[i]t was previously the practice of [the department] to use the phrasing 'notice of assessment' when it issued assessments." *Fradco*, 298 Mich App at 300.

[30] *Random House Webster's College Dictionary* (1997).

[31] Although it did not preserve this issue in the Court of Appeals below, the department here challenges the validity of the power of attorney forms in both cases. In *Fradco*, the department argues that the authorization form was invalid because it did not identify a specific dispute, as MCL 205.8 allegedly requires. However, MCL 205.8 only states that a taxpayer may not designate more than one representative for a single dispute. Here, Fradco had only one designated representative throughout the dispute. In *SMK*, the department argues that the form designating Edward Kisscorni as a representative was not valid because it was the third authorization form on file. While it is true that SMK had three authorization forms on file, the third form gave Kisscorni limited authorization to represent SMK in this tax matter specifically. Thus, SMK only specifically designated one representative for this dispute.

ment an obligation to notify a taxpayer's official representative before the time to appeal a final assessment may begin to run. In both force and effect, this obligation applies to the department coextensively with MCL 205.28(1)(a).

The running of the appeal period is triggered by "issuance of the assessment," and while issuance is not explicitly defined, MCL 205.21(2)(f) demonstrates that notice of the assessment is equivalent to the assessment itself. Thus, the running of the appeal period is triggered by issuance of statutory notice. Further, compliance with MCL 205.28(1)(a) is undisputedly a prerequisite to issuance.[32] Because MCL 205.8 operates in tandem with MCL 205.28(1)(a), we hold that compliance with the department's statutory obligation to notify a taxpayer's official representative is likewise a prerequisite to issuance. However, because MCL 205.28(1)(a) and MCL 205.8 do not require the department to show that the taxpayer or its representative actually received the notice, we vacate the portions of the Court of Appeals opinions that read, "Because Petitioner filed its appeal within 35 days after its representative received notice from respondent, the Tax Tribunal had jurisdiction to hear petitioner's appeal."[33] To the extent that this can be read to mean the appeal period begins when a taxpayer's representative receives notice, we conclude it is erroneous. Instead, the appeal period begins when the department complies with MCL 205.28(1)(a) by giving the taxpayer notice of the final assessment through personal service or certified mail and MCL 205.8 by sending a copy of the notice of the final assessment to the representative's address pro-

[32] See note 26 of this opinion.

[33] *Fradco*, 298 Mich App at 301; *SMK*, 298 Mich App at 310.

vided by the taxpayer in its written request. In all other respects, we affirm the rulings of the Court of Appeals.

CAVANAGH, MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with YOUNG, C.J.

PEOPLE v HARRIS

Docket No. 146212. Argued October 9, 2013 (Calendar No. 7). Decided April 3, 2014.

James Early Harris, Jr., was convicted by a jury in the Saginaw Circuit Court, James T. Borchard, J., of extortion; carrying a dangerous weapon with unlawful intent; assaulting, resisting, or obstructing a police officer; and three counts of carrying a firearm during the commission of a felony. Defendant had agreed to pay Willie Neal $400 to fix the transmission on defendant's truck. Neal began working on the truck in the driveway that defendant shared with a neighbor, but stopped when it began to rain. Upset by Neal's refusal to work in the rain, defendant went into his house and returned with a gun. Defendant told Neal that he would "silence him" unless Neal resumed working on the truck or returned a portion of defendant's down payment for the work. Neal refused, and defendant returned home. When police officers arrived, they found defendant in the driveway carrying a rifle. Defendant appealed. The Court of Appeals, JANSEN and RIORDAN, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), affirmed in an unpublished opinion per curiam, issued September 27, 2012 (Docket No. 304875). The Supreme Court granted defendant's application for leave to appeal. 493 Mich 948 (2013).

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

Under the plain language of the extortion statute, MCL 750.213, extortion occurs when a defendant maliciously threatens to injure another person with the intent to compel that person to do any act against his or her will, without regard to the seriousness or significance of the compelled act, overruling *People v Fobb*, 145 Mich App 786 (1985), and *People v Hubbard (After Remand)*, 217 Mich App 459 (1996), to the extent that those decisions required that the act or omission compelled by the defendant be of serious consequence to the victim.

1. Under the plain language of the extortion statute, the crime of extortion is complete when a defendant (1) either orally or by a written or printed communication, maliciously threatens (2) to

accuse another of any crime or offense, or to injure the person or property or mother, father, spouse or child of another (3) with the intent to extort money or any pecuniary advantage whatever, or with the intent to compel the person threatened to do or refrain from doing any act against his or her will. The Court of Appeals decisions in *Fobb* and *Hubbard*, which held that the act demanded of the victim must have been of serious consequence to the victim in order to convict a defendant of extortion, are contrary to the plain language of the statute.

2. A statute may be challenged for vagueness on three grounds: (1) that it fails to provide fair notice of the conduct proscribed, (2) that it is so indefinite that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) that its coverage is overbroad and impinges on First Amendment protections. In this case, the key question is whether the extortion statute provides adequate notice to citizens regarding what conduct is prohibited and sufficient guidance to fact-finders in order to avoid arbitrary enforcement. The Legislature's inclusion of a malice requirement in the extortion statute provides law enforcement, judges, and juries with an explicit standard for applying the statute. Only those threats made with the intent to commit a wrongful act without justification or excuse, or made in reckless disregard of the law or of a person's legal rights, rise to the level necessary to support an extortion conviction. The plain language of the statute provides the trier of fact with sufficient guidance regarding the nature of the threat required for a conviction of extortion and also provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may act accordingly.

3. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Defendant orally communicated a malicious threat to injure Neal, thereby satisfying the first two elements of statutory extortion, when he threatened to "silence" Neal while waving a gun. Defendant made the threat with the intent to compel Neal to undertake an act against his will, thereby satisfying the third element of statutory extortion.

Affirmed.

Justice CAVANAGH concurred in the result only.

CRIMINAL LAW — EXTORTION — ELEMENTS.

The crime of extortion is complete when a defendant (1) either orally or by a written or printed communication, maliciously threatens (2) to accuse another of any crime or offense, or to injure the

> person or property or mother, father, spouse or child of another (3) with the intent to extort money or any pecuniary advantage whatever, or with the intent to compel the person threatened to do or refrain from doing any act against his or her will; there is no requirement that the act demanded of the victim must have been of serious consequence to the victim in order to convict a defendant of extortion (MCL 750.213).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

ZAHRA, J. In *People v Fobb*, the Court of Appeals held that an extortion conviction under the "against his will" prong of MCL 750.213 may only be maintained when the act defendant sought to compel entailed "serious consequences" to the victim.[1] This case requires us to revisit the *Fobb* decision. In the instant case, a jury convicted defendant of extortion after he maliciously threatened to injure a mechanic unless the mechanic resumed working on defendant's truck in the rain. Defendant, relying on *Fobb*, maintains that he cannot be convicted of extortion because the act defendant sought to compel—the mechanic's continued work on the truck—was not of serious consequence to the mechanic. But the plain language of the extortion statute, MCL 750.213, defines extortion in terms of whether the defendant maliciously threatened a person with harm in order to "compel the person so threatened

[1] *People v Fobb*, 145 Mich App 786, 791-792; 378 NW2d 600 (1985). See also *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996), overruled on other grounds by *People v Bryant*, 491 Mich 575, 618; 822 NW2d 124 (2012).

to do . . . *any* act against his will."[2] Thus, the Legislature clearly intended the crime of extortion to occur when a defendant maliciously threatens to injure another person with the intent to compel that person to do any act against his will, without regard to the significance or seriousness of the compelled act. Because the defendant's conduct satisfies the requirements set forth in MCL 750.213, we affirm his conviction of extortion. Furthermore, we overrule the Court of Appeals decisions in *People v Fobb* and *People v Hubbard* to the extent that those decisions require that the act or omission compelled by the defendant be of serious consequence to the victim.

I. FACTS AND PROCEEDINGS

Defendant, James Early Harris, Jr., agreed to pay Willie Lee Neal $400 to fix the transmission on defendant's truck. Defendant paid $210 in advance, and agreed to tender the balance upon completion of the work. On the afternoon of September 11, 2010, Neal was working on the truck in the shared driveway between defendant's home and that of his neighbor, Robbin Smith. Smith had just returned home from work, and her mother and aunt were sitting on her front porch.

It began to rain, and Smith's mother invited Neal to sit on Smith's covered porch to get out of the rain. Smith went inside to prepare a sandwich for Neal. When she returned outside, defendant was on the porch talking to Neal. He was upset that Neal was not repairing the truck. Neal indicated that he would resume working once it stopped raining, but defendant continued to express his displeasure with Neal. Of-

[2] MCL 750.213 (emphasis added).

fended by defendant's vulgar language, Smith asked defendant to leave her porch.

Defendant went into his house and returned with a handgun. Waving the gun, defendant confronted Neal from the side of Smith's porch. Defendant told Neal that he would "silence him" unless Neal either immediately resumed working on the truck or returned $100 of the prepaid compensation. Neal did neither, but instead indicated that he would rather meet his maker than capitulate to defendant's demands. The incident upset the three women on the porch. Smith's mother was in tears. Smith perceived defendant's actions as a threat, and announced her intention to telephone the police.

Defendant went home. He was in the shared driveway carrying a rifle when the police arrived. Defendant was arrested and charged with felonious assault, carrying a dangerous weapon with unlawful intent, assaulting, resisting or obstructing a police officer, and three corresponding counts of carrying a firearm during the commission of a felony (felony-firearm). The felonious assault charge was amended to extortion at the request of the prosecution, and defendant was bound over to circuit court on all counts.

A jury found defendant guilty of all counts after a three-day trial. Defendant appealed by right in the Court of Appeals, which affirmed his convictions in a divided, unpublished opinion.[3]

The Court of Appeals majority concluded that there was sufficient evidence to support defendant's extortion conviction. For present purposes, the first two elements of extortion are (1) an oral threat (2) to harm another

[3] *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued September 27, 2012 (Docket No. 304875).

person. The Court of Appeals reasoned that, because defendant held a gun and threatened Neal that he would "silence him" if Neal did not comply with defendant's demands, the first two elements of extortion were satisfied.[4] The Court of Appeals rejected defendant's contention that there was insufficient evidence to satisfy the third element of extortion—that defendant's threat was intended to compel Neal to perform an act against Neal's will.[5] The Court of Appeals acknowledged that *People v Fobb* held that only "serious" acts could support a conviction under the "against his will" prong of the extortion statute, but observed that "nothing in the statutory language of MCL 750.213 requires the action to be serious in nature or have significant value."[6] The Court of Appeals concluded that defendant's threat was intended to compel Neal to perform an act against Neal's will and therefore the third element of MCL 750.213 was satisfied, even under the *Fobb* standard.[7]

Judge O'CONNELL dissented in part, asserting that "[e]stablished precedent required the prosecution to prove that defendant intended to compel Neal to do something that had serious consequences, against Neal's will."[8] Because Neal had previously agreed to repair the truck for his own pecuniary benefit, Judge O'CONNELL reasoned that returning to work would not have been against Neal's will.[9] In his view, neither returning to work nor

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[4] *Id.* at 4-5. Specifically, the Court of Appeals held that defendant orally communicated a malicious threat of injury to Neal's person.

[5] *Id.*

[6] *Id.*, citing *Fobb*, 145 Mich App at 791.

[7] *Harris*, unpub op at 4-5.

[8] *Harris*, unpub op at 1 (O'CONNELL, J., concurring in part and dissenting in part), citing *Hubbard*, 217 Mich App 459.

[9] *Harris*, unpub op at 3 (O'CONNELL, J., concurring in part and dissenting in part).

returning $100 of the prepayment were of "serious consequence" to Neal as required by *Fobb*.[10] Judge O'CONNELL concluded that although this Court might wish to clarify the elements of extortion and the holding in *Fobb*, the Court of Appeals panel was bound to follow precedent.[11] Therefore, Judge O'CONNELL would have reversed defendant's extortion conviction.

This Court granted leave to appeal to determine what the prosecution must prove to convict a defendant of extortion and whether the evidence was sufficient to sustain defendant's conviction.[12]

II. STANDARD OF REVIEW

Whether the crime of extortion requires that the act compelled of the victim be one having "serious consequences" to the victim is a question of statutory interpretation, which is reviewed de novo.[13] In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.[14]

III. ANALYSIS

A. INTERPRETING MCL 750.213

As always, the goal of statutory interpretation " 'is to ascertain and give effect to the intent of the Legislature.

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[10] *Id*.

[11] *Id*.

[12] *People v Harris*, 493 Mich 948 (2013).

[13] *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

[14] *People v Sherman-Huffman*, 466 Mich 39, 41; 642 NW2d 339 (2002).

The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.' "[15]

At common law, extortion was defined as "the unlawful taking by a public officer, under color of his office, of any money or thing of value that was not due to him, or more than was due, or before it was due."[16] The origin of statutory extortion, however, is attributed at least in part to the English courts' refusal to expand the scope of common-law robbery:

> The English courts had held it to be robbery, where a defendant coerced payment of money or goods by a threat to accuse the victim of sodomy or to destroy a dwelling; however, they refused to extend robbery to threats of other accusations or of other harm to persons or property. Thus, they held it was robbery when the threat was to commit immediate violence, but not robbery where the threat was of violence in the future, or was of destruction of property, or of accusation of crime. This gap in coverage was filled in various ways by the statutory extortion offenses enacted in many jurisdictions.[17]

Michigan was among those jurisdictions that enacted an extortion statute early in its statehood.[18] The current version of the statute, MCL 750.213, provides:

> Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse

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[15] *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

[16] *People v Krist*, 97 Mich App 669, 674; 296 NW2d 139 (1980), citing Hawkins, Pleas of the Crown (1787), p 418, and *Commonwealth v Bagley*, 24 Mass 279 (1828).

[17] Saltzman, Michigan Criminal Law: Definitions of Offenses (2nd ed), § 6-9(d), p 518.

[18] See 1846 RS, ch 153, § 19.

> another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.

The statute has remained largely unchanged since its enactment more than 150 years ago.[19]

According to the plain language of the statute, the crime of extortion is complete when a defendant (1) either orally or by a written or printed communication, maliciously threatens (2) to accuse another of any crime

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[19] Michigan's earliest extortion statute, 1846 RS, ch 153, § 19, provided:

> If any person shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offence, or shall by any written or printed communication maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the state prison or in the county jail, not more than two years, or by fine not exceeding one thousand dollars.

The statute has undergone few amendments since its enactment. In 1897, "verbally" was replaced by "orally" with respect to malicious threats to accuse another of a crime, and "orally" was added with respect to "written or printed" malicious threats to injure persons or property. See 1897 PA 188. In 1925, "threaten injury to the person or property or property of another" was amended to include "or mother, father, husband, wife, or child of another." See 1925 PA 83, § 1. The extortion statute was most recently amended during the 1931 enactment of the Penal Code, which raised the maximum authorized fine to $10,000 and the maximum authorized imprisonment to 20 years. See 1931 PA 328, § 213. See also Saltzman, Michigan Criminal Law: Definitions of Offenses (2nd ed), § 6-9(d), pp 518-519.

or offense, *or* to injure the person or property or mother, father, spouse or child of another (3) with the intent to extort money or any pecuniary advantage whatever, *or* with the intent to compel the person threatened to do or refrain from doing any act against his or her will. In the instant case, the prosecution alleged that defendant maliciously threatened to injure Neal with the intent to compel Neal to do an act against his will.

Relying on *Fobb*, defendant maintains that the prosecution failed to prove that he intended to compel Neal to do "any act against his will." In *People v Fobb*, the defendant twice telephoned the victim, first complaining that the victim had been spreading lies about the defendant, and then again threatening to sue the victim for $21,000.[20] After the victim hung up the telephone on defendant the second time, the defendant broke through the victim's locked door and attacked the victim, first choking her and then beating her with a hairdryer.[21] During the attack, the defendant demanded that the victim draft and sign a note admitting that she had spread lies about the defendant.[22] The defendant was convicted of extortion and assault with intent to do great bodily harm less than murder.[23] The Court of Appeals reversed Fobb's extortion conviction.

Although acknowledging that the note was obtained against the victim's will, the *Fobb* panel held that the defendant's extortion conviction should be overturned because "the act required of the victim was minor with no serious consequences to the victim. The note the victim was forced to write was erratic, quixotic and was

[20] *Fobb*, 145 Mich App at 788.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 787-788.

not used to the victim's detriment or defendant's advantage."[24] The *Fobb* panel reasoned that "[t]he Legislature did not intend punishment for every minor threat," and after discussing "an old Tennessee case," noted "that Michigan cases brought under the 'against his will' section of the extortion statutes have been for serious demands."[25] Despite the lack of any "seriousness" requirement in the plain language of the "against his will" prong of MCL 750.213, *Fobb* concluded "that the demand by the defendant that the victim execute a useless note was not an offense such as was contemplated by the extortion statute as no pecuniary advantage was obtained nor was the act demanded of such consequence or seriousness as to apply that statute."[26]

In *People v Hubbard*, the defendant challenged his extortion conviction on the ground that MCL 750.213 is void for vagueness because "the statute allows a defendant to be convicted of extortion after making a minor threat that results in the victim engaging in an action with no serious consequences to the victim."[27] Relying on its decision in *Fobb*, the Court of Appeals reasoned that the Legislature did not intend to punish every minor threat, but only "those threats that result in pecuniary advantage to the individual making the threat or that result in the victim undertaking an action of serious consequence . . . ."[28] Therefore, the Court of Appeals concluded that the statute is not void for vagueness because "the construction afforded the statute by *Fobb* provides sufficient guidance regarding the nature of the threat and act compelled to ensure that

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[24] *Id*. at 791.

[25] *Id*. at 791-792 (citations omitted).

[26] *Fobb*, 145 Mich App at 793.

[27] *Hubbard*, 217 Mich App at 485.

[28] *Id*. at 485-486, citing *Fobb*, 145 Mich App at 792-793.

the statute will not be enforced arbitrarily or discriminatorily."[29] Although *Fobb* was decided before 1990 and was therefore not binding on subsequent panels of the Court of Appeals, the reaffirmation of *Fobb* by *Hubbard* in 1996 rendered it binding on subsequent panels.[30]

The Court of Appeals holding in *Fobb* is contrary to the plain language of MCL 750.213. The statute contains no requirement whatsoever that the act demanded must be of serious consequence to the victim in order to convict a defendant. The "against his will" prong of MCL 750.213 is satisfied when a malicious threat is communicated "with intent to compel the person so threatened to do or refrain from doing *any* act against his will."[31] "Any" is defined as:

> **1.** one, a, an, or some; one or more without specification or identification. **2.** whatever or whichever it may be. **3.** in whatever quantity or number, great or small; some. **4.** every; all . . . .[32]

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[29] *Harris*, 217 Mich App at 486.

[30] See MCR 7.215(J)(1).

[31] MCL 750.213 (emphasis added).

[32] *Random House Webster's College Dictionary* (1997). The definition of "any" has undergone little change in the more than 150 years since the enactment of the extortion statute. When the statute was enacted in 1846, "any" was defined as:

> 1. One, indefinitely. 2. Some; an indefinite number, plurally. 3. Some; an indefinite quantity; a small portion. 4. It is often used as a substitute, the person or thing being understood. It is used in opposition to *none*. [*Webster's American Dictionary of the English Language* (1846).]

When the statute was most recently amended in 1931, "any" was defined as:

> 1. adj. (With neg., interrog., if, &c.) one, some, (*not having [any] time to spare; have we [any] screws?*; *if you can find [any] excuse; to avoid [any] delay*); one or some taken at random, whichever you will, every, (*can get it from [any] chemist; in [any] case; gives [any] amount of trouble*, an infinite). [American Oxford Dictionary (1931).]

Because "any" is commonly understood to encompass a wide range of things, we conclude that the Legislature intended that MCL 750.213 is satisfied without regard to whether the act required of the victim had "serious consequences."[33] Indeed, it is difficult to imagine how the Legislature could have cast a broader net given the use of the words "any act" in MCL 750.213. Consequently, the Court of Appeals decision in *Fobb* requiring that the act demanded be of serious consequence to the victim improperly narrowed the scope of MCL 750.213, and we overrule that aspect of the decision.

Relying on this Court's decision in *People v Tombs*, defendant urges this Court to maintain the *Hubbard* panel's adoption of *Fobb*'s construction of the extortion statute. In *Tombs*, the defendant challenged his conviction of distributing or promoting child sexually abusive material under MCL 750.145c(3).[34] This Court addressed the question of whether MCL 750.145c(3) requires that the distribution or promotion of child sexually abusive material be performed with criminal

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[33] See also *People v Lively*, 470 Mich 248, 253-254; 680 NW2d 878 (2004) ("The commonly understood word 'any' generally casts a wide net and encompasses a wide range of things.")

[34] *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005). MCL 750.145c(3) reads in relevant part:

> A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in section 7 of 1984 PA 343, MCL 752.367.

intent. We concluded that despite the absence of an explicit criminal intent requirement in the statutory language, the Legislature's use of active verbs "supports the presumption that the Legislature intended that the prosecution prove that an accused performed the prohibited act with criminal intent."[35] Citing the United States Supreme Court decision in *United States v X-Citement Video, Inc*, the Court reasoned that "if there were no *mens rea* element respecting the distribution of the material, the statute could punish otherwise innocent conduct."[36] Accordingly, the Court inferred a criminal intent requirement in the statute.

Just as the Court inferred a criminal intent element in the statute in *Tombs*, the defendant in the instant case urges the Court to retain *Fobb*'s "serious consequences" construction of MCL 750.213—as the Court of Appeals did in *Hubbard*—for the purpose of limiting the scope of the extortion statute. The comparison of the statutory analysis in *Tombs* to that of instant case is inapposite. Because the language of MCL 750.145c(3) lacked a *mens rea* requirement, the *Tombs* Court saved the statute by inferring a criminal intent requirement in the statute. Unlike MCL 750.145c(3), the plain language of the extortion statute passes constitutional muster without any judicial construction.

A statute may be challenged for vagueness on three grounds: (1) that it fails to provide fair notice of the conduct proscribed; (2) that it is so indefinite that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; or (3) that its coverage is overbroad and

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[35] *Id*. at 457.

[36] *Id*. at 458, citing *United States v X-Citement Video, Inc*, 513 US 64, 69; 115 S Ct 464; 130 L Ed 2d 372 (1994).

impinges on First Amendment protections.[37] The party challenging the constitutionality of a statute bears the burden of proving that the law is unconstitutional.[38] This Court is responsible for upholding both the Michigan and federal constitutions, and our authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality. Moreover, laws are presumed constitutional, and this Court must construe a statute as constitutional unless its unconstitutionality is clearly apparent.[39] Because neither *Hubbard* nor the instant case implicates First Amendment freedoms, the constitutionality of the extortion statute must be examined in light of the particular facts at hand.[40]

The pertinent inquiry is whether the extortion statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, and also whether the statute provides an explicit standard for those who apply it.[41] In *Kolender v Lawson*, the United States Supreme Court reasoned that

> [a]lthough the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized

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[37] *Woll v Attorney General*, 409 Mich 500, 533; 297 NW2d 578 (1980); *People v Howell*, 396 Mich 16, 20; 238 NW2d 148 (1976).

[38] *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

[39] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011); *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002) (applying a presumption of constitutionality to an ordinance challenged on vagueness grounds).

[40] See *Howell*, 396 Mich at 21, citing *United States v Nat'l Dairy Prod Corp*, 372 US 29; 83 S Ct 594; 9 L Ed 2d 561 (1963); *People v Lynch*, 410 Mich 343, 352; 301 NW2d 796 (1981).

[41] *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972). See also *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994), quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

> recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." [*Smith v Goguen*, 415 US 566, 574; 94 S Ct 1242; 39 L Ed 2d 605 (1974)]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections. *Id*., at 575."[42]

Thus, the key question is whether the extortion statute provides adequate notice to citizens regarding what conduct is prohibited and sufficient guidance to fact-finders in order to avoid arbitrary enforcement.

Hubbard correctly concluded that the Legislature did not intend to punish every minor threat, but it need not have relied on the judicially crafted "serious consequences" construction of the extortion statute to arrive at its conclusion. The *Hubbard* panel relied on *Fobb*'s "serious consequences" construction to conclude that the statute provides the fact-finder with sufficient guidance so as not to encourage arbitrary and discriminatory enforcement. But the plain language of the extortion statute itself clearly provides that the Legislature intended punishment for those who "*maliciously* threaten" others.[43] In other words, the Legislature's inclusion of a malice requirement provides law enforce-

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[42] *Kolender*, 461 US at 357-358. The *Kolender* Court noted that its concern for minimal guidelines dates as far back as its decision in *United States v Reese*, 92 US 214, 221; 23 L Ed 563 (1875). *Reese* held:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. [*Id*. at 221.]

[43] MCL 750.213 (emphasis added).

ment, judges, and juries with an explicit standard for applying MCL 750.213. Malice is defined as

> **1.** The intent, without justification or excuse, to commit a wrongful act. **2.** Reckless disregard of the law or of a person's legal rights. **3.** Ill will; wickedness of heart. This sense is most typical in nonlegal contexts.[44]

Therefore, only those threats made with the intent to commit a wrongful act without justification or excuse, or made in reckless disregard of the law or of a person's legal rights, rise to the level necessary to support an extortion conviction.

Defendant's vagueness challenge in *Hubbard* was premised on the theory that MCL 750.213 conferred unlimited discretion on the trier of fact to determine whether extortion had been committed. Thus, the panel did not address whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. With regard to whether a person of ordinary intelligence is afforded a reasonable opportunity to know what is prohibited by the extortion statute, the Court of Appeals opinion in *People v Boomer* is insightful.[45] In *Boomer*, the Court of Appeals addressed the constitutionality of MCL 750.337, which provides:

> Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor.

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[44] *Black's Law Dictionary* (9th ed), p 1042. See also *People v Whittemore*, 102 Mich 519, 526; 61 NW 13 (1894). "The malice required by the [extortion] statute was . . . the willful doing of the act with the illegal intent. If the threat was willfully made with the intent to extort money, it was a malicious act . . . ." *Id*., quoting *Com v Buckley*, 148 Mass 27, 28; 18 NE 577 (1888).

[45] *People v Boomer*, 250 Mich App 534; 655 NW2d 255 (2002).

Given the lack of any restrictive language to limit or guide a prosecution for "indecent, immoral, obscene, vulgar or insulting language," the Court of Appeals concluded that "[a]llowing a prosecution where one utters 'insulting' language could possibly subject a vast percentage of the populace to a misdemeanor conviction."[46] Because the statute failed to provide fair notice of the scope of conduct it prohibited, and also because it encouraged arbitrary and discriminatory enforcement, the Court of Appeals held that the statute was facially vague.[47] Central to its analysis, the panel reasoned that the statute's failure to provide fair notice of the conduct proscribed was due at least in part to the subjective nature of the statutory language. The Court of Appeals noted that even inferring a reasonable person standard

> would require every person who speaks audibly where children are present to guess what a law enforcement officer might consider too indecent, immoral, or vulgar for a child's ears. Children aside, it is far from obvious what the reasonable adult considers to be indecent, immoral, vulgar, or insulting. As a result, a judicially imposed "reasonable person" limitation would not, in our opinion, cure the vagueness of the statute.[48]

In light of the reasoning in *Boomer*, the *Hubbard* panel's adoption of *Fobb*'s "serious consequences" construction actually exposes the extortion statute to a vagueness claim premised on the lack of notice of the prohibited conduct. Indeed, how would a putative defendant in a statutory extortion context know with any degree of certainty whether the act he or she intends to compel is of serious consequence to the victim? Just as

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[46] *Id*. at 540.

[47] *Id*.

[48] *Id*. at 541.

in *Boomer*, it may be far from obvious what a reasonable adult considers to be "serious" in consequence.

Nonetheless, any claim that MCL 750.213 fails to provide fair notice of the conduct proscribed is meritless. A statute is not vague if the meaning of the words in controversy can be fairly ascertained by referring to their generally accepted meaning.[49] Because the word "any" is commonly understood to encompass a wide range of things,[50] and the word "malicious" is commonly understood to involve either the intent to commit a wrongful act, absent justification or excuse, or an act or omission in reckless disregard of the law or of a person's legal rights,[51] any contention that the defendant did not have sufficient notice that his conduct would fall within the scope of the extortion statute is meritless. Moreover, the Legislature's inclusion of a scienter requirement—in this case the requirement that the defendant "maliciously" threaten another—may mitigate a statute's vagueness, "especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[52]

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[49] See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 516; 821 NW2d 117 (2012) (reasoning that courts may consult dictionary definitions to ascertain the common and ordinary meaning of words in a statute); *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988) ("[A] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.").

[50] See the text accompanying notes 32-33 of this opinion.

[51] See the text accompanying note 44 of this opinion.

[52] *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 499; 102 S Ct 1186; 71 L Ed 2d 362 (1982). The scienter requirement limiting the statute's scope to threats made in reckless disregard of the law or another's legal rights prohibits the application of the extortion statute to the far-fetched scenarios the defendant is concerned about, such as a judge compelling their law clerk to complete a work-related task

The plain language of MCL 750.213 provides the trier of fact with sufficient guidance regarding the nature of the threat required for a conviction of statutory extortion and also provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may act accordingly. Therefore, the Court of Appeals decision in *Hubbard* erred by relying on the "serious consequences" construction afforded the statute in *Fobb*. Accordingly, we overrule that aspect of those decisions.[53]

B. APPLICATION

Having overruled *Fobb* and *Hubbard*, and looking exclusively to the text of the extortion statute, we conclude that there was sufficient evidence in the record to support defendant's extortion conviction. The existence of malice, as set forth in this opinion, depends on the facts and circumstances of each case and can be inferred from a defendant's conduct. In this case, the record shows that defendant was upset and used vulgar language when, while armed with a handgun, he threatened to "silence" Neal. Defendant's threat to "silence" Neal, while waving a gun, unless Neal resumed repairing the truck in the rain, was certainly a wrongful act,

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under threat of termination or docked pay. Although the prosecution mistakenly suggested during oral argument that reasonable prosecutorial discretion would guard against application of the statute in such cases, the Supreme Court of the United States has made clear that the good will of prosecutors cannot *alone* save a vague statute. *Baggett v Bullitt*, 377 US 360, 373; 84 S Ct 1316; 12 L Ed 2d 377 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.")

[53] In *People v Bryant*, this Court overruled *Hubbard* on other grounds, specifically in the context of a Sixth Amendment claim addressing whether the defendant's jury venire reflected a fair cross section of the community. See *Bryant*, 491 Mich 575.

and it was not justified.[54] Therefore, the threat was sufficiently malicious. Neal expressed a willingness to face God rather than capitulate to the defendant's demands. Defendant orally communicated a malicious threat to injure Neal, thereby satisfying the first two elements of statutory extortion.

Moreover, the evidence is sufficient to satisfy the third element—that defendant made the threat with the intent to compel Neal to undertake an act against his will. Although Neal initially agreed to work on the truck, the record establishes that he did not want to work on the truck in the rain, when defendant demanded otherwise. Whether a victim was in breach of a contract is immaterial under the extortion statute.[55] Therefore, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.

IV. CONCLUSION

Because the plain language of MCL 750.213 requires that a defendant maliciously threaten harm to another with the intent to compel that person "to do or refrain from doing any act against his will," the level of significance or seriousness of the consequences of the compelled act to the victim is immaterial. We overrule the Court of Appeals decisions in *People v Fobb* and *People v Hubbard* to the extent that they require that the intended compelled act or omission be of serious

[54] See footnote 55, *infra*.

[55] Even if defendant's demands were within the scope of his agreement with Neal, which they were not, the proper means of enforcing a contract is through the courts, not by engaging in malicious behavior. See *People v Maranian*, 359 Mich 361; 102 NW2d 568 (1960) (a claim of right is not a defense to an extortion charge).

consequence to the victim, and we affirm the judgment of the Court of Appeals in the instant case.

YOUNG, C.J., and MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with ZAHRA, J.

CAVANAGH, J., concurred in the result only.

PEOPLE v CHENAULT

Docket Nos. 146523 and 146524. Argued December 12, 2013 (Calendar No. 6). Decided April 4, 2014. Rehearing denied at 495 Mich 998.

An Oakland Circuit Court jury convicted Schuyler D. Chenault of felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b, arising out of the shooting death of Kevin Harris, a cocaine dealer, during a drug transaction in which defendant was involved. The sole question at trial was the identity of the shooter. During one of her interviews with the police, Heather Holloway (Harris's girlfriend) identified defendant as the shooter. Her interviews were videotaped, but defendant's counsel did not receive copies of the recordings. Holloway's written statements did not mention that Jared Chambers (a middleman whom Harris sometimes used) was also present at the shooting. Only defendant, Holloway, and Chambers witnessed the shooting, and there was no physical evidence to tie either defendant or Chambers to the shooting. The defense theory was that Chambers shot Harris and that Holloway identified defendant as the shooter out of fear of Chambers. A month after the trial, defense counsel moved for a new trial and requested a copy of the recordings of Holloway's interviews. Defense counsel also added claims of ineffective assistance of counsel and prosecutorial misconduct regarding the failure to provide the recordings. The court, Daniel Patrick O'Brien, J., granted defendant's motion for a new trial, concluding that his due process rights had been violated under *Brady v Maryland*, 373 US 83 (1963), because the suppressed videotaped recordings undermined confidence in the outcome of the trial. The Court of Appeals, FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ., reversed in an unpublished opinion per curiam, issued November 27, 2012 (Docket Nos. 309384 and 310456). The panel analyzed the *Brady* claim using the four-factor test articulated in *People v Lester*, 232 Mich App 262 (1998), which had added a requirement of due diligence to the *Brady* test, and concluded that defense counsel had not exercised due diligence and that the suppressed evidence was neither favorable nor material. It also held that defendant had not been denied the effective

assistance of counsel because there was no prejudice. Defendant sought leave to appeal, which the Supreme Court granted. 494 Mich 862 (2013).

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

Brady and its progeny do not support a diligence requirement, and *Lester* must be overruled.

1. *Brady* held that the prosecution's suppression of evidence favorable to an accused upon request violates due process when the evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith. The United States Supreme Court articulated the essential components of a *Brady* violation in a three-factor test: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the prosecution must have suppressed that evidence, either willfully or inadvertently, and (3) prejudice must have ensued, that is, the evidence must be material. The government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith. Evidence is favorable to the defense when it is either exculpatory or impeaching. To establish materiality, the defendant must show a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. This standard does not require demonstrating by a preponderance of the evidence that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal. The question is whether in the absence of the suppressed evidence, the defendant received a fair trial, that is, a trial resulting in a verdict worthy of confidence. In assessing the materiality of the evidence, courts must consider the suppressed evidence collectively, rather than piecemeal.

2. In *Lester*, the Court of Appeals added an additional requirement to the *Brady* test: that the defendant did not possess the evidence and could not have obtained it himself or herself with any reasonable diligence. Neither the United States Supreme Court nor the Michigan Supreme Court has endorsed this element. Any concerns that a diligence requirement might address are already confronted in the context of *Brady*'s suppression requirement and the Sixth Amendment's guarantee of the effective assistance of counsel. A diligence rule of the sort adopted in *Lester* is contrary to *Brady*. The *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel.

Adding a diligence requirement to the rule undermines the fairness that it is designed to protect. Because the four-factor *Lester* test was not doctrinally supported and undermined the purpose of *Brady*, it was overruled. The controlling test is that articulated in *Strickler v Greene*, 527 US 263 (1999): (1) the prosecution has suppressed evidence (2) that is favorable to the accused and (3) viewed in its totality, is material.

3. Defendant's *Brady* claim failed because the suppressed evidence was not material to his guilt. The prosecution conceded that the evidence in question was suppressed, leaving the questions of whether the suppressed evidence was favorable to defendant, either as exculpatory or impeaching evidence, and whether it was material. Only three people witnessed the shooting. Other than Holloway's and Chambers's testimony, no other evidence at trial identified defendant as the shooter. Because the videotaped statements could have impeached Holloway and Chambers as well as undermined the strength of Holloway's identification of defendant, the evidence was favorable to the defense. The suppressed evidence was not material, however. The question was not whether defendant would more likely than not have received a different verdict with the evidence, but whether in its absence defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Even in the absence of the suppressed evidence, defendant received such a trial because the cumulative effect of the evidence was not material. The promises of leniency made to both Holloway and Chambers were not material; they were not conditioned on any behavior on their part. The evidence would not have undermined Holloway's identification of defendant in a material way. Despite minor discrepancies, Holloway identified defendant with confidence, and her qualifications about her ability to view the shooter did not undermine the overall strength of her identification. The suppressed evidence also did not contain information that would lead to the conclusion that defense counsel would have asserted that Holloway misidentified defendant rather than the cover-up theory pursued at trial.

4. Defendant could not establish the prejudice necessary to prevail on his claim of ineffective assistance of counsel. Defendant claimed that defense counsel was ineffective for failing to investigate and acquire the recordings during trial. Defendant could not establish a *Brady* violation because the suppressed evidence was not material, however, and *Brady* materiality is assessed under the same reasonable-probability standard as that used to assess prejudice for purposes of ineffective assistance of counsel.

Court of Appeals' result affirmed.

CRIMINAL LAW — EVIDENCE — SUPPRESSION BY PROSECUTION — *BRADY* VIOLATIONS.

Under *Brady v Maryland*, 373 US 83 (1963), the prosecution's suppression of evidence favorable to an accused upon request violates due process when the evidence is material to either guilt or punishment, irrespective of the prosecution's good or bad faith; the controlling test is that articulated in *Strickler v Greene*, 527 US 263 (1999): (1) the prosecution has suppressed evidence (2) that is favorable to the accused and (3) viewed in its totality, is material; it is not necessary to show that the defendant did not possess the evidence and could not have obtained it himself or herself with any reasonable diligence; evidence is favorable to the defense when it is either exculpatory or impeaching; to establish materiality, the defendant must show a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome, which does not require demonstrating by a preponderance of the evidence that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal; the question is whether in the absence of the suppressed evidence, the defendant received a fair trial, that is, a trial resulting in a verdict worthy of confidence; in assessing the materiality of the evidence, courts must consider the suppressed evidence collectively, rather than piecemeal.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for defendant.

Amici Curiae:

David A. Moran and *Imran J. Syed* for the Michigan Innocence Clinic.

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

MCCORMACK, J. In this case we consider the proper test for applying the United States Supreme Court's

decision in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In *People v Lester*, 232 Mich App 262; 591 NW 2d 267 (1998), the Court of Appeals adopted a four-factor test that added a requirement of defendant diligence to the traditional *Brady* test. Neither the Supreme Court of the United States nor this Court has endorsed this element.

We hold that a diligence requirement is not supported by *Brady* or its progeny. Thus, we overrule *Lester* and reaffirm the traditional three-factor *Brady* test. Because the defendant cannot establish that the suppressed evidence was material, however, his *Brady* claim nevertheless fails. Accordingly, we affirm the result reached by the Court of Appeals.

I. FACTS AND PROCEDURAL BACKGROUND

The defendant's convictions for felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b, arose out of the shooting death of Kevin Harris in Pontiac, Michigan, on June 29, 2008. Harris was a cocaine dealer, who often used Jared Chambers as a middleman to connect with buyers. Chambers occasionally contacted Harris through Harris's girlfriend, Heather Holloway.

On June 29, 2008, Chambers arranged a transaction between the defendant and Harris. The defendant and Chambers, together with several others, met Harris on a side street in Pontiac. Harris pulled up behind the defendant's car. Holloway was in Harris's passenger seat. As both Chambers and the defendant approached Harris' car, shots were fired at Harris, and he was struck in the head.

The Pontiac Police Department conducted an investigation and interviewed Holloway on June 29 and July 2, 2008, and Chambers on June 30, 2008. All of

these interviews were video recorded. Holloway also produced two written statements, one after each interview, and Detective Steven Wittebort summarized the interviews in an incident report. Holloway's written statements and the police report summarizing them were provided to defense counsel before trial, but the video recordings were not.

Holloway was more forthcoming in her second interview than in her first. At her first interview, Holloway told the police that two unknown men walked up to the car and shot Harris. During her second interview, which took place after Harris died on June 30, 2008, Holloway said that Harris had been shot as part of a drug deal. Although Holloway identified the defendant in a photo array, neither of Holloway's written statements mentioned Chambers's presence. According to Wittebort's report, Holloway said that she did not get a good look at the shooter but that she could identify him. The report also revealed that she confidently selected the defendant's photo from an array.

The defendant never denied that he was present at the scene of the shooting, and most of the facts were likewise not in dispute. The sole question at trial concerned the identity of the shooter. Only the defendant, Holloway, and Chambers witnessed the shooting and, unsurprisingly, they did not agree about what happened: the defendant identified Chambers as the shooter while Holloway and Chambers identified the defendant.[1] There was no physical evidence to tie either the defendant or Chambers to the shooting. The defense theory was that Chambers shot

[1] Three others were present at the scene, but did not provide any evidence supporting either theory. Two of them were never questioned by police. The third did not see who shot Harris but testified that immediately after the shot was fired, he saw the defendant standing on the driver's side of Harris's car. The prosecution concedes that the Court of Appeals was mistaken in stating otherwise.

Harris, and that Holloway identified the defendant as the shooter out of fear of Chambers.

On the last day of trial, the prosecution called Wittebort as its final witness. When questioned, Wittebort was surprised that Holloway's second written statement did not confirm that she had mentioned Chambers and was confident that the video recordings would verify his recollection. He was also surprised to learn that the recordings had not been provided to the defendant. On March 11, 2010, the defendant was convicted of felony murder and felony-firearm.

On April 13, 2010, defense counsel filed a motion for a new trial and requested a copy of the interview recordings. Later, counsel amended the motion to add claims of ineffective assistance of counsel and prosecutorial misconduct regarding the failure to provide the recorded statements. There was no dispute that the defendant never had the recordings.[2] The trial court conducted two evidentiary hearings on the motion. On February 29, 2012, Wittebort testified that the police generally let the prosecution know when recordings are available, but the regular practice was to provide them only "if there's an admission or something of that nature from the person of interest or defendant in that matter."[3] On March 8, 2012, the trial court granted the defendant's motion for a new trial, concluding that his due process rights were violated pursuant to *Brady* because the suppressed videotaped recordings undermined confidence in the outcome of the trial.

The Court of Appeals reversed the trial court. *People v Chenault*, unpublished opinion per curiam of the

[2] In fact, the defendant's first counsel submitted an affidavit stating that he had not received the recorded statements.

[3] Wittebort also testified that he had never heard of the phrase "*Brady* material."

Court of Appeals, issued November 27, 2012 (Docket Nos. 309384 and 310456). The Court of Appeals analyzed the *Brady* claim using the four-factor test articulated in *Lester*. The Court held that trial counsel had not exercised due diligence, and that the suppressed evidence was neither favorable nor material. It also held that the defendant was not denied the effective assistance of counsel because there was no prejudice.

On June 5, 2013, this Court granted leave to appeal, directing the parties to address:

> (1) whether the Court of Appeals' decision in *Lester* correctly articulates what a defendant must show to establish a *Brady* violation; (2) whether the Court of Appeals erred when it reversed the trial court's grant of a new trial, which was premised on the prosecution's violation of the rule from *Brady*; and (3) whether trial counsel rendered ineffective assistance of counsel under *Strickland* for failing to exercise reasonable diligence after learning of the existence of the videotaped interviews. [*People v Chenault*, 494 Mich 862 (2013) (citations omitted).]

II. LEGAL BACKGROUND

The Supreme Court of the United States held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. In identifying the essential components of a *Brady* violation, the Supreme Court has articulated a three-factor test:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have

> ensued. [*Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999).]

Stated differently, the components of a "true *Brady* violation," are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material. *Id*.

The contours of these three factors are fairly settled. The government is held responsible for evidence within its control, even evidence unknown to the prosecution, *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995), without regard to the prosecution's good or bad faith, *United States v Agurs*, 427 US 97, 110; 96 S Ct 2392; 49 L Ed 2d 342 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). Evidence is favorable to the defense when it is either exculpatory or impeaching. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*]."), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). To establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v Bagley*, 473 US 667, 682; 105 SC 3375; 87 L Ed 2d 481 (1985). This standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 US at 434. The question is whether, in the absence of the suppressed evi-

dence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. *Id.* at 436.

In contrast to the three-factor *Brady* test articulated by the United States Supreme Court, our Court of Appeals adopted a four-factor *Brady* test in 1998:

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester*, 232 Mich App at 281, citing *United States v Meros*, 866 F 2d 1304, 1308 (CA 11, 1989).]

The inclusion of the second factor is the only difference between the *Lester* test and the test articulated in *Strickler*. Although *Lester* did not involve a question of a defendant's diligence, the Court of Appeals relied on authority from the United States Court of Appeals for the Eleventh Circuit for this additional requirement, now widely referred to as a "due diligence" or "reasonable diligence" factor. This test has been applied by our Court of Appeals since *Lester*.

III. *BRADY* DISCLOSURES

A. *PEOPLE* v *LESTER* AND THE ADDITION OF A DILIGENCE REQUIREMENT

This is the first occasion on which this Court has examined the merits of the diligence requirement. Some understanding of its doctrinal history is useful. As noted, the Court of Appeals borrowed the four-factor

test from the Eleventh Circuit's opinion in *Meros*, 866 F 2d at 1308, which in turn cited another Eleventh Circuit case, *United States v Valera*, 845 F 2d 923, 927-928 (CA 11, 1988). In *Valera*, the Eleventh Circuit relied on two cases from the Fifth Circuit, *United States v Cravero*, 545 F2d 406, 420 (CA 5, 1976), and *United States v Prior*, 546 F2d 1254, 1259 (CA 5, 1977). Both of these Fifth Circuit cases in turn relied on authority from other circuits.[4] None of these cases, however, provides a sufficient explanation for adding a diligence requirement to the Supreme Court's three-factor *Brady* test and are consequently of little value to us.

We disagree with the prosecution's suggestion that the diligence requirement is consistent with or implied by United States Supreme Court precedent. Nor do we conclude that a diligence requirement is consistent with the *Brady* doctrine generally. We believe that the concerns that a diligence requirement might address are already confronted in the context of *Brady*'s suppression requirement as well as in the Sixth Amendment's guarantee of the effective assistance of counsel. For these reasons, we reject the addition of a diligence requirement to the *Brady* test and we overrule *Lester*.

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[4] *See Cravero*, 545 F2d at 420 n 46, citing *Maglaya v Buchkoe*, 515 F 2d 265, 268 (CA 6, 1975), and *United States v Ruggiero*, 472 F2d 599, 604 (CA 2, 1973); *Prior*, 546 F2d at 1259, citing *Williams v United States*, 503 F2d 995 (CA 2, 1974), *United States v Purin*, 486 F2d 1363 (CA 2, 1973), *Wallace v Hocker*, 441 F2d 219 (CA 9, 1971), and *United States v Brawer*, 367 F Supp 156 (SD NY, 1973). None of these cases articulated a diligence prong of the sort that the Court of Appeals applied in this case. In each of these cases, the factual predicate was different in an important way because the defendant had actual knowledge of the evidence in question. In other words, the evidence was not "suppressed." In particular, *Ruggiero* explicitly (and, in our view, appropriately) addressed diligence under the suppression prong of *Brady*, finding there was no suppression when the government provided the requested evidence to the trial court for an in camera inspection and ruling. *Ruggiero*, 472 F2d at 604.

We are not persuaded by the prosecution's reliance on *Agurs* and *Kyles* for the proposition that the diligence requirement is merely a clarification of existing Supreme Court precedent. The prosecution argues that the phrase "unknown to the defense," as used in these two cases, suggests that the Supreme Court would affirm the addition of a diligence requirement to the *Brady* analysis. Specifically, the argument goes, the phrase "unknown to the defense" implies that *Brady* places some sort of burden onto the defense to discover *Brady* information when possible. We do not share the prosecution's understanding of the meaning of this phrase in either case.

In *Agurs*, the Supreme Court identified three different contexts in which *Brady* applies, stating that "[e]ach involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 US at 103. The phrase is best understood as a general description of what constitutes *Brady* evidence, instead of the imposition of a new hurdle for defendants.[5] We see no additional meaning to the phrase given its context.

The *Kyles* Court held that "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation without more." *Kyles*, 514 US at 437. The phrase is used in a larger discussion of the materiality requirement and the prosecution's duty to gauge the likely effect of potential *Brady* evidence: although the mere showing that the prosecution knew of evidence that was unknown to the defense does not amount to a *Brady*

[5] *Bagley* retreated from the different materiality standards articulated in *Agurs*. *Bagley*, 473 US at 682. Thus, any reliance on the *Agurs* language as an articulation of existing Supreme Court precedent is undermined.

showing by itself, *Brady* imposes on the prosecution "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* Read in context, this language is meant to define the prosecution's duty both to become aware of evidence in the government's possession and to weigh the materiality of evidence. We believe that if the Supreme Court wanted to articulate a diligence requirement, it would do so more directly. It has not.

Moreover, we do not believe that the goals of *Brady* counsel in favor of adopting a diligence requirement. The Supreme Court has consistently stated that, when confronted with potential *Brady* evidence, the prosecution must always err on the side of disclosure. *Kyles*, 514 US at 439; *Agurs*, 427 US at 108. Just recently the Supreme Court underscored this obligation:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." . . .
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process . . . . We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be

> faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.[6]

In fact, we conclude that a diligence rule of the sort adopted by the Court of Appeals in *Lester* is contrary to *Brady*, i.e., a rule requiring a defendant to show that counsel performed an adequate investigation in discovering the alleged *Brady* material. The *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel. Adding a diligence requirement to this rule undermines the fairness that the rule is designed to protect. However, as we previously explained, evidence that the defense knew of favorable evidence, will reduce the likelihood that the defendant can establish that the evidence was suppressed for purposes of a *Brady* claim.[7]

We decline to adopt the four-factor *Lester* test, as we believe it is not doctrinally supported and undermines the purpose of *Brady*. We hold that the controlling test is that articulated by the Supreme Court in *Strickler*, no less and no more: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material.

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[6] *Banks v Dretke*, 540 US 668, 695-696; 124 S Ct 1256; 157 L Ed 2d 1166 (2004) (citations omitted). In reliance on this language, the Sixth Circuit recently "decline[d] to adopt the due diligence rule that the government proposes based on earlier, erroneous cases." *United States v Tavera*, 719 F 3d 705, 712 (CA 6, 2013).

[7] Failures on the part of defense counsel to make use of known and available evidence can instead be evaluated under the Sixth Amendment's guarantee of effective assistance of counsel. To be sure, there is a relationship between *Brady* claims and ineffective assistance of counsel claims: when the government complies with its obligation to provide favorable and material evidence, it becomes the defendant's burden to then make use of that evidence. If defense counsel's failure to make use of the evidence is not strategic and prejudice results, the defendant will surely bring an ineffective assistance of counsel claim.

B. APPLICATION OF *BRADY* TO THIS CASE

We now apply the controlling *Brady* test to the defendant's claim. As an initial matter, we note that the prosecution has conceded that the evidence in question was suppressed.[8] That leaves two questions: whether the suppressed evidence was favorable to the defendant, either as exculpatory or impeaching evidence, and whether it was material.

In contrast to the question of materiality, the favorability of evidence is a simple threshold question that need not delay us long. Only three people witnessed the shooting: Holloway, Chambers, and the defendant. Other than the testimony of Holloway and Chambers, there was no other evidence at trial that identified the defendant as the shooter. Because the

[8] As noted, the defendant's first counsel never received the recorded statements. Additionally, all three assistant prosecutors never received the recorded statements, as evidenced by their affidavits submitted in the trial court. At the second evidentiary hearing, the prosecution stated, "Certainly it was not disclosed — it was not turned over to them and the police had it, so truthfully, my understanding of the case law . . . it really doesn't matter whether it was intentional or inadvertent, the question is if it wasn't disclosed and is it exculpatory, would it affect the trial . . . ." The prosecution also stated specifically that the evidence was suppressed: "Well, I would say prong three [of *Brady*] is satisfied. The prosecutor suppressed — well, we did not give out the evidence but we don't agree it's favorable . . . ." At no point before the trial court or the Court of Appeals did the prosecution argue otherwise. The prosecution argued that the evidence was not suppressed for the first time at oral argument before this Court, and we decline to address this argument. That the *existence* of the videotapes was discovered before the end of trial does not change our view because the prosecution waived the argument that the midtrial disclosure and defense counsel's subsequent actions affected the defendant's ability to show that he was prejudiced for purposes of his *Brady* claim. Although a defense counsel's failure to ask for a continuance may be relevant in a case where defense counsel has actual knowledge of the suppressed evidence midtrial, *see*, e.g., *State v Spivey*, 102 NC App 640, 646; 404 SE2d 23 (1991), we decline to address this issue in light of the prosecution's waiver.

videotaped statements could have impeached Holloway and Chambers as well as undermined the strength of Holloway's identification, the evidence was favorable to the defense.

We are not convinced, however, that the suppressed evidence was material. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 US at 434. We conclude that, even in the absence of the suppressed evidence, the defendant received a trial that resulted in a verdict worthy of confidence, because the cumulative effect of the evidence was not material.

We disagree with the defendant that Wittebort's promises of leniency to both Holloway and Chambers were material. While the detectives assured both witnesses that they would not be investigated or charged for drug crimes, these promises of leniency were not conditioned on any behavior on the part of the witnesses. Indeed, Chambers decided not to make any written statement even after such promises were made, and, likewise, any alleged promises of leniency occurred after Chambers implicated himself in the drug activity. For her part, Holloway also admitted that she lied in her first interview, promises of leniency notwithstanding, and in her second interview, the alleged promises were made *after* she disclosed the drug activity.

We are similarly unconvinced that the evidence would have undermined Holloway's identification of the defendant in a material way. While there were minor discrepancies between the characterization of Holloway's identification as expressed in the disclosed material and at trial as contrasted with her recorded identification, she was able to quickly identify the defendant as the shooter in her

second interview.[9] Although the specific strong language that Wittebort attributed to Holloway as she identified the defendant is not supported by the recording, Holloway did identify the defendant with confidence. Holloway's honest qualifications about her ability to view the shooter do not undermine the overall strength of her identification.

Finally, we disagree with the defendant that the suppressed evidence supports his trial theory that Chambers was the shooter, and that Holloway only identified the defendant as the shooter out of fear of Chambers. Although Holloway was not forthright in her first statement about Chambers's involvement, in her second interview she expressed confidence that Chambers must have been involved. If Holloway were frightened of Chambers to the extent that she would implicate an innocent third party, she would not have engaged in a discussion with the police about Chambers's own culpability. The suppressed evidence did not contain information that leads us to conclude that defense counsel would have asserted the defense that Holloway misidentified the defendant, rather than the cover-up theory that defense counsel pursued at trial. Furthermore, another witness placed the defendant on the side of Harris's car where the shooter indisputably stood.

We therefore conclude that, even in the absence of the suppressed evidence, the defendant received a trial

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[9] Specifically, in her first interview, Holloway was asked if she saw the shooter's face "pretty good." Holloway responded, "Not that good, I could, maybe if I seen him you know I might be able to say it was him." In her second interview, Holloway stated: "[I]f I seen him . . . , I could be like that's that guy, I know it." After picking defendant in the photo array she stated: "This guy right here. This is him right here." Detective Wittebort told her to circle it, and she stated: "I think this is him, out of all these guys that looks the most." After Holloway initialed the photo, she *again* stated: "I know that's him." Moreover, contrary to the defendant's argument, there is nothing unduly suggestive regarding the photo lineup.

that resulted in a verdict worthy of confidence. The defendant's *Brady* claim must fail because the suppressed evidence was not material to his guilt.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant also raises a claim that trial counsel was ineffective for failing to investigate and acquire the video recordings during trial. Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). A trial court's factual findings are reviewed for clear error; questions of law are reviewed de novo. *Id.* We have determined that the defendant cannot establish a *Brady* violation because the suppressed evidence was not, in sum, material. As *Brady* materiality is assessed under the same "reasonable probability" standard that is used to assess prejudice under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 LEd2d 674 (1984),[10] we similarly conclude that the defendant cannot establish prejudice in order to prevail on his ineffective assistance of counsel claim.

V. CONCLUSION

We conclude that *Brady* does not support the adoption of a diligence requirement and we therefore over-

[10] Compare *Bagley*, 473 US at 682 (stating that to establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome"), with *Strickland*, 466 US at 694 (stating that to establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome").

rule *Lester*. In order to establish a *Brady* violation, a defendant need only demonstrate that the government suppressed evidence that is both favorable to the defendant and material. Because the defendant cannot establish that the suppressed evidence in this case was material, he cannot prevail on either his *Brady* claim or his claim of ineffective assistance of counsel. Therefore, we affirm the result reached by the Court of Appeals.

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, ZAHRA, and VIVIANO, JJ., concurred with MCCORMACK, J.

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC

Docket No. 145052. Argued November 7, 2013 (Calendar No. 5). Decided April 15, 2014.

Miller-Davis Company, the general contractor and construction manager for the construction of a natatorium housing an indoor pool at the Sherman Lake YMCA, brought an action in the Kalamazoo Circuit Court against Ahrens Construction, Inc. (a subcontractor), and Merchants Bonding Company (a surety), alleging breach of contract as a result of faulty workmanship when installing the roofing system covering the natatorium. The subcontract had incorporated by reference the project plans and specifications and required Ahrens to indemnify Miller-Davis from and against any liabilities, claims, damages, losses, actions, and expenses arising out of the subcontract. After a moisture problem involving condensation in the natatorium developed, the project architects discovered significant deficiencies in Ahrens's work. Ahrens moved for summary disposition on the basis that the statute of repose for architects, engineers, and contractors, MCL 600.5839(1) barred the action. The court, William G. Schma, J., denied the motion. The Court of Appeals denied Ahrens's interlocutory application for leave to appeal in an unpublished order, entered March 6, 2006 (Docket No. 266936). After Judge Schma retired, the court, Gary C. Giguere, Jr., J., concluded following a bench trial that Ahrens had breached its contract and that the breach caused the moisture problem. The court awarded Miller-Davis damages against Ahrens for the cost of corrective work made necessary by the breach. The court also ruled that Miller-Davis had no cause of action for contractual indemnity because no claims, suits, actions, recoveries, or demands were ever made, brought, or recovered against it within the meaning of the indemnity clause in the parties' contract. Ahrens appealed, and Miller-Davis cross-appealed. The Court of Appeals, JANSEN, P.J., and HOEKSTRA and MARKEY, JJ., reversed and remanded the case for entry of a judgment in favor of Ahrens, holding that MCL 600.5839(1) barred Miller-Davis's claims. 285 Mich App 289 (2009). The Supreme Court granted Miller-Davis's application for leave to appeal. 488 Mich 875 (2010). The Supreme Court reversed and remanded the case to the Court of Appeals for further

proceedings, holding that MCL 600.5839(1), which is both a statute of limitations and a statute of repose applicable in actions against licensed architects, professional engineers, and contractors to recover damages for injuries to persons or property, does not apply to breach of contract actions. Therefore, breach of contract actions against architects, engineers, or contractors are governed by the general statute of limitations for contract actions, MCL 600.5807(8). Because Miller-Davis's complaint alleged that Ahrens had breached the contract by installing a roof that did not conform to the specifications and also sought indemnity for the corrective work that Miller-Davis had to perform, the Supreme Court held that the contract statute of limitations applied and that the Court of Appeals had erred by concluding that MCL 600.5839(1) barred Miller-Davis's contract action. 489 Mich 355 (2011). On remand, the Court of Appeals, JANSEN, P.J., and HOEKSTRA and MARKEY, JJ., affirmed in part, reversed in part, and remanded the case for entry of judgment in favor of Ahrens, concluding that under MCL 600.5827, Miller-Davis's claim had accrued at the time of the wrong on which it was based rather than the time when damage resulted. Because the panel determined that the underlying basis for Miller-Davis's claim was the breach of a contract provision specifying that all work had to comply with the terms and requirements of the plans and specifications, it held that Ahrens's breach occurred on the date of substantial completion, which was beyond the six-year period of limitations for contract actions in MCL 600.5807(8). The panel also stated that the indemnity clauses in the contract did not affect its conclusion because no one had brought a claim or demand against Miller-Davis within the meaning of those clauses. Ahrens therefore had not breached the indemnity provisions, and Miller-Davis could not use the date of the alleged breach of the indemnity clauses as an alternative accrual date for its underlying breach of contract claim because even if Miller-Davis could show that the YMCA had made a claim or demand against it, that demand arose out of the YMCA's contract with Miller-Davis as general contractor, not Miller-Davis's subcontract with Ahrens. Finally, the panel determined that Miller-Davis had failed to provide evidence causally linking Ahrens's nonconforming work to the moisture problem, which the panel considered the basis for Miller-Davis's claim for damages. 296 Mich App 56 (2012). The Supreme Court granted Miller-Davis's application for leave to appeal. 494 Mich 861 (2013).

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

The six-year statute of limitations in MCL 600.5807(8) did not bar Miller-Davis's claim because its breach of contract claim for damages related to Ahrens's failure to indemnify was distinct from its breach of contract claim based on Ahrens's failure to install the roof properly in the first place and therefore necessarily accrued at a later point.

1. An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation. The language of the subcontract between Ahrens as indemnitor and Miller-Davis as indemnitee was clearly intended to apply as broadly as possible. The Court of Appeals erred by determining that the indemnity clauses did not apply because no one had brought a claim or demand against Miller-Davis within the meaning of those clauses. The agreement for corrective work that the YWCA and Miller-Davis entered into indicated that the YMCA had a claim or demand against Miller-Davis that was resolved at the latter's expense. That the YMCA and Miller-Davis resolved their dispute without legal action did not alter Ahrens's obligation to indemnify Miller-Davis for the corrective work it was required to undertake in light of Ahrens's default. Accordingly, the indemnity clauses applied to Miller-Davis's corrective work.

2. Causation of damages is an essential element of any breach of contract action, including an action for indemnity. A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) that the other party breached (3) thereby resulting in damages to the party claiming the breach. The Court of Appeals misconstrued the relevant causation inquiry. Miller-Davis incurred costs undertaking the corrective work that Ahrens refused to perform. To the extent that Ahrens was obligated to indemnify Miller-Davis for the costs of the corrective work, its breach of that obligation caused Miller-Davis's claimed damages. Whether Ahrens's nonconforming work caused the moisture problem was not relevant to the analysis. Ahrens was obligated to install the roof system in accordance with the plans and specifications and correct any nonconforming installation, regardless of whether its nonconforming work caused the problem. Ahrens's refusal to correct its nonconforming work was a but-for cause of the agreement for corrective work, which passed the liability for that work on to Miller-Davis. Miller-Davis's duty to undertake the corrective-work obligation shirked by Ahrens resulted in the out-of-pocket expenses that Miller-Davis sustained in the course of reinstalling the roof. Because Miller-Davis presented sufficient evidence to estab-

lish that Ahrens's breach of the indemnity clauses caused those losses, it was entitled to damages in the amount of its losses.

3. The six-year limitations period of MCL 600.5807(8) begins to run when the promisor fails to perform under the contract. A specific action for indemnification against losses accrues when the indemnitee has sustained the loss. The Court of Appeals incorrectly held that the wrong that provided the basis for Miller-Davis's complaint must have occurred on or before Ahrens completed its portion of the overall construction project. This analysis failed to recognize that Ahrens breached the contract twice: initially when it failed to install the roof system in accordance with the plans and specifications and again later when it refused to indemnify Miller-Davis for the corrective work required to remedy its nonconforming installation. While both claims were based on terms in the same agreement, nothing in MCL 600.5807 or contract-law principles compelled the conclusion that the claims must therefore share a common point of accrual. Rather, the date of accrual for the breach of an indemnified promise does not serve as the date of accrual for an indemnity action. Those separate breaches have logically distinct points of accrual. The cause of action for the first breach accrued when Miller-Davis made its last payment to Ahrens under the subcontract, more than six years before Miller-Davis brought suit, and was therefore barred by MCL 600.5807(8). Ahrens's breach of the indemnity provision provided an independent basis for Miller-Davis's instant indemnification claim. That breach necessarily occurred after Ahrens's breach of the underlying promise to conform its work to the subcontract's specifications because no demand or claim on Miller-Davis could trigger Ahrens's obligation to indemnify until after Ahrens had breached its promise to install the roof system according to the specifications. Miller-Davis filed its complaint well within the six-year period of limitations, and MCL 600.5807(8) did not bar its indemnification claim.

Court of Appeals' judgment reversed in part with respect to discussion of indemnity claim, and case remanded to circuit court for entry of judgment in favor of Miller-Davis and determination of entitlement to attorney's fees under the indemnification clauses.

LIMITATION OF ACTIONS — BREACHES OF CONTRACT — INDEMNITY ACTIONS — ACCRUAL.

The six-year limitations period of MCL 600.5807(8) for contract actions begins to run when the promisor fails to perform under the contract; an action for indemnification against losses accrues when the indemnitee has sustained the loss; a contract that

> contains indemnification provisions may be breached when the promisor fails to perform under the contract and again when it refuses to indemnify the promisee for damages caused by remedying the breach; the accrual date under MCL 600.5827 for the breach of an indemnified promise does not serve as the date of accrual for an indemnity action; the breach of the indemnity provision provides an independent basis for an indemnification claim because that breach necessarily occurs after the breach of the underlying promise.

Gemrich Law PLC (by *Alfred J. Gemrich*) and *Scott Graham PLLC* (by *Scott Graham*) for Miller-Davis Company.

Field & Field, PC (by *Samuel T. Field*), for Ahrens Construction, Inc.

KELLY, J. After nearly a decade of litigation and alternative dispute resolution proceedings, the indemnification contract underlying the troubled natatorium roof in this case again wends its way to this Court. We previously held that the six-year period of limitations of MCL 600.5807(8) applies to the parties' indemnification contract. We now hold that the indemnity clauses in the parties' subcontract apply here, because the plain language of the indemnification clauses extends to Ahrens's failure to undertake corrective work as obligated by the subcontract. We further hold that Sherman Lake YMCA made a "claim" upon Miller-Davis which triggered Ahrens's liability under the indemnity clauses. Ahrens's failure to indemnify therefore caused the damages Miller-Davis sustained in undertaking the corrective work itself. Finally, we hold that Miller-Davis's claim was not barred by the six-year statute of limitations found in MCL 600.5807(8). Rather, Miller-Davis's breach of contract claim for Ahrens's failure to indemnify is distinct from its breach of contract claim based on Ahrens's failure to install the roof according to

specifications, and Miller-Davis's indemnity action necessarily accrued at a later point. We therefore reverse that portion of the Court of Appeals' opinion discussing Miller-Davis's indemnity claim, and remand this case to the Kalamazoo Circuit Court for entry of judgment in Miller-Davis's favor and to determine whether Miller-Davis is entitled to attorney's fees under the relevant indemnification clauses.

I. FACTS AND PROCEDURAL HISTORY

Miller-Davis Company was an "at risk" contractor[1] for the Sherman Lake YMCA's natatorium project.[2] Miller-Davis hired defendant Ahrens Construction, Inc., as a subcontractor to install similar roof systems on three rooms, including the natatorium. The contract incorporated by reference the applicable project plans and specifications, the American Institute of Architects General Conditions (AIA A201), the project manual, and a written guarantee of Ahrens's work.[3] AIA A201 required the subcontractor to "assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assume[d] toward the Owner and Architect."[4] It further obligated Ahrens to "bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary

[1] Miller-Davis was contractually obligated to the owner, Sherman Lake YMCA, to fulfill the obligations of all subcontractors in the event of a subcontractor default.

[2] Sherman Lake YMCA is not a party to this action.

[3] We disagree with the Court of Appeals that the record was unclear whether AIA A201 was part of the subcontract, or that Miller-Davis waived any arguments regarding AIA A201. The parties expressly stipulated at trial that AIA A201 was incorporated by reference and made part of their subcontract.

[4] AIA A201 5.3.

thereby,"[5] and to correct at its expense any work "found to be not in accordance with the Contract Documents" within one year of Substantial Completion.[6] Ahrens agreed to install all products in accordance with the manufacturer's instructions and the requirements of the plans and specifications. Ahrens further agreed to indemnify Miller-Davis from and against any liabilities, claims, damages, losses, actions, and expenses arising out of the subcontract.

Ahrens substantially completed the work on June 11, 1999, at which point its Written Guarantee commenced. The Guarantee provides in relevant part:

> [Ahrens] hereby agree[s] that all work furnished to the project is guaranteed against deficiencies and defects in materials and/or workmanship for a period of one (1) year, as described in the Contract Documents.
>
> * * *
>
> We agree to satisfy such obligations, which appear within the guarantee period without cost to the Owner.
>
> * * *
>
> Nothing contained in this agreement shall be construed to establish a period of limitation with respect to any other obligation we may have under the Contract Documents or to alter any longer period of time as may be prescribed by law of the Contract Documents.

A certificate of substantial completion issued on June 25, 1999. During the winter season of 1999-2000, Sherman Lake YMCA experienced excessive condensation in the natatorium, which it termed the "natatorium moisture problem" (NMP). As a result of the accumulated conden-

[5] AIA A201 12.2.1.

[6] AIA A201 12.2.2.

sation, it sometimes appeared to be raining within the natatorium. Miller-Davis notified Ahrens of the NMP on January 28, 2000, and Ahrens returned to the project to undertake remedial work not contemplated in the original design. Ahrens received its final payment on February 17, 2000, but the NMP persisted.

In February 2003, the project architects opened the roof and discovered significant deficiencies with Ahrens's installation of the roof system, namely inch-wide gaps between the Styrofoam blocks and sub-T supports, and many gaps and tears in the vapor barrier. The architects determined that the installation was not in substantial compliance with the contract, and directed reinstallation of the roof system using salvageable materials to the extent possible. The corrective work contained three elements not contained in the original design: Procor, a waterproofing agent; expanding foam insulation; and butyl caulk sealant.

By letter dated April 2, 2003, Miller-Davis notified Ahrens that the roof system was not installed in accordance with the manufacturer's requirements and the subcontract guidelines. Miller-Davis's May 5, 2003 letter to Merchants Bonding Company, Ahrens's surety, explicitly declared Ahrens in default and requested a conference within fifteen days. The parties met on June 27, 2003, and Ahrens agreed to review the corrective work plans and provide a plan for performance within a week. Neither Ahrens nor its bonding company provided such a plan. On July 15, 2003, Miller-Davis gave Ahrens notice of default, terminated Ahrens's right to perform the contract, and demanded the bonding company perform under the bond. In that letter, plaintiff noted that Sherman Lake YMCA was "considering declaring a Contractor Default . . . ." The bonding company notified Miller-Davis that Ahrens had waived the surety's right to perform under the bond.

Miller-Davis and Sherman Lake YMCA entered into an Agreement for Corrective Work on August 27, 2003. Pursuant to the agreement and at the direction of the architects, Miller-Davis installed Procor, expanding foam insulation, and butyl caulk. On December 8, 2003, an independent contractor certified that Miller-Davis had completed the corrective work. Sherman Lake YMCA has not since experienced the NMP.

Miller-Davis filed suit in the Kalamazoo Circuit Court against Ahrens and its bonding company in May 2005, alleging breach of contract and seeking indemnification and bond collection.[7] Following a bench trial, the circuit court found that Ahrens's work was deficient and that it caused the NMP. The court rejected Ahrens's assertion that it had ceased involvement with the project before July 2003, noting that the parties had engaged in a series of meetings regarding corrective work from March to July 2003. Although the court found that "no claims, suits, actions, recoveries, or demands were ever made or recovered" by Sherman Lake YMCA against Miller-Davis, it found that Miller-Davis had nonetheless suffered damages as a result of Ahrens's deficient work and awarded Miller-Davis damages of $348,851.50.

On appeal, Ahrens argued that the circuit court erred by not granting summary disposition in its favor based on the contractor's statute of repose, MCL 600.5839(1).[8]

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[7] Merchants Bonding Company's liability is no longer at issue in this case. See *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 370 n 36; 802 NW2d 32 (2011). As a result, "defendant" refers only to Ahrens.

[8] MCL 600.5839(1) provides:

> A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state

The Court of Appeals agreed.[9] We reversed, holding that the general statute of limitations for contract actions set forth in MCL 600.5807(8)[10] applies to this case rather than the contractor's statute of repose, which applies only to tort actions against a contractor.[11] We remanded to the Court of Appeals for application of the proper statute of limitations and for consideration of any remaining issues.[12]

On remand, the Court of Appeals explained that MCL 600.5827 provided that Miller-Davis's claim ac-

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licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods:

(a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

(b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

[9] *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 292; 777 NW2d 437 (2009).

[10] MCL 600.5807 provides:

No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

* * *

(8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

[11] *Miller-Davis*, 489 Mich at 363-364.

[12] *Id.* at 371-372.

crued at the time of the wrong upon which it was based rather than the time when damage resulted.[13] According to that distinction, the Court of Appeals determined that "the underlying basis for [Miller-Davis's] claim is that defendant breached a contract provision providing that '[a]ll . . . work furnished on this order shall comply with the terms and requirements of the plans and specifications . . . .' "[14] As a result, it held that Ahrens's breach occurred upon the date of substantial completion, which was beyond the six-year statute of limitations for breach of contract actions supplied by MCL 600.5807(8).

The Court of Appeals also held that the indemnity clauses did not affect its conclusion, explaining that "no one had brought a claim or demand against plaintiff within the meaning of the indemnification clause."[15] The Court of Appeals found that "defendant did not breach [the indemnity] provision[s] of the contract," and Miller-Davis could not use the date of defendant's alleged breach of the indemnity clause as an "alternative accrual date" for its underlying breach of contract claim.[16] The Court of Appeals also concluded that even if Miller-Davis could show that Sherman Lake YMCA made a claim or demand against plaintiff, such a demand "arose out of the owner's contract with plain-

[13] MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

[14] *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 61; 817 NW2d 609 (2012).

[15] *Id.* at 69.

[16] *Id.* at 70.

tiff, not plaintiff's subcontract with defendant."[17] Finally, the Court of Appeals determined that Miller-Davis had failed to provide evidence causally linking Ahrens's nonconforming work to the NMP, which it considered to be the basis for Miller-Davis's claim for damages.[18]

We again granted Miller-Davis's application for leave to appeal, requesting that the parties brief:

> (1) whether the indemnification clause in the plaintiff's contract with defendant Ahrens applies to this case; (2) if so, whether the plaintiff's action for breach of that provision was barred by the statute of limitations, MCL 600.5807(8); and (3) whether the plaintiff adequately proved that any breach of the indemnification clause caused its damages, including the issue whether the trial court clearly erred in concluding that defendant Ahrens' performance of nonconforming work caused the natatorium moisture problem.[19]

II. STANDARD OF REVIEW

Resolution of this case requires interpretation of MCL 600.5807(8). We review this question of law de novo.[20] The proper interpretation of a contract is also a question of law that we review de novo.[21] We review a trial court's findings of fact for clear error, giving particular deference to the trial court's superior position to determine witness credibility.[22] A factual finding is clearly erroneous if there is no substantial evidence to

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[17] *Id*.

[18] *Id*. at 71-72.

[19] *Miller-Davis Co v Ahrens Constr, Inc*, 494 Mich 861; 831 NW2d 234 (2013).

[20] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[21] *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

[22] *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999).

sustain it[23] or if, although there is some evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.[24]

III. ANALYSIS AND APPLICATION

To determine whether Miller-Davis has an actionable claim for indemnification, we will first consider the language of the indemnity clauses, ascertaining whether they apply to the facts of this case. If these clauses apply, we must then consider whether Miller-Davis has shown that Ahrens's failure to conduct corrective work caused Miller-Davis's damages. Finally, we determine whether Miller-Davis sustained any such damages within the six-year limitations period for breach of contract actions found in MCL 600.5807(8).

A. INDEMNIFICATION

An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation.[25] In the construction context, indemnity clauses between general contractors (indemnitees) and subcontractors (indemnitors) are common, with general contractors and subcontractors ultimately liable to the project owner. Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses. The only legal restriction upon indemnity in the subcontractor context is the prohibition on indemnification against the "sole negligence" of the contractor, which is not at issue here.[26]

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[23] *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990).

[24] *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

[25] 41 Am Jur 2d, Indemnity, § 4, p 417.

[26] MCL 691.991.

As with any other contract, our primary task in construing a contract for indemnification is to give effect to the parties' intention at the time they entered into the contract.[27] We determine the parties' intent by examining the language of the contract according to its plain and ordinary meaning.[28] In doing so, we avoid an interpretation that would render any portion of the contract nugatory.[29] We assess the threshold question whether a contract's indemnity clause applies to a set of facts by a "straightforward analysis of the facts and the contract terms."[30]

Where parties have expressly contracted for indemnification, "the extent of the duty must be determined from the language of the contract."[31] To this end, the indemnity clauses in the parties' subcontract are critical in applying general indemnification principles to the facts of this case. The subcontract provides in relevant part:

> You [Ahrens] as Subcontractor/Supplier agree to *defend, hold harmless and indemnify* Miller-Davis Company . . . from and against *all* claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses including attorney's fees, interest, sanctions, and court costs which are made, brought, *or recovered* against Miller-Davis Company, by reasons of or resulting from, but not limited to, any injury, damage, loss, or occurrence arising out of or resulting from the performance or execution of this Purchase Order and caused, in whole or in part, by any act, omission, fault, negligence, or breach of the

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[27] *Smith Trust*, 480 Mich at 24.

[28] *Id.*

[29] *Lukazewski v Sovereign Camp, WOW*, 270 Mich 415, 420; 259 NW 307 (1935).

[30] *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 356-357; 686 NW2d 756 (2004).

[31] *Id.* at 353.

> conditions of this Purchase Order by the Subcontractor/Supplier, its agents, employees, and subcontractors regardless of whether or not caused in whole or in part by any act, omission, fault, breach of contract, or negligence of Miller-Davis Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify Miller-Davis Company for any damage or injuries caused by or resulting from the sole negligence of Miller-Davis Company.[32]

The plain language of this clause is inclusive.[33] The clause uses the terms "all" or "any," which provide for the broadest possible obligation to indemnify.[34]

The language used by the parties in contracting for indemnity is unambiguous and clearly intended to apply as broadly as possible. Nevertheless, the Court of Appeals determined that the indemnity clauses were inapplicable because "no one had brought a claim or demand against plaintiff within the meaning of the indemnification clause."[35] While the indemnity clauses specifically mention a "claim," they also trigger liability more broadly, when "damages, losses, demands," or "expenses," result from "any act, omission, fault, negligence, or breach . . . ." Furthermore, the definition of "claim" itself is broad. *Black's Law Dictionary* defines a claim as the "aggregate of operative facts giving rise to

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[32] Emphasis added.

[33] Indeed, another clause provides:

> You [Ahrens] agree to defend and save harmless and to indemnify MILLER-DAVIS COMPANY from *any and all* liens or claims *arising out of* the performance or fulfillment of this order and to furnish such guarantees as may be required, as to workmanship and materials. (Emphasis added.)

[34] *Pritts v J I Case Co*, 108 Mich App 22, 30; 310 NW2d 261 (1981) ("[T]here cannot be any broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions.") (citations and quotation marks omitted).

[35] *Miller-Davis (On Remand)*, 296 Mich App at 69.

a right *enforceable* by a court," and "any *right* to payment or to an equitable remedy . . . ."[36] Moreover, AIA A201, § 4.3.1, incorporated into the subcontract, defines a claim as "a demand or assertion by one of the parties seeking, as a matter of right, . . . relief with respect to the terms of the Contract," as well as "other disputes and matters in question . . . arising out of or relating to the Contract." It further requires any claims to be made in writing.

To determine whether Sherman Lake YMCA made a written claim or demand against Miller-Davis, we look to the Agreement for Corrective Work they entered into. That agreement specified that Miller-Davis "acknowledges it has responsibility to correct work or replace materials that are not in compliance with the contract documents" and that "subcontractor Ahrens did not install one or more components of the Roof System in accordance with the Owner-Contractor contract documents." The purpose of the agreement was to "avoid differences or any dispute that may be time consuming, financially expensive and/or not in the best interest of any of [the parties] or the users of the Project," and it goes on to outline "the rights and obligations" of the parties. "Nothing herein," it continues, "shall . . . release any rights of claim the Owner, and/or the Contractor may now have or hereafter acquire against any third person regarding responsibility for the NMP . . . ." The agreement termed this course of action a "compromise, settlement and accord . . . to effect a settlement of contested claims."

A straightforward reading of the Agreement for Corrective Work confirms that Sherman Lake YMCA possessed a claim or demand against Miller-Davis that was resolved—at Miller-Davis's expense—by this settle-

[36] *Black's Law Dictionary* (9th ed), pp 281-282 (emphasis added).

ment between them. That Sherman Lake YMCA and Miller-Davis succeeded in resolving their dispute without resort to legal action does not alter Ahrens's obligation to indemnify Miller-Davis for the corrective work it was required to undertake in light of Ahrens's default. The indemnity provisions do not require Sherman Lake YMCA to prove liability or initiate a lawsuit or arbitration proceeding against Miller-Davis for Miller-Davis to seek indemnification from Ahrens for the corrective work it performed under the Agreement, nor do we see any question regarding the reasonableness of that agreed-upon work or Miller-Davis's liability to Sherman Lake YMCA for it.[37] As a result, we hold that the indemnity clauses of the subcontract apply to Miller-Davis's corrective work.[38]

B. CAUSATION

We turn next to the Court of Appeals' conclusion that Miller-Davis is not entitled to indemnification because it has failed to sufficiently demonstrate that Ahrens's nonconforming work caused the NMP.[39] As the Court of

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[37] See *Grand Trunk*, 262 Mich App at 354-355.

[38] Miller-Davis argues that it is entitled to attorney fees under the indemnification clauses. Because the trial court and the Court of Appeals determined that Miller-Davis did not establish a breach of the indemnification clauses, they did not consider whether Miller-Davis was entitled to attorney fees under the clauses. We decline to address this argument in the first instance and make no determination whether Miller-Davis is entitled to attorney fees under the relevant indemnification clauses. Instead, we remand to the trial court for further consideration of this issue.

[39] *Miller-Davis (On Remand)*, 296 Mich App at 71-72 ("The specific weakness in plaintiff's case is the lack of evidence to causally link defendant's alleged nonconforming workmanship to the moisture problem, which is the basis for plaintiff's claim for damages in the form of expenses to correct the cold-weather condensation problem in the YMCA's natatorium.").

Appeals recognized, causation of damages is an essential element of any breach of contract action, including an action for indemnity.[40] A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.[41]

The Court of Appeals, however, misconstrued the relevant causation inquiry. There is no dispute that Miller-Davis incurred costs in undertaking the corrective work that Ahrens refused to perform, and that Miller-Davis has claimed those costs as damages. Therefore, to the extent that Ahrens was obligated to indemnify Miller-Davis for the costs of the corrective work, its breach of that obligation caused Miller-Davis's claimed damages. Whether Ahrens's nonconforming work caused the NMP is not relevant to this analysis.

Nor do the terms of the subcontract require Miller-Davis to show that Ahrens caused the NMP. Under the subcontract, Ahrens is obligated to indemnify Miller-Davis for, among other things, all claims and demands made or brought against Miller-Davis "by reasons of or resulting from, but not limited to, any injury, damage, loss, or occurrence arising out of or resulting from the performance of execution of [the subcontract] and caused, in whole or in part, by any act, omission, fault, negligence, or breach of the conditions of this [subcontract] by" Ahrens. At no point did Sherman Lake YMCA demand, or Miller-Davis guarantee, to correct the NMP. Indeed, the Agreement for Corrective Work made clear that Miller-Davis did not concede that Ahrens's work

[40] *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 69; 761 NW2d 832 (2008).

[41] *Stevenson v Brotherhoods Mut Benefit*, 312 Mich 81, 90-91; 19 NW2d 494 (1945).

caused the NMP: "The Contractor does not acknowledge that its or any subcontractor's non-conforming work or materials were or are a contributing or the sole cause of the NMP." Rather, Miller-Davis acknowledged only that it "has the responsibility for construction of the Project in accordance with the Owner-Contractor contract documents" under the Agreement for Corrective work, never promising to resolve the NMP. Correspondingly, Miller-Davis maintained at trial and throughout its communication with Ahrens that it does not know whether Ahrens's workmanship caused the NMP.

Ahrens, for its part, was obligated to install the roof system in accordance with the plans and specifications and to correct any nonconforming installation, regardless of whether its nonconforming work caused the NMP.[42] Accordingly, as the terms of the subcontract and the Agreement for Corrective Work make clear, Miller-Davis was only obligated, in light of Ahrens's default, to correct Ahrens's nonconforming work; whether such correction resolved the NMP is separate from the question whether Ahrens's nonconforming work caused Miller-Davis damages for which it could seek indemnification.

Miller-Davis has shown that Ahrens's failure to undertake corrective work caused those damages by way of Sherman Lake YMCA's demand that Miller-Davis itself correct the work.[43] Ahrens's refusal to correct its nonconforming work was a "but for" cause of the Agreement for Corrective Work, which passed liability for that work on to Miller-Davis. Miller-Davis's duty to undertake the corrective-work obligation shirked by Ahrens resulted in the out-of-pocket expenses—

[42] AIA A201, § 12.2.1-2.

[43] See Part III(A) of this opinion.

"damages" or "losses"—sustained by Miller-Davis in the course of reinstalling the roof. Because Miller-Davis presented sufficient evidence to establish that Ahrens's breach of the indemnity clauses caused its losses in correcting Ahrens's work, Miller-Davis is entitled to damages in the amount of its losses.[44] We therefore reverse the Court of Appeals' contrary conclusion.

C. STATUTE OF LIMITATIONS

Nevertheless, Ahrens also asserts that Miller-Davis brought its breach of contract action beyond the relevant limitations period. MCL 600.5807(8) provides that "[n]o person may bring or maintain an action to recover damages or sums due for breach of contract . . . unless, after the claim first accrued . . . , he commences the action within . . . 6 years . . . ."[45] The six-year limitation of MCL 600.5807(8) begins to run "when the promisor fails to perform under the contract."[46] A specific action for indemnification against losses accrues "when the indemnitee [has] sustained the loss."[47]

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[44] Ahrens stresses that the corrective work performed by Miller-Davis went beyond that specifically required by the original plans and specifications. We see no clear error, however, in the circuit court's conclusion that these additional measures were necessary to mitigate the expense of correcting Ahrens's nonconforming work. Likewise, even though the inquiry has no bearing here, we see no clear error in the circuit court's determination that Ahrens's nonconforming work caused the NMP; contrary to the Court of Appeals' suggestion, this determination was not based simply on "an inference drawn from the fact that after the corrective work the problem was not present," but rather was supported by dozens of exhibits and the testimony of numerous witnesses.

[45] MCL 600.5807(8).

[46] *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995).

[47] *Ins Co of North America v Southeastern Electric Co Inc*, 405 Mich 554, 557; 275 NW2d 255 (1979).

The Court of Appeals examined the subcontract to determine the wrong on which Miller-Davis's claims were based, explaining that the "underlying basis" for its claims was Ahrens's breach of the contract provision that " '[a]ll materials and/or work furnished on this order shall comply with the terms and the requirements of the plans and specifications . . . .' "[48] As a result, the Court of Appeals held that the wrong that provided the basis for Miller-Davis's complaint "must have occurred on or before defendant completed its portion of the overall construction project."[49] This analysis fails to recognize that Ahrens *twice* breached the contract: first, when it failed to install the roof system in accordance with the relevant plans and specifications, and then later when it refused to indemnify Miller-Davis for the corrective work required to remedy its nonconforming installation.

While these contract claims were both based on terms within the same agreement, nothing in MCL 600.5807 or our contract-law principles compels the conclusion that the claims must therefore share a common point of accrual. Rather, the date of accrual for the breach of an indemnified promise does not serve as the date of accrual for an indemnity action. These separate breaches have logically distinct points of accrual.[50]

Ahrens first failed to perform under the contract when it installed a roof that did not conform to plan specifications. The cause of action for *this* breach accrued by April 1999, when Miller-Davis made its last payment to Ahrens under the subcontract. This oc-

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[48] *Miller-Davis (On Remand)*, 296 Mich App at 60-61.

[49] *Id.* at 61, citing *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991).

[50] *Ins Co of North America*, 405 Mich at 557.

curred more than six years before Miller-Davis brought suit in May 2005. As a result, Miller-Davis's cause of action for breach of Ahrens's promise to install a roof conforming to plan specifications is barred by MCL 600.5807(8).

However, Ahrens's breach of the indemnity provision provides an independent basis for Miller-Davis's current indemnification claim. This breach necessarily occurred *after* Ahrens's breach of the underlying promise to conform its work to the subcontract's specifications. This is because no demand or claim upon Miller-Davis could trigger Ahrens's obligation to indemnify until *after* Ahrens had breached its promise to install the roof system according to the specifications. Miller-Davis offers three potential points of first accrual for this claim: February 26, 2003 (when Miller-Davis conducted a partial tear-off of the roof and discovered the nonconforming work); August 27, 2003 (when Miller-Davis settled Sherman Lake YMCA's claims via the Agreement for Corrective Work); and December 8, 2003 (when an independent engineering firm certified that Miller-Davis had corrected Ahrens's defective work). We need not decide which of these dates marks the accrual of Miller-Davis's cause of action for indemnity because we agree the claim did not accrue before February 2003 and Miller-Davis's May 2005 complaint was therefore well within the six-year period of limitations. Accordingly, we hold that Miller-Davis's indemnification claim was not barred by MCL 600.5807(8).

IV. CONCLUSION

The Court of Appeals erred by concluding that the indemnity clauses in the parties' subcontract were inapplicable because no third party made a claim or demand upon Miller-Davis. Rather, Miller-Davis en-

tered into the Agreement for Corrective Work with Sherman Lake YMCA that clearly established Sherman Lake YMCA's claim against Miller-Davis that Ahrens's installation of the natatorium did not conform to the subcontract's specifications. Miller-Davis's indemnity claim for Ahrens's failure to undertake corrective work is logically distinct from its breach of contract claim for Ahrens's faulty installation of the roof system, and necessarily accrued at a later point. As such, the Court of Appeals further erred to the extent it held that Miller-Davis's indemnity claim was barred by MCL 600.5807(8) because it accrued on the date of substantial completion.

Because Sherman Lake YMCA made a claim or demand upon Miller-Davis for corrective work which Ahrens was obligated to perform, and Ahrens refused to indemnify Miller-Davis for undertaking that work, Miller-Davis has established that Ahrens caused its damages. We therefore reverse that portion of the Court of Appeals' opinion discussing Miller-Davis's indemnity claim, and remand this case to the Kalamazoo Circuit Court for entry of judgment in Miller-Davis's favor and to determine whether Miller-Davis is entitled to attorney's fees under the relevant indemnification clauses.

YOUNG, C.J., and CAVANAGH, MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with KELLY, J.

In re COH

Docket No. 147515. Argued December 10, 2013 (Calendar No. 2). Decided April 22, 2014.

The Department of Human Services (DHS) petitioned the Muskegon Circuit Court, Family Division, to terminate the parental rights of the mother and two fathers of the minor children COH, ERH, JRG, and KBH, who had been removed from the mother's home and placed in foster care. At the dispositional hearing, Lori Scribner, the biological grandmother of three of the children, submitted a letter expressing interest in becoming all four children's guardian if they were not returned to their mother. The court concluded that terminating the mother's rights was not in the children's best interests, although it granted the petition with respect to the fathers. The following year, the DHS again petitioned to terminate the mother's parental rights. The mother pleaded no contest to the allegations in the petition, and Scribner moved to be appointed the children's guardian under MCL 712A.19c and MCR 3.979. The court, William C. Marietti, J., denied Scribner's motion after considering the best-interest factors from the Child Custody Act, MCL 722.21 *et seq*., and admitted the children to the Michigan Children's Institute (MCI) under MCL 400.203. Scribner requested consent from the MCI superintendent to adopt the children, but the superintendent denied it, and the trial court denied Scribner's motion to reverse the denial. Scribner appealed both this decision and the order denying her petition for guardianship. After consolidating the appeals, the Court of Appeals, TALBOT, P.J., and MARKEY and RIORDAN, JJ., reversed the order denying Scribner's petition for guardianship in an unpublished opinion per curiam issued June 25, 2013 (Docket Nos. 309161 and 312691) and remanded for the entry of an order appointing Scribner guardian. The Supreme Court granted the DHS's application for leave to appeal. 495 Mich 870 (2013).

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

The preference created in MCL 722.954a for a child who has been removed from the parental home to be placed with relatives applies when the DHS is making its initial placement decision, but

it does not apply to a court's decision regarding whether to appoint a guardian for the child under MCL 712A.19c(2). In deciding whether to appoint a guardian under MCL 712A.19c(2), a court must determine whether the guardianship is in the child's best interests. In so doing, the court has the discretion to consider the best-interest factors from the Child Custody Act, MCL 722.23; the Adoption Code, MCL 710.22(g); or any other factors that may be relevant under the circumstances of a particular case.

1. The Court of Appeals erred by holding that the preference set forth in MCL 722.954a for placing a child with relatives after the initial removal from a parent's custody applies to a court's decision under MCL 712A.19c whether to appoint a guardian for a child whose parents' rights have been terminated. MCL 722.954a applies from the moment a child is removed from his or her parents' care and throughout the review process, but there is no indication in the statutory language that the Legislature intended this preference to apply beyond the time frame identified within MCL 722.954a. Similarly, MCL 712A.19c expressly applies only to instances in which a child remains in placement following the termination of parental rights, which occurs after the DHS makes the initial placement decision regulated by MCL 722.954a. Moreover, MCL 712A.19c(14) expressly provides that MCL 712A.19c, which includes the court's authority to appoint a guardian under MCL 712A.19c(2), applies only to cases in which parental rights to the child were terminated, and MCL 712A.19a(7)(c) establishes a separate process for appointing a guardian before parental rights have been terminated. The fact that MCL 712A.19c(2) refers neither to MCL 722.954a nor to "relatives" bolsters the conclusion that the preference for placement with relatives created in MCL 722.954a does not apply outside the period for determining a child's initial placement immediately after removal.

2. MCL 712A.19c(2) provides that at a review hearing for a child who remains in placement after parental rights were terminated, the trial court may appoint a guardian if it determines that doing so is in the child's best interests. Because MCL 712A.19c(2) does not direct a court to apply certain factors or otherwise limit a court's method for determining the child's best interests, a trial court has discretion to determine the best method for analyzing the child's best interests by considering the circumstances relevant to the particular case. While the Adoption Code factors set forth in MCL 710.22(g) provide a useful list of considerations that may be relevant to a guardianship decision, neither the language of MCL 712A.19c(2) nor the similarities between a guardianship and an adoption requires application of the Adoption Code factors

to all guardianship petitions. Depending on the circumstances, a case may more reasonably lend itself to application of the Child Custody Act factors, some combination of the Adoption Code and Child Custody Act factors, or a unique set of factors developed by the trial court for purposes of a particular case.

3. The trial court did not abuse its discretion by applying the best-interest factors from the Child Custody Act rather than those set forth in the Adoption Code to decide Scribner's petition for a guardianship under MCL 712A.19c. The Child Custody Act factors incorporate a comparative analysis, which was a logical method for determining which of the two placement options was in the children's best interests. The court did not clearly err in its factual findings regarding these factors or in its conclusion that a guardianship with Scribner was not in the children's best interests under MCL 712A.19c(2). Because the Court of Appeals erroneously concluded that a preference for placement with relatives existed under MCL 712A.19c(2) and substituted its judgment for the trial court's on questions of fact regarding the children's best interests, the Court of Appeals judgment was reversed and the case remanded to that Court for consideration of Scribner's appeal of the MCI Superintendent's denial of consent to adopt the children.

Court of Appeals judgment reversed; case remanded to that Court for further proceedings.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — PREFERENCE FOR PLACING CHILD WITH RELATIVES — APPOINTMENT OF GUARDIAN.

The preference set forth in MCL 722.954a for placing a child with relatives after the child's initial removal from a parent's custody does not apply to a court's decision under MCL 712A.19c whether to appoint a guardian for a child whose parents' rights have been terminated.

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — APPOINTMENT OF GUARDIAN — BEST INTEREST OF THE CHILD — DETERMINATION.

When determining whether appointing a guardian under MCL 712A.19c(2) is in the best interest of a child who remains in placement after the rights of the child's parents were terminated, a court has discretion to consider the factors set forth in the Adoption Code, MCL 710.22(g); the Child Custody Act, MCL 722.23; or to develop a unique set of factors for that particular case.

Dale J. Hilson, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the Department of Human Services.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *H. Daniel Beaton, Jr.*, Assistant Attorney General, for the Superintendent of the Michigan Children's Institute.

Scott Bassett for Lori Scribner.

Amici Curiae:

Tobin L. Miller for the State Bar of Michigan, Children's Law Section.

Honigman Miller Schwartz and Cohn LLP (by *Beth J. Kerwin*) for the Legal Services Association of Michigan and the Michigan State Planning Body for the Delivery of Legal Services to the Poor.

CAVANAGH, J. This case requires us to consider the interplay between MCL 722.954a and MCL 712A.19c. Specifically, we must determine whether the preference for placement with relatives created by MCL 722.954a is relevant to a court's consideration of a petition to appoint a guardian under MCL 712A.19c(2).

Because we conclude that the two statutes apply at different and distinct stages of child protective proceedings, we hold that there is no preference for placement with relatives as part of a guardianship determination under MCL 712A.19c(2). Accordingly, because the Court of Appeals in this case applied a preference in favor of creating a guardianship with a relative in support of its decision to reverse the trial court, we conclude that the Court of Appeals erred. Therefore, we

reverse the Court of Appeals and remand to that Court to consider issues not previously addressed.

I. FACTS AND PROCEDURAL HISTORY

In February 2008, the Department of Human Services (DHS) removed COH, ERH, JRG, and KBH from their mother's care under MCL 712A.2(b).[1] The children were initially placed in two separate foster homes; however, in October 2008, all of the children were placed in their current foster home, with Holy Cross Children's Services supervising the placement.

At the December 12, 2008, review hearing, the DHS expressed its intent to seek termination of the mother's and both fathers' parental rights, and, in March 2009, the DHS petitioned to terminate all parental rights. A dispositional hearing occurred in June 2009, and the trial court terminated the fathers' parental rights but did not terminate the mother's parental rights. The trial court concluded that grounds existed to terminate the mother's rights, but that termination of her parental rights was not in the children's best interests at that time. One of the exhibits offered during the dispositional hearing was a letter dated June 2, 2009, written to the trial court by appellant Lori Scribner, who is the paternal biological grandmother of COH, ERH, and KBH. Scribner requested that the trial court return the children to the mother and stated that if the children were not returned to their mother, Scribner "would like to petition the court for guardianship and would like information on how to proceed."[2]

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[1] JRG does not have the same biological father as COH, ERH, and KBH.

[2] Holy Cross's foster care worker also testified that Scribner first expressed an interest in a guardianship in May 2009.

In July 2010, the DHS again petitioned to terminate the mother's parental rights. Scribner moved to intervene and to be appointed the children's juvenile guardian under MCL 712A.19c(2) and MCR 3.979. The prosecutor and the mother agreed that the mother would plead no contest to the allegations that she was unable to provide proper care and custody for the children, that it was in the children's best interests to terminate the mother's rights, and, if the plea was accepted, the prosecutor would agree that the children not be committed to the Michigan Children's Institute (MCI) until the trial court ruled on Scribner's guardianship petition. The trial court accepted the mother's plea under these conditions.

On August 26, 2010, the trial court held a guardianship hearing. At the hearing, Scribner testified that she had lived in Florida since 2005. Scribner also testified that she had frequent contact with the children before moving to Florida, that she traveled to Michigan in the summer of 2007 to visit the children, and that she continued to have contact with the children after they were removed from the mother's care in February 2008. However, Scribner testified that, in her opinion, Holy Cross frustrated her efforts to contact the children after the children were placed in their current foster home in October 2008. Regarding her efforts to have the children placed in her home, Scribner testified that she began the process "a few months after" the children were removed from the mother's care. Because Scribner was living in a two-bedroom apartment, she also began looking for a larger home to accommodate the children, but she did not purchase the home until July 2009 and did not move into the home immediately. Scribner also testified that she visited the children in Michigan during the summer of 2010. As part of the guardianship

decision process, the trial court permitted the children to visit Scribner in Florida for Thanksgiving and Christmas in 2010.

A February 2011 evidentiary hearing regarding Scribner's motion for a guardianship included, among other things, testimony from multiple witnesses about the children's visits to Florida and the foster parents' living arrangements and parenting methods, some of which were incompatible with Holy Cross's procedures.[3] Ultimately, the trial court denied Scribner's guardianship petition.

In making the guardianship decision, the trial court applied the best-interest factors from the Child Custody Act, MCL 722.21 *et seq*., and determined that it was in the children's best interests to remain with their foster parents, who had petitioned to adopt the children. Accordingly, the trial court committed the children to the DHS under MCL 400.203 for permanency planning, supervision, and care and placement.

Scribner requested consent from the MCI superintendent to adopt the children, but the superintendent denied the request, finding that adoption by the foster parents was in the children's best interests. Scribner filed a motion with the trial court under MCL 710.45(2), alleging that the superintendent's decision was arbitrary and capricious. The trial court denied the motion.

Scribner appealed by leave granted in the Court of Appeals, which reversed the trial court's denial of Scribner's petition for guardianship. *In re COH, ERH, JRG & KBH, Minors*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2013 (Docket

[3] Testimony established that the foster parents at times required the children to run laps around the house or consume fish oil and Tabasco sauce as punishment. The foster father testified that the foster parents discontinued those discipline methods at Holy Cross's request.

Nos. 309161 and 312691). The Court of Appeals concluded that the trial court "failed to recognize the preference for children to be placed with relatives" and determined that "had the trial court recognized this preference and then given [Scribner] the special preference and consideration that she was due as the children's grandmother, the court would have granted the guardianship petition." Unpub op at 5. The Court of Appeals did not address Scribner's appeal of the denial of consent to adopt, finding the issue moot under its disposition of the case. We granted the DHS's application for leave to appeal. 495 Mich 870 (2013).

II. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). "A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012).

III. ANALYSIS

This case involves the removal of juveniles from the care of their biological parents. As explained in *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009), the overarching goals guiding the juvenile code, MCL 712A.1 *et seq*., are established in MCL 712A.1(3):

> This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.

See, also, MCR 3.902(B).

A. LEGAL BACKGROUND

Child protective proceedings are generally divided into the adjudicative and the dispositional phases. "The adjudicative phase determines whether the . . . court may exercise jurisdiction over the child," *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993), and includes "a preliminary hearing at which the court may authorize a petition for removal of a child from his home, MCL 712A.13a(2)," *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010).

If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child. *In re Brock*, 442 Mich at 108. The dispositional phase includes "review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b." *In re Mason*, 486 Mich at 154. Additionally, MCL 712A.19c establishes the procedures applicable when a child remains in a placement after termination of parental rights.

When a child is removed from a parent's care during the adjudication phase under MCL 712A.2(b), as in this case, "the court shall order the juvenile placed in the most family-like setting available consistent with the juvenile's needs." MCL 712A.13a(12). The "agency," which was the DHS in this case,[4] must complete an initial services plan within 30 days of the child's placement. MCL 712A.13a(10)(a). As part of the initial

[4] "Agency" is defined as

> a public or private organization, institution, or facility that is performing the functions under part D of title IV of the social

services plan, the DHS is required to comply with MCL 722.954a(2), which, at the times relevant to this case, stated:

> *Upon removal*, . . . the supervising agency shall, within 30 days, identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to foster care. [Emphasis added.][5]

The DHS is also required, under former MCL 722.954a(2), to meet the following requirements not more than 90 days after the child's removal:

> (a) Make a placement decision and document in writing the reason for the decision.
>
> (b) Provide written notice of the decision and the reasons for the placement decision to . . . each relative who expresses an interest in caring for the child . . . .

Finally, former MCL 722.954a(3) provides for review of the DHS's decision:

> A person who receives a written decision described in subsection (2) may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child's attorney review the decision to determine if the decision is in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the

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> security act, 42 USC 651 to 669b, or that is responsible under court order or contractual arrangement for a juvenile's care and supervision. [MCL 712A.13a(1)(a).]

[5] The Legislature amended MCL 722.954a, effective December 14, 2010. 2010 PA 265. Because the trial court decided the issues relevant to the children's initial placement before December 14, 2010, we analyze this case under the statutory provisions in effect when the trial court decided the issues and, as a result, the statutory citations in this opinion may not correspond to the amended version of MCL 722.954a.

> date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record.

In this case, Scribner seeks a juvenile guardianship under MCL 712A.19c, which applies during the dispositional phase of child protective proceedings and states in relevant part:

> (1) [I]f a child remains in placement *following the termination of parental rights* to the child, the court shall conduct a review hearing not more than 91 days after the termination of parental rights and no later than every 91 days after that hearing for the first year following termination of parental rights to the child. If a child remains in a placement for more than 1 year following termination of parental rights to the child, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed. . . . At a hearing under this section, the court shall review all of the following:
>
> (a) The appropriateness of the permanency planning goal for the child.
>
> (b) The appropriateness of the child's placement.
>
> (c) The reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner.
>
> (2) [I]f the court determines that it is in the child's best interests, the court may appoint a guardian for the child.
>
> * * *
>
> (14) *This section applies only to a child's case in which parental rights to the child were . . . terminated as the result of a proceeding under section 2(b)* of this chapter . . . . This

> section applies as long as the child is subject to the jurisdiction, control, or supervision of the court or of the Michigan children's institute or other agency. [Emphasis added.]

B. INTERPLAY BETWEEN MCL 722.954a AND MCL 712A.19c

When interpreting statutes, "our primary task . . . is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted). To accomplish that task, we begin by examining the language of the statute itself. *Id.* (citation omitted). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* (citation omitted).

The plain language of MCL 722.954a and MCL 712A.19c establishes that the two statutes apply at different stages of child protective proceedings. Specifically, MCL 722.954a(2) provides that "[u]pon removal" DHS has a duty to "identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs" and that duty must be satisfied "within 30 days" of removal. Accordingly, MCL 722.954a applies from the moment a child is removed from his or her parents' care, i.e., *before* any placement decision is made, and, consequently, the requirements of MCL 722.954a are intended to guide the DHS's initial placement decision.

The preference for placement with relatives is also expressly preserved throughout the review process established in former MCL 722.954a(2) and (3). Specifically, subsection (2)(b) requires the DHS to make an initial placement decision within 90 days of removal and "[p]rovide written notice of the decision and the reasons for the

placement decision to . . . each relative who expresses an interest in caring for the child . . . .” Additionally, subsection (3) permits a relative who receives notice to request an explanation of the decision and potentially obtain a review hearing if the person does not agree with the placement decision. However, the review process is limited to a narrow time period: the request for documentation of the reasons for the placement decision must be made within 5 days of receiving the placement decision, the potential petition for a review hearing must be made within 14 days of the written decision, and the review hearing must be held within 7 days after the petition. MCL 722.954a(3). Thus, there is no indication within the statutory language of MCL 722.954a that the Legislature intended that the preference for placement with relatives exists beyond the time frame identified within MCL 722.954a.

Similarly, the plain language of MCL 712A.19c expressly limits the statute's applicability only to instances in which “a child *remains in placement following the termination of parental rights* . . . .” MCL 712A.19c(1) (emphasis added). Thus, the plain language of MCL 712A.19c establishes that the statute only applies *after* termination of parental rights, which occurs *after* the DHS makes the initial placement decision regulated by MCL 722.954a.

Although when considered in isolation MCL 712A.19c(2) does not expressly state that the court's authority to appoint a guardian under that subsection is limited to the posttermination stage of child protective proceedings, we must consider the subsection's “placement and purpose in the statutory scheme.” *Sun Valley Foods Co*, 460 Mich at 237 (quotation marks and citation omitted). As established, the subsection immediately preceding subsection (2) expressly limits the statute's appli-

cability to the posttermination stage. Moreover, subsection (14) expressly provides that "[t]his section," meaning section 19c, "applies only to a child's case in which parental rights to the child were . . . terminated . . . ." Because the court's authority to appoint a guardian under MCL 712A.19c(2) is part of section 19c, MCL 712A.19c(14) expressly limits its application to the posttermination stage of child protective proceedings.

Additionally, MCL 712A.19a establishes the process for appointing a guardian *before* termination of parental rights. Specifically, MCL 712A.19a(7) provides that

> [i]f the agency demonstrates . . . that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child . . . then the court shall order 1 or more of the following alternative placement plans:
>
> * * *
>
> (c) . . . [i]f the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.

Because the Legislature enacted separate statutes that create distinct processes for appointing a guardian before and after termination of parental rights, we must interpret those statutes in a way that avoids rendering either statute surplusage. *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013). We conclude that the process for appointing a guardian under MCL 712A.19c(2) is only applicable at the posttermination stage of a child protective proceeding.[6]

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[6] The court rules likewise reflect the fact that the statutory scheme creates different processes for appointing a guardianship that apply at different stages of child protective proceedings. Specifically, MCR 3.979(A) states:

Finally, MCL 712A.19c(2) does not refer to MCL 722.954a, nor does it refer to "relatives," which bolsters the conclusion that the preference for placement with relatives created in MCL 722.954a does not apply outside the time period for determining a child's initial placement immediately after removal and, therefore, does not apply to a court's decision to appoint a guardian under MCL 712A.19c(2) after parental rights are terminated. Accordingly, although the Court of Appeals accurately concluded that MCL 722.954a creates a statutory preference for placement with relatives, the plain language of MCL 722.954a limits the applicability of the preference to only the initial stage of the process, i.e., immediately after a child is removed from his or her parents' care and during the statutory review period established in MCL 722.954a(3).[7] Therefore, we agree with the Court of Appeals' conclusion in *In re AEG & LEG*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599),

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> Appointment of Juvenile Guardian; Process. If the court determines *at a posttermination review hearing or a permanency planning hearing* that it is in the child's best interests, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c. [Emphasis added.]

Thus, MCR 3.979(A) recognizes that a court may appoint a guardian at a posttermination review hearing, which is governed by MCL 712A.19c, or at a permanency planning hearing, which is governed by MCL 712A.19a.

[7] As noted, the Legislature amended MCL 722.954a, effective December 14, 2010. 2010 PA 265. We also note that as part of the 2010 amendments, the Legislature added MCL 722.954a(5), which expressly requires the DHS to "give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs" and requires the DHS to do so "[*b*]*efore* determining placement of a child" in the DHS's care. Emphasis added. Accordingly, although we do not expressly apply subsection (5) in this case, we note that our analysis is not inconsistent with this new statutory language, because subsection (5) expressly applies *before* the initial placement decision is made.

that the plain language of MCL 722.954a "indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding," but that there "is no indication that [MCL 722.954a] was intended to apply to . . . decisions after termination," which includes a court's decision regarding a guardianship petition under MCL 712A.19c(2).

C. INTERPRETATION OF MCL 712A.19c

Having established that MCL 712A.19c applies *after* termination of parental rights and does not include a preference for creating a guardianship with a relative, we must now determine what a trial court must do to satisfy MCL 712A.19c(2). The plain language of the statute simply provides that the trial court may appoint a guardian "if the court determines that [a guardianship] is in the child's best interests[.]" MCL 712A.19c(2).

As previously discussed, the trial court applied the best-interest factors from the Child Custody Act, MCL 722.23;[8] however, Scribner argues, and the Court of

[8] MCL 722.23 states:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

Appeals agreed, that the best-interest factors in the Adoption Code, MCL 710.22(g),[9] should apply to a

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

[9] MCL 710.22(g) states:

"Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under [MCL 710.39], the putative father and the adoptee.

(*ii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(*iii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the

guardianship decision under MCL 712A.19c(2). Therefore, the Court of Appeals concluded that the trial court erred by using the Child Custody Act factors to compare Scribner and the foster parents.

In order to define the proper method for determining whether a guardianship is in the child's best interest, we must first interpret MCL 712A.19c(2). Issues of statutory interpretation are reviewed de novo. *Ambassador Bridge Co*, 481 Mich at 35. The plain language of MCL 712A.19c(2) does not expressly require application of any particular set of factors; rather, the statute simply requires the court to base its decision whether to

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putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(*iv*) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(*v*) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under [MCL 710.39], the home of the putative father.

(*vi*) The moral fitness of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father.

(*vii*) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father, and of the adoptee.

(*viii*) The home, school, and community record of the adoptee.

(*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(*x*) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

appoint a guardian on "the child's best interests." Because MCL 712A.19c(2) does not direct a court to apply certain factors or otherwise limit a court's method for determining the child's best interests, the statute grants the court discretion regarding how to determine what is in the child's best interests depending on the case-specific circumstances. See *Easton Sch Dist No 4 v Snell*, 24 Mich 350, 353 (1872) (holding that when a statute grants a power "in general terms," the statute "leaves the details to the sound discretion" of the entity to whom the power is granted).

Because MCL 712A.19c(2) grants the trial court discretion in determining whether a guardianship is in the child's best interest, a trial court's decision regarding what factors to consider in making the best-interest determination is reviewed for an abuse of discretion. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

A trial court may use its discretion under MCL 712A.19c(2) to determine the best method for analyzing the child's best interests by considering the circumstances relevant to the particular case. The Adoption Code factors are a logical decision-making tool when only one party petitions for a guardianship, because the court need not compare the petitioning party to any other party. Rather, determining whether the guardianship is in the child's best interests depends solely on whether a guardianship with the petitioning party is in the child's best interests. Moreover, a juvenile guardianship has many characteristics that are similar to an adoption. Thus, the Adoption Code factors provide a useful list of considerations that may be relevant to a guardianship decision, and trial courts may therefore be

led to apply the Adoption Code factors in deciding some, or perhaps many, petitions for guardianship.

However, neither the statutory language of MCL 712A.19c(2) nor the similarities between a guardianship and an adoption require application of the Adoption Code factors to all guardianship petitions, as the Court of Appeals suggests. Rather, depending on the circumstances, a case may more reasonably lend itself to application of the Child Custody Act factors, some combination of the Adoption Code and Child Custody Act factors, or a unique set of factors developed by the trial court for purposes of a particular case.[10]

Finally, we must review the trial court's findings of fact regarding the best-interest determination, which are subject to the clear-error standard on appeal. See MCR 2.613(C). See, also, *In re BKD*, 246 Mich App 212, 219; 631 NW2d 353 (2001) (applying the clear-error standard to the trial court's findings of fact regarding the best-interest factors in the Adoption Code).[11] "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

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[10] In this regard, we note that the Child Custody Act and the Adoption Code factors permit a court to consider "[a]ny other factor considered by the court to be relevant[.]" MCL 722.23(*l*); MCL 710.22(g)(*xi*). Thus, although MCL 712A.19c(2) does not create an overarching preference for creating a guardianship with a relative, the statute nevertheless permits a trial court to consider familial ties in determining whether the guardianship is in the child's best interests. However, we stress that if a court concludes that familial ties are relevant to the guardianship decision under MCL 712A.19c(2), the familial relationship is only *a factor* that must be balanced among all the other relevant factors—it does not give rise to *a presumption* in favor of creating a guardianship.

[11] Cases in which this Court reviewed the trial court's factual findings underlying its best-interest determination for whether they were against the great weight of the evidence did so under MCL 722.28, which does not apply here.

that a mistake has been made." *In re Mason*, 486 Mich at 152 (quotation marks, brackets, and citation omitted). Thus, under the clear-error standard, "a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotation marks, brackets, and citations omitted).

D. APPLICATION

Because we conclude that MCL 722.954a and MCL 712A.19c apply at different stages of child protective proceedings, we conclude that the requirements of MCL 722.954a have no bearing on a trial court's decision regarding a guardianship petition under MCL 712A.19c. Thus, we conclude that the Court of Appeals erroneously held that, as a relative of the children, Scribner was entitled to a preference as part of her petition for a guardianship under MCL 712A.19c.[12] However, that conclusion does not necessarily mandate that we affirm the trial court's decision to deny Scribner's guardianship petition. Rather, we must also consider whether the trial court abused its discretion when it selected the Child Custody Act's best-interest factors rather than some other set of factors to determine whether the guardianship was in the children's best interests. Additionally, we must consider whether the

[12] Although our grant order directed the parties to address whether Scribner "was entitled to [a] preference [for placement with relatives] where her son's parental rights to the children had been terminated," 495 Mich at 870, that question is dependent on holding that a preference for placement with relatives applies to MCL 712A.19c(2). Because we conclude that no such preference exists, we need not consider the impact of the termination of parental rights on a grandparent's status as a relative under MCL 722.954a(2).

trial court clearly erred in its findings of fact regarding the children's best interests under MCL 712A.19c.

We conclude that the trial court did not abuse its discretion by applying the best-interest factors from the Child Custody Act. In this case, the trial court was faced with two placement options for the children; therefore, logic required the trial court to compare the two options in order to determine which placement was in the children's best interest. Under these circumstances, such a comparison was necessary because, although both placement options may be qualified to meet the children's needs, only one of the placement options can truly be in the children's *best* interests. Because the Child Custody Act factors incorporate a comparative analysis, and because comparison of the two placement options in this case was a logical method for determining which option was in the children's best interests, the trial court's decision to apply those factors rather than the Adoption Code factors was not an abuse of discretion.[13]

We likewise conclude that the trial court did not clearly err in its application and findings of fact related to the Child Custody Act's best-interest factors to decide Scribner's petition for a guardianship under

[13] Application of the Child Custody Act best-interest factors outside the context of a custody dispute is not a novel approach in the area of juvenile law. For example, in *In re Barlow*, 404 Mich 216, 236; 273 NW2d 35 (1978), we concluded that consideration of the Child Custody Act factors "for guidance" was proper in the context of termination of parental rights and adoption cases. We recognize that *In re Barlow* was decided before specific best-interest factors were added to the Adoption Code by amendment in 1980 and thus should not be interpreted as condoning the application of different factors in the face of a statutory requirement to do otherwise. However, *In re Barlow* is nevertheless instructive in this case, in which the Legislature has not elected to confine the court's decision-making process regarding guardianships to a specific list of statutory factors.

MCL 712A.19c. The trial court accurately emphasized that "the paramount concern is what is best for the *children*." The trial court concluded that the children had developed a strong bond with the foster parents, while only JRG displayed a similar bond with Scribner. The trial court concluded that the foster parents had demonstrated the capacity to give the children love and guidance whereas Scribner expressed a desire to do so, but had not demonstrated the ability to do so, given that she had not cared for the children for a significant period of time. The trial court determined that Scribner had a superior financial ability to support the children, but that the foster parents also had sufficient income to support the children financially. The trial court also determined that the children's stability with the foster parents and desirability of maintaining that stability "overwhelming[ly]" favored denying the guardianship. The trial court acknowledged that Scribner could have provided similar stability given the opportunity, but it would be improper to focus on "what may be fair for" Scribner rather than "the best interests of the *children*."

The trial court likewise found the children's school record to be a compelling reason to deny the guardianship. The trial court recognized that the school district where Scribner lived was highly regarded, but the court noted that the children made "significant progress in their school performances" while with the foster parents. Accordingly, the trial court stated, "[h]ow uprooting them and changing schools would serve their best interests is highly questionable." The trial court recognized that significant testimony was devoted to the children's preference and concluded that JRG was agreeable to either outcome, while COH, ERH, and KBH were "decidedly in favor of remaining in their existing placement [with the foster parents] on a per-

manent basis." Acknowledging that the children's preference had already been overridden when they were removed from the care of their biological parents, the trial court determined that it was not in the children's best interest to again ignore their preference, particularly when that preference was for what the trial court determined to be a "stable, loving, secure, and trustworthy home . . . ." Finally, the trial court lamented its conclusion that neither the foster parents nor Scribner seemed willing to encourage a relationship with the other party.

Overall, we are not left with the definite and firm conviction that a mistake was made in assessing the facts relevant to the children's best interests and, thus, we conclude that the trial court's best-interest determination was not clearly erroneous. First, the trial court provided an individualized analysis based on the relevant evidence for each of the applicable factors. Second, the trial court did not take a one-sided view of the evidence; rather, the court weighed evidence that favored each placement option and acknowledged that Scribner could likely provide a stable and caring environment for the children if given the opportunity. The trial court also recognized that its decision to deny the guardianship could appear unfair to Scribner. However, the trial court correctly explained that its focus remained on the *children's* best interests, as required by law. See MCL 712A.19c(2). Finally, the Court of Appeals' conclusion that the trial court erred by denying Scribner's petition for guardianship under MCL 712A.19c(2) was largely rooted in its erroneous conclusion that Scribner was entitled to a preference because of her status as a relative. However, as previously established, the Court of Appeals erroneously interpreted MCL 722.954a and MCL 712A.19c. Because there is no statutory preference for creating a guard-

ianship with a relative under MCL 712A.19c(2), the entirety of the Court of Appeals' review of the trial court's best-interest determination is severely undercut.

Accordingly, we conclude that the Court of Appeals erroneously substituted its judgment for the trial court's judgment on questions of fact. Additionally, we conclude that the trial court did not clearly err in concluding that a guardianship with Scribner was not in the children's best interests under MCL 712A.19c(2).

IV. CONCLUSION

We hold that MCL 722.954a creates a preference for placement with relatives, but that preference does not apply to a court's decision regarding whether to appoint a guardian under MCL 712A.19c(2). We further hold that, in deciding whether to appoint a guardian, a court must determine whether the guardianship is in the child's best interests, and to do so the court may consider the best-interest factors from the Child Custody Act, the Adoption Code, or any other factors that may be relevant under the circumstances of a particular case.

Because the Court of Appeals erroneously concluded that a preference for placement with relatives exists under MCL 712A.19c(2) and substituted its judgment for the trial court's on questions of fact regarding the children's best interests, we reverse the Court of Appeals judgment and remand to that Court to consider Scribner's appeal of the MCI Superintendent's denial of consent to adopt the children.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with CAVANAGH, J.

BONNER v CITY OF BRIGHTON

Docket No. 146520. Argued December 12, 2013 (Calendar No. 3). Decided April 24, 2014.

Leon V. and Marilyn E. Bonner brought an action against the city of Brighton in the Livingston Circuit Court, claiming that the city's order under Brighton Code of Ordinances (BCO) § 18-59 to demolish three unoccupied residential structures on their property violated their procedural and substantive due process rights. BCO § 18-59 states that if a structure is determined unsafe as defined under the standards set forth in BCO § 18-46 and the cost of the repairs would exceed 100 percent of the true cash value of the structure before it was deemed unsafe, the repairs are presumed unreasonable and the structure is presumed to be a public nuisance that may be ordered demolished without providing the owner an option to repair it. Under this provision, the city notified plaintiffs of the structures' defects and code violations, informed them that the structures had been deemed unsafe and were presumed to be a public nuisance, and ordered them to demolish the structures within 60 days with no option to repair. Plaintiffs appealed this determination under the process set forth in BCO § 18-61 to the city council, which concluded that the buildings were unsafe and unreasonable to repair under BCO § 18-59 and that demolition was required within 60 days of the order. Plaintiffs then filed an independent cause of action in the circuit court, alleging various constitutional claims, and the city thereafter filed its own action in the circuit court to enforce the demolition order. The court, Michael P. Hatty, J., denied the city's request for a preliminary injunction and granted plaintiffs partial summary disposition, concluding that BCO § 18-59 violated substantive due process on its face by not giving property owners the opportunity to repair their property. The circuit court denied the city's motion for reconsideration. The Court of Appeals, MARKEY, P.J., and SHAPIRO, J. (MURRAY, J., dissenting), granted the city's application for leave to appeal and affirmed, holding that BCO § 18-59 violated property owners' substantive and procedural due process rights. 298 Mich App 693 (2012). The Supreme Court granted the city's application for leave to appeal. 494 Mich 873 (2013).

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

BCO § 18-59 did not constitute an unconstitutional deprivation of substantive due process because the ordinance's unreasonable-to-repair presumption was reasonably related to the city's legitimate interest in promoting the health, safety, and welfare of its citizens. The ordinance was not an arbitrary and unreasonable restriction on a property owner's use of his or her property because there were circumstances under which the presumption could be overcome and repairs permitted. Further, the demolition procedures provided property owners with procedural due process by providing the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review. Because plaintiffs did not show that no aggrieved property owners could meaningfully exercise their right to review or that such review was not conducted impartially, they failed to establish that BCO § 18-59, on its face, violated procedural due process rights.

1. The Court of Appeals erred by failing to separately analyze plaintiffs' substantive and procedural due process claims. The substantive component of due process protects against the arbitrary exercise of governmental power, whereas the procedural component ensures constitutionally sufficient procedures for the protection of life, liberty, and property interests. Accordingly, whether BCO § 18-59 was facially unconstitutional for denying property owners the opportunity to repair unsafe structures in violation of the right to substantive due process was a distinct issue from whether the ordinance was facially unconstitutional for permitting the demolition of unsafe structures without providing adequate procedural safeguards in violation of the right to procedural due process.

2. The ordinance did not facially violate property owners' substantive due process rights. Because property owners do not have a fundamental right to repair a structure municipally deemed unsafe before that structure can be demolished, the government's interference with that right need only be reasonably related to a legitimate governmental interest. BCO § 18-59 was enacted pursuant to the city's police powers, and its purpose was to abate a public nuisance by requiring repair or demolition of unsafe structures. Nuisance abatement is a legitimate exercise of police power, and demolition is a permissible method of achieving that end. Further, plaintiffs did not show that BCO § 18-59 violated their substantive due process rights as an arbitrary and unreasonable restriction on their property interests given that the unreasonable-to-repair presumption could be overcome by pre-

senting a viable repair plan, evidence from the challenger's own experts that the repair costs would not exceed 100 percent of the property value, or evidence that the structure subject to demolition has some sort of cultural, historical, familial, or artistic value. The unreasonable-to-repair presumption in BCO § 18-59 was also not arbitrary because it did not represent a total prohibition on a property owner's opportunity to repair an unsafe structure and it applied uniformly to all nonexempt structures that had repair costs in excess of 100 percent of their value before they became unsafe.

3. Plaintiffs failed to establish that BCO § 18-59 constituted a facial procedural due process violation. Affording a property owner an option to repair as a matter of right was not required before an unsafe structure could be demolished, and existing procedures in the ordinance comported with due process. Specifically, BCO § 18-52 required the city manager to serve the structure's owner with written notice of the determination whether the structure at issue can be made safe or whether demolition will ensue and of the owner's right to appeal this determination to the city council pursuant to BCO § 18-61, and the owner had the right to appeal the city council's decision to the circuit court pursuant to BCO § 18-63. The city was not required to provide for a reasonable opportunity to repair the unsafe structure in order for the ordinance to pass constitutional scrutiny, and the unreasonableness-to-repair presumption was rebuttable.

Court of Appeals judgment reversed; case remanded to the trial court for further proceedings.

1. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS — PROCEDURAL DUE PROCESS.

Courts must analyze claims of substantive and procedural due process violations separately; the substantive component of due process protects against the arbitrary exercise of governmental power, whereas the procedural component ensures constitutionally sufficient procedures for the protection of life, liberty, and property interests (US Const, Am XIV; Const 1963, art 1, § 17).

2. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS — CITY ORDINANCES — UNSAFE STRUCTURES — DEMOLITION ORDERS — REPAIR.

A city ordinance that allows the demolition of a structure that has been determined to be unsafe on the presumption that it is a public nuisance that would be unreasonable to repair if the repairs would cost more than the true cash value of the structure before it was deemed unsafe bears a reasonable relationship to a legitimate

governmental interest; such an ordinance is not an arbitrary and unreasonable restriction on the owner's use of the property if the presumption can be overcome and repairs permitted (US Const, Am XIV; Const 1963, art 1, § 17).

3. CONSTITUTIONAL LAW — DUE PROCESS — PROCEDURAL DUE PROCESS — CITY ORDINANCES — UNSAFE STRUCTURES — DEMOLITION ORDERS — REPAIR.

A city ordinance that allows the demolition of a structure that has been determined to be unsafe on the presumption that it is a public nuisance that would be unreasonable to repair that also provides a meaningful right to an impartial review of the demolition order as well as subsequent judicial review is not a facial violation of the property owner's right to procedural due process of law (US Const, Am XIV; Const 1963, art 1, § 17).

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Essex Park Law Office, PC (by *Dennis B. Dubuc*), for Leon and Marilyn Bonner.

Amici Curiae:

McClelland & Anderson, LLP (by *David E. Pierson*), and *Vercruysse Murray and Calzone PC* (by *Ronald E. Reynolds*) for the Real Property Section of the State Bar of Michigan.

Plunkett Cooney (by *Mary Massaron Ross* and *Josephine A. DeLorenzo*) for the Michigan Municipal League.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors.

Johnson, Rosati, Schultz & Joppich, P.C. (by *Carol A. Rosati* and *Thomas R. Schultz*), for the Public Corporation Law Section of the State Bar of Michigan.

KELLY, J. This case involves two landowners' facial challenge to the constitutionality of § 18-59 of the Brighton Code of Ordinances (BCO), which creates a rebuttable presumption that an unsafe structure may be demolished as a public nuisance if it is determined that the cost to repair the structure would exceed 100 percent of the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe. Specifically, we address whether this unreasonable-to-repair presumption violates substantive and procedural due process protections by permitting demolition without affording the owner of the structure an option to repair as a matter of right.

As a preliminary matter, we clarify that the landowners' substantive due process and procedural due process claims implicate two separate constitutional rights, and that we must analyze each claim under separate constitutional tests. The Court of Appeals therefore erred by improperly conflating these analyses and subsequently determining that BCO § 18-59 facially violates plaintiffs' general due process rights. Instead, when each due process protection is separately examined pursuant to the proper test, the ordinance does not violate either protection on its face.

We hold that BCO § 18-59 does not constitute an unconstitutional deprivation of substantive due process because the ordinance's unreasonable-to-repair presumption is reasonably related to the city of Brighton's legitimate interest in promoting the health, safety, and welfare of its citizens. Furthermore, the ordinance is not an arbitrary and unreasonable restriction on a property owner's use of his or her property because there are circumstances under which the presumption may be overcome and repairs permitted.

We likewise hold that the city of Brighton's existing demolition procedures provide property owners, including plaintiffs, with procedural due process. Contrary to plaintiffs' argument, the prescribed procedures are not faulty for failing to include an automatic repair option, which is, in essence, plaintiffs' substantive due process argument recast in procedural due process terms. For purposes of this facial challenge, it is sufficient that aggrieved parties are provided the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review. For the facial challenge to succeed, plaintiffs must show that no aggrieved property owners can meaningfully exercise their right to review or that such review is not conducted impartially. Because they have not done so, plaintiffs have failed to establish that BCO § 18-59, on its face, violates their procedural due process rights.

We therefore reverse the judgment of the Court of Appeals and remand this case to the Livingston Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Leon and Marilyn Bonner own two residential properties, 122 E. North Street and 116 E. North Street, both located in downtown Brighton. Situated on these properties are three structures—two former residential homes and one barn/garage—all of which have been unoccupied and generally unmaintained for over 30 years. In January 2009, defendant city of Brighton's (the City) building and code enforcement officer, James Rowell (the building official), informed plaintiffs via written notice that these three structures had been deemed "unsafe" in violation of the Brighton Code of Ordinances, and further constituted public nuisances in

violation of Michigan common law.[1] Plaintiffs were also informed of the building official's additional determination that it was unreasonable to repair these structures consistent with the standard set forth in BCO § 18-59, which provides in its entirety as follows:

> *Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.* This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair. If the owner does not make the repairs within the designated time period, then the structure may be ordered demolished without option on the part of the owner to repair. The cost of demolishing the structure shall be a lien against the real property and shall be reported to the city assessor, who shall assess the cost against the property on which the structure is located.[2]

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[1] Specifically, the property was deemed "unsafe," as defined by BCO § 18-46, for the following defects: "collapsing porch structure and foundations for same; collapsing porch roof structure; damaged or missing shingles; rotted roof sheathing; lacking platform at front door; rotted and damaged wood siding; damaged/collapsing rear porch roof structure; damaged or missing stairs, handrails, guardrails at rear porch; damaged/missing footings for rear porch; rotted rafters; fascia and exterior trim; damaged and/or lacking foundations; and repair damaged chimney." This list only included violations observable from outside the structures.

[2] Emphasis added. The italicized language reflects what we refer to as the unreasonable-to-repair presumption.

Consequently, plaintiffs were ordered to demolish the structures within 60 days of the date of the building official's letter.

Because demolition had been ordered without an option to repair, plaintiffs appealed the building official's determination to the Brighton City Council (city council) pursuant to the appellate process set forth in BCO § 18-61, which provides in relevant part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal. . . . The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

Initially, the city council stayed its review pending the building official's interior inspection of the structures. However, despite having previously agreed to allow the building official interior access, plaintiffs thereafter refused entry, causing the City to petition for and obtain administrative search warrants. On May 27, 2009, the building official and several other representatives of the City inspected the structures and found over 45 unsafe conditions therein. The hearing resumed on June 4, 2009, and June 18, 2009, during which the city council received written reports and heard oral testimony from both parties on the issues of the City's findings and conclusions pursuant to the interior and exterior inspection of the premises, as well as its cost estimates for the structures' repair versus their demolition. On July 16, 2009, the city council unanimously affirmed the building official's determination that the structures were unsafe

under all ten of the standards set forth in BCO § 18-46.[3] The city council likewise found that plaintiffs had been maintaining unsafe structures in

[3] BCO § 18-46 provides,

> *Unsafe structure* means a structure which has any of the following defects or is in any of the following conditions:
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> (1) A structure, because of dilapidation, decay, damage, faulty construction, or otherwise which is unsanitary or unfit for human use;
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> (2) A structure that has light, air, or sanitation facilities which are inadequate to protect the health, safety, or general welfare of those who live or may live within;
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> (3) A structure that has inadequate means of egress as required by this Code;
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> (4) A structure, or part thereof, which is likely to partially or entirely collapse, or some part of the foundation or underpinning is likely to fall or give way so as to injure persons or damage property;
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> (5) A structure that is in such a condition so as to constitute a nuisance, as defined by this Code;
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> (6) A structure that is hazardous to the safety, health, or general welfare of the people of the city by reason of inadequate maintenance, dilapidation, or abandonment;
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> (7) A structure that has become vacant, dilapidated, and open at door or window, leaving the interior of the structure exposed to the elements or accessible to entrance by trespassers or animals or open to casual entry;
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> (8) A structure that has settled to such an extent that walls or other structural portions have less resistance to winds than is required in the case of new construction by this Code;
>
> (9) A structure that has been damaged by fire, wind, flood, or by any other cause to such an extent as to be dangerous to the life, safety, health, or general welfare of the people living in the city;
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> (10) A structure that has become damaged to such an extent that the cost of repair to place it in a safe, sound, and sanitary condition exceeds 50 percent of the assessed valuation of the structure, at the time when repairs are to be made.

violation of BCO § 18-47,[4] that the structures were unreasonable to repair under BCO § 18-59, and that demolition was required within 60 days of its decision.[5]

Rather than appeal the city council's decision to the Livingston Circuit Court as an original action per BCO § 18-63,[6] plaintiffs instead filed this independent cause of action against the City, alleging violations of due process, generally, as well as substantive due process; a violation of equal protection; inverse condemnation or a regulatory taking; contempt of court; common-law and statutory slander of title; and a violation of Michigan housing laws under MCL 125.540.[7] The City subsequently filed its own complaint against plaintiffs in a separate action, requesting injunctive relief in the form of an order enforcing BCO § 18-59 and requiring demolition of the structures.

After consolidating these cases, the circuit court denied the City's request for injunctive relief and likewise denied relief to plaintiffs on several of the theories

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[4] BCO § 18-47 provides, "It shall be unlawful for an owner or agent to maintain or occupy an unsafe structure."

[5] Plaintiffs did not demolish the structures as required and were thus ordered to show cause as to their failure to comply with the city council's decision in accordance with BCO § 18-58. At the show cause hearing, the city council determined that cause had not been shown to prevent demolition and again ordered demolition. To date, demolition has not occurred.

[6] Specifically, this ordinance provides that "[a]n owner aggrieved by a final decision of the city council may appeal the decision to the county circuit court by filing a complaint within 20 calendar days from the date of the decision."

[7] Though plaintiffs clearly alleged a substantive due process violation under Count II of their complaint, they did not expressly state a procedural due process claim given that Count I simply alleges a violation of "due process rights." However, because the Court of Appeals addressed the procedural due process component, and our grant order directed the parties to brief both substantive and procedural due process, we will address both claims.

they had advanced. However, the circuit court did address the constitutionality of the ordinance, determining that, on its face, BCO § 18-59 violates substantive due process by permitting the City to order an unsafe structure to be demolished as a public nuisance without providing the owner the option to repair it when the structure is deemed unreasonable to repair as defined under the ordinance. The circuit court thus granted plaintiffs' renewed motion for partial summary disposition under MCR 2.116(C)(10) on the substantive due process claim and thereafter denied reconsideration.[8]

After granting the City's application for leave to appeal, the Court of Appeals affirmed the circuit court in a split published opinion.[9] The majority concluded that the standard set forth under BCO § 18-59 is arbitrary and unreasonable, and thus violates substantive due process, because it

> only allow[s] the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs.[10]

The majority also determined that BCO § 18-59 does not bear a reasonable relationship to the permissible legislative objective of protecting citizens from unsafe and dangerous structures because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and that an owner is willing and able to timely finance. Accordingly, the

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[8] The circuit court did not rule on the procedural due process issue.

[9] *Bonner v City of Brighton*, 298 Mich App 693; 828 NW2d 408 (2012).

[10] *Id*. at 731.

majority held that BCO § 18-59 is facially unconstitutional. Finally, notwithstanding the circuit court's abstention from reaching the procedural due process issue, the majority went on to conclude that BCO § 18-59 likewise violates procedural due process because "the only way the city's ordinances could withstand a procedural due process challenge" would be if it provides a property owner with the option to repair the structure.[11]

We granted the City's application for leave to appeal, directing the parties to brief separately "whether § 18-59 is facially unconstitutional on the basis that the ordinance violates: (1) substantive due process; and/or (2) procedural due process."[12]

II. STANDARD OF REVIEW

This case implicates myriad standards of review. The circuit court granted plaintiff's motion for partial summary disposition pursuant to MCR 2.116(C)(10). We review de novo a circuit court's decision on a motion for summary disposition.[13] Summary disposition is appropriate under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[14] "A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ."[15] In deciding whether to grant a motion for

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[11] *Id*. at 717.

[12] *Bonner v City of Brighton*, 494 Mich 873 (2013).

[13] *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

[14] MCR 2.116(C)(10).

[15] *Debano-Griffin*, 493 Mich at 175 (citation omitted).

summary disposition pursuant to MCR 2.116(C)(10), a court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties,"[16] in the light most favorable to the nonmoving party.[17]

This dispute also concerns the constitutionality of a municipal ordinance, which necessarily involves the interpretation and application of the ordinance itself. We review de novo questions of constitutional law;[18] however, this Court accords deference to a deliberate act of a legislative body, and does not inquire into the wisdom of its legislation.[19] The decision to declare a legislative act unconstitutional should be approached with extreme circumspection and trepidation, and should never result in the formulation of a rule of constitutional law "broader than that demanded by the particular facts of the case rendering such a pronouncement necessary."[20] "Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity."[21]

Further, because ordinances are treated as statutes for purposes of interpretation and review, we also

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[16] MCR 2.116(G)(5).

[17] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[18] *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

[19] *Dearborn Twp v Dail*, 334 Mich 673, 680; 55 NW2d 201 (1952).

[20] *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), citing *United States v Raines*, 362 US 17, 21; 80 S Ct 519; 4 L Ed 2d 524 (1960).

[21] *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

review de novo the interpretation and application of a municipal ordinance.[22] Since the rules governing statutory interpretation apply with equal force to a municipal ordinance,[23] the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body.[24] The most reliable evidence of that intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings.[25]

III. ANALYSIS

Plaintiffs make two facial constitutional attacks upon BCO § 18-59. First, they assert that the ordinance violates substantive due process by permitting demolition of an unsafe structure without extending to its owner an option to repair, because denying a property owner the chance to repair an unsafe structure does not advance the City's otherwise legitimate interest in protecting the health, safety, and welfare of the Brighton citizenry. Second, plaintiffs argue that the ordinance violates procedural due process by failing to provide a procedure to safeguard a property owner's right to choose whether to repair a structure municipally deemed unsafe before the City orders it demolished. We will address plaintiffs' arguments in this order; before proceeding further, however, we find it necessary to make two critical observations.

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[22] *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

[23] *Macenas v Village of Michiana*, 433 Mich 380, 396, 446 NW2d 102 (1989).

[24] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[25] *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011).

First, we emphasize that this is a *facial* challenge to BCO § 18-59;[26] plaintiffs do not challenge the ordinance's application in a particular instance.[27] A party challenging the facial constitutionality of an ordinance "faces an extremely rigorous standard."[28] To prevail, plaintiffs must establish that " 'no set of circumstances exists under which the [ordinance] would be valid' " and " '[t]he fact that the . . . [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient' " to render it invalid.[29] Indeed, " 'if any state of facts reasonably can be conceived that would sustain [the ordinance], the existence of the state of facts at the time the law was enacted must be assumed' " and the ordinance upheld.[30] Finally, because facial attacks, by their nature, are not dependent on the facts surrounding any particular decision, the specific facts surrounding plaintiffs' claim are inapposite.[31]

Second, and particularly noteworthy here, we emphasize that analysis of substantive and procedural due

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[26] A facial challenge alleges that an ordinance is unconstitutional "on its face" because "[t]o make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998) (citations and quotation marks omitted).

[27] An as-applied challenge, to be distinguished from a facial challenge, alleges "a present infringement or denial of a specific right or of a particular injury in process of actual execution" of government action. *Village of Euclid, Ohio v Amber Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

[28] *Judicial Attorneys Ass'n v Michigan*, 459 Mich at 310.

[29] *Council of Orgs*, 455 Mich at 568, quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

[30] *Council of Orgs*, 455 Mich at 568-569, quoting 16 Am Jur 2d, Constitutional Law, § 218, p 642.

[31] *City of Lakewood v Plain Dealer Pub Co*, 486 US 750, 770 n 11; 108 S Ct 2138; 100 L Ed 2d 771 (1988).

process involves two separate legal tests. While the touchstone of due process, generally, "is protection of the individual against arbitrary action of government,"[32] the substantive component protects against the arbitrary exercise of governmental power,[33] whereas the procedural component is fittingly aimed at ensuring constitutionally sufficient procedures for the protection of life, liberty, and property interests.[34] As evidenced by the following statement, the Court of Appeals made clear its misunderstanding of these distinct constitutional claims when it concluded that BCO § 18-59 was facially unconstitutional:

> Ultimately, we conclude that the ordinance infringes on plaintiffs' due process rights, whether denominated procedural or substantive, thereby *making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument*.[35]

As a result, the Court of Appeals conflated what previous decisions have indicated should be treated as separate inquiries. Indeed, the issue whether BCO § 18-59 is facially unconstitutional for denying property owners the opportunity to repair unsafe structures in violation of substantive due process is distinct from the issue whether the ordinance is facially unconstitutional

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[32] *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974).

[33] *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986) (the substantive due process guarantee prevents governmental power from being oppressively exercised).

[34] *Hannah v Larche*, 363 US 420; 80 S Ct 1502; 4 L Ed 2d 1307 (1960) (the procedural due process guarantee requires that an individual must be accorded certain procedures before a protected interest is infringed, including notice of the proceedings against him, a meaningful opportunity to be heard, as well as the assurance that the matter will be conducted in an impartial manner); *Wolff*, 418 US 539; *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976).

[35] *Bonner*, 298 Mich App at 710 (emphasis added).

for permitting the demolition of unsafe structures without providing adequate procedural safeguards in violation of the right to procedural due process. By melding together plaintiffs' substantive and procedural due process claims, the Court of Appeals failed to observe that distinction and thus examine these claims in light of the correct legal standards. We therefore take this opportunity to clarify that alleged violations of substantive and procedural due process must be separately analyzed in order to determine whether the specific dictates of due process have been satisfied.

A. GENERAL DUE PROCESS PRINCIPLES

1. LEGAL FRAMEWORK

The federal due process provision guarantees that no person shall be deprived of "life, liberty, or property, without due process of law."[36] Prior caselaw has interpreted this language to "guarante[e] more than fair process,"[37] but to encompass a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them."[38] Determining whether the ordinance in this case violates due process requires that we engage in several inquiries, the first and most essential of which asks whether the interest allegedly infringed by the challenged government action—here, a property owner's interest in repairing an unsafe structure—comes within the definition of "life, liberty or property."[39] If it does not, the Due Process Clause affords no protection.

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[36] US Const, Am XIV.

[37] *Washington v Glucksberg*, 521 US 702, 719, 117 S Ct 2258; 138 L Ed 2d 772 (1997).

[38] *Daniels*, 474 US at 331.

[39] *Ingraham v Wright*, 430 US 651; 97 S Ct 1401; 51 L Ed 2d 711 (1977).

If, however, a life, liberty or property interest is found to exist and to be threatened by the City's conduct, the next two queries will address what process is due before the government can interfere with that interest. Because the Due Process Clause offers two separate types of protections—substantive and procedural—separate inquiries must examine whether these protections have been provided.

2. APPLICATION

Plaintiffs allege that their property rights have been violated by the City's decision to order their structures demolished without providing them with the option to repair the structures. Explicit in our state and federal caselaw is the recognition that an individual's vested interest in the use and possession of real estate is a property interest protected by due process.[40] Accordingly, plaintiffs, as owners of the three structures at issue and the land on which those structures are situated, have a significant property interest within the protection of the Due Process Clause.

B. SUBSTANTIVE DUE PROCESS

1. LEGAL FRAMEWORK

Having identified a significant property interest protected by the Due Process Clause, we continue our analysis by addressing plaintiffs' substantive due process claim. " 'Substantive due process' analysis must begin with a careful description of the asserted right,"[41]

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[40] See, e.g., *Dow v Michigan*, 396 Mich 192, 204; 240 NW2d 450 (1976); *Bd of Regents of State Colleges v Roth*, 408 US 564, 571-572; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (The "actual owner[] . . . of real estate, chattels or money" has "property interests protected by procedural due process").

[41] *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993).

for there has "always been reluctan[ce] to expand the concept of substantive due process" given that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[42] Where the right asserted is not fundamental, the government's interference with that right need only be reasonably related to a legitimate governmental interest.[43]

A zoning ordinance must similarly stand the test of reasonableness—that it is " 'reasonably necessary for the preservation of public health, morals, or safety' "[44]—and, as we have stated, it is presumed to be so until the plaintiff demonstrates otherwise. Accordingly, a plaintiff may successfully challenge a local ordinance on substantive due process grounds, and therefore overcome the presumption of reasonableness, by proving either "that there is no reasonable govern-

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[42] *Collins v City of Harker Hts*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992). See also *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994).

[43] *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001). Discussing the parameters of this standard, this Court in *TIG* stated:

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946). [*TIG Ins Co*, 464 Mich at 557-558.]

[44] *City of North Muskegon v Miller*, 249 Mich 52, 58; 227 NW 743 (1929).

mental interest being advanced by the present zoning classification itself . . . or, secondly, that an ordinance [is] unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[45] The reasonableness of the ordinance thus becomes the test of its legality.[46]

2. APPLICATION

Mindful of these principles, we begin by describing the right asserted by plaintiffs. Plaintiffs are not generally arguing that they have a categorical right of property use or possession, but assert a much more limited constitutional right; namely, that encompassed within the Due Process Clause's protection of property is a property owner's right to repair a structure municipally deemed "unsafe" before that structure can be demolished. However, we are unaware of any court that has ever granted a property owner the fundamental right of an absolute repair option involving property that has fallen into such disrepair as to create a risk to the health and safety of the public. Indeed, that conclusion would hardly be compatible with the line of cases in which this Court and the United States Supreme Court have held that reasonableness is essential to the validity of an exercise of police power affecting the general rights of the land owner by restricting the character of the owner's use,[47] which would include the opportunity

[45] *Kropf v Sterling Hts*, 391 Mich 139, 158; 215 NW2d 179 (1974).

[46] *Moreland v Armstrong*, 297 Mich 32, 35; 297 NW 60 (1941).

[47] See *City of North Muskegon*, 249 Mich 52; *Moreland*, 297 Mich 32; *Pere Marquette R Co v Muskegon Twp Bd*, 298 Mich 31; 298 NW 393; *Pringle v Shevnock*, 309 Mich 179; 14 NW2d 827 (1944); *Hammond v Bloomfield Hills Bldg Inspector*, 331 Mich 551; 50 NW2d 155 (1951); *Fenner v City of Muskegon*, 331 Mich 732; 50 NW2d 210 (1951); *Anchor*

to repair unsafe structures. The right asserted by plaintiffs, then, cannot be considered fundamental. Therefore, to demonstrate a violation on substantive due process grounds, plaintiffs have the burden of showing that the unreasonable-to-repair presumption set forth in BCO § 18-59 does not bear any reasonable relationship to a legitimate governmental interest.

BCO § 18-59 was enacted pursuant to the City's police powers, and its purpose is to abate a public nuisance by requiring repairs or demolition of unsafe structures. It is firmly established that nuisance abatement, as a means to promoting public health, safety, and welfare, is a legitimate exercise of police power[48] and that demolition is a permissible method of achieving that end.[49] Certainly, then, there can be no dispute that the public interest that BCO § 18-59 is intended to serve—protecting the health and welfare of the citizens of Brighton by eliminating the hazards posed by dangerous and unsafe structures—is a legitimate one. What is in dispute, however, is whether the unreasonable-to-repair presumption bears a reasonable relationship to that interest.

The Court of Appeals found it did not. In the Court of Appeals' view, to refuse a willing and able property owner the option to repair property that has been

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Steel & Conveyor Co v City of Dearborn, 342 Mich 361; 70 NW2d 753 (1955); *Detroit Edison Co v City of Wixom*, 382 Mich 673; 172 NW2d 382 (1969); *Kropf*, 391 Mich 139; *Bevan v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991). See also *Village of Belle Terre v Boraas*, 416 US 1; 94; S Ct 1536; 39 L Ed 2d 1536 (1974); *Williamson v Lee Optical of Oklahoma*, 348 US 483; 75 S Ct 461; 99 L Ed 563 (1955); *Penn Central Transp Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978); *Schad v Borough of Mount Ephraim*, 452 US 61; 101 S Ct 2176; 68 L Ed 2d 671 (1981); *Reno*, 507 US 292.

[48] *Austin v Tennessee*, 179 US 343, 349; 21 S Ct 132; 45 L Ed 224 (1900).

[49] See MCL 125.486.

deemed unsafe because of the City's view of the unreasonableness of the cost does no more to advance this permissible legislative objective than does allowing corrective repairs to be made in the first instance. In our view, however, if permitting demolition of unsafe structures (notwithstanding the willingness and financial ability of property owners to undertake corrective repairs) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other action. While affording a property owner the opportunity to perform corrective repairs is one method by which the dangers posed by an unsafe structure may be remedied, it is by no means the only method—much less the only *constitutional* method—of doing so. As long as certain minimum standards have been met, and the ordinance does not encroach upon a property owner's fundamental rights, the decision to exceed those standards by providing a property owner with an automatic right of repair, as some municipalities have chosen to do, is a policy judgment, not a constitutional mandate.[50]

Indeed, to satisfy substantive due process, the infringement of an interest that is less than fundamental, such as the right asserted here, requires no more than a reasonable relationship between the governmental purpose and the means chosen to advance that purpose. This standard allows a municipal body sufficient lati-

[50] That the City's legitimate interest in protecting its citizens from unsafe and dangerous structures might be equally advanced by demolition and by repairing the property at issue does not sever the reasonableness between BCO § 18-59 and the City's permissible legislative objective. To affirm the lower courts' conclusion to the contrary would appear to subject the City's demolition process to heightened scrutiny by requiring that BCO § 18-59 be narrowly tailored to minimize the denial of a repair option. Of course, narrow tailoring is not required here because fundamental rights are not involved.

tude to decide, as the City has, that certain considerations favor using one means, i.e., demolition, rather than another, i.e., repairing. Enacting an ordinance that presumes repairs will be unreasonable to undertake if the cost of those repairs exceeds 100 percent of the property's value before it became unsafe protects children and others from the risk of increased injury, reduces the opportunity for crime, and aids in the maintenance of property values and marketability of lands. Any one of these purposes is reasonably related to the City's interest in promoting the health, safety, and welfare of its citizens and it is presumed that the City acted for such reasons, or for any other valid reason, in enacting BCO § 18-59.

Without question, property owners have a constitutional right of property use, but this does not translate into an absolute constitutional right to repair unsafe structures. Moreover, even assuming that plaintiffs had a protected interest in repairing the unsafe structures at issue here before that property could be subject to demolition,[51] BCO § 18-59 is reasonably related to several governmental interests, and thus did not facially violate substantive due process. Accordingly, plaintiffs' asserted private right of repair must yield to the City's higher governmental interest in protecting the health, safety, and welfare of its citizens, and the Court of Appeals erred in concluding otherwise.[52]

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[51] For a property interest to be protected pursuant to the Due Process Clause, a claimant must have "a legitimate claim of entitlement" to the property interest, not simply "a unilateral expectation of it." *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988), quoting *Roth*, 408 US at 577.

[52] The Court of Appeals' reliance on several nonbinding decisions from other jurisdictions for their "general due process analys[e]s," *Bonner*, 298 Mich App at 727, provides nominal, if any, support for its holding that BCO § 18-59, on its face, violates due process. Indeed, both *Horton v*

Nor have plaintiffs shown that BCO § 18-59 violates their substantive due process rights as an arbitrary and unreasonable restriction on plaintiffs' constitutionally recognized property interests. Under this standard, a presumption still prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance, unless plaintiffs can show that the unreasonable-to-repair-presumption constitutes " 'an arbitrary fiat, a whimsical ipse dixit,' " leaving " 'no room for a legitimate difference of opinion concerning its reasonableness.' "[53]

Gulledge, 277 NC 353, 360; 177 SE2d 885 (1970), overruled in part on other grounds by *State v Jones*, 305 NC 520; 290 SE2d 675 (1982), and *Johnson v City of Paducah*, 512 SW2d 514, 516 (Ky, 1974), involve as-applied challenges, not facial challenges. Nor do the cases relied on by the Court of Appeals assist us in resolving the specific inquiry whether BCO § 18-59 is facially violative of substantive due process, since *Horton*, 277 NC 353, *Horne v City of Cordele*, 140 Ga App 127; 230 SE2d 333 (1976), *Herrit v Code Mgmt Appeal Bd of City of Butler*, 704 A2d 186 (1997), and *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), do not specifically consider a local demolition ordinance in the context of substantive due process.

Furthermore, *Horton*, *Herrit*, and *Horne* all involve takings claims, and, unlike the rebuttable unreasonable-to-repair presumption in BCO § 18-59, the ordinances at issue in both *Horton* and *Johnson* were held unconstitutional on the basis that they *required* demolition if the cost to repair an unsafe structure exceeded a certain no-repair cost threshold. In contrast, nothing in BCO § 18-59 expressly provides that the unreasonable-to-repair presumption is irrebuttable. Indeed, had the legislative body intended to make demolition the unavoidable result upon incidence of the unreasonable-to-repair presumption, it certainly could have drafted BCO § 18-59 to make that result explicit. However, under the plain language of the ordinance, demolition is permissive. Consequently, to read BCO § 18-59 as creating an irrebuttable presumption would impermissibly render a portion of the ordinance surplusage in violation of the rules of statutory construction. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003).

[53] *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

Plaintiffs argue, and the Court of Appeals agreed, that the unreasonable-to-repair presumption in BCO § 18-59 can only be overcome upon a showing of economic reasonableness, i.e., that repair costs would not exceed "100 percent of the true cash value of the structure as reflected on the city assessment tax rolls prior to the building becoming an unsafe structure." There is, however, no textual support for this interpretation because BCO § 18-59 does not specify the manner in which the unreasonable-to-repair presumption may be overcome. A showing of reasonableness could therefore be established by presenting a viable repair plan; evidence from the challenger's own experts that, contrary to the City's estimates, the repair costs would not exceed 100 percent of the property value; or evidence that the structure subject to demolition has some sort of cultural, historical, familial, or artistic value. Because reasonableness can be established in economic or noneconomic terms, plaintiffs have failed to show, and the Court of Appeals erred by concluding, that BCO § 18-59 is arbitrary and unreasonable because "it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable."[54]

Again, even assuming that there is a protected property interest in repairing an unsafe structure, plaintiffs have failed to demonstrate that BCO § 18-59 arbitrarily or unreasonably infringes that right by denying a property owner an option to repair as a matter of right. The unreasonable-to-repair presumption in BCO § 18-59 is not arbitrary because it does not represent a total prohibition on a property owner's opportunity to repair an unsafe structure, and the ordinance applies uniformly to all structures that have repair costs in excess of 100 percent

[54] *Bonner*, 298 Mich App at 714.

of the structure's value before it became unsafe, except those structures that BCO § 18-59 expressly exempts.[55] Nor is the ordinance unreasonable merely because there exists an arguably preferred method of addressing the legislative objective sought to be attained, or because the prohibited land use is just as reasonable as the one permitted or required under the ordinance. Certainly, a variety of permissible land uses may be excluded or restricted by local ordinance provided the ordinance is reasonable, and we do not concern ourselves with the wisdom or desirability of such legislation. Furthermore, even if the relationship between BCO § 18-59 and the City's interest in promoting the public health, safety, and welfare is debatable, we need more than a mere difference of opinion to establish a substantive due process violation, and plaintiffs have failed to make such a showing. Accordingly, the presumption of constitutionality favors the ordinance's validity, and we may not second-guess the City's policy judgment in enacting it.

We find nothing arbitrary or unreasonable about the City's interest in demolishing unsafe structures and believe the means selected—the unreasonable-to-repair presumption in BCO § 18-59—bears a reasonable relationship to the objective sought to be attained. Because plaintiffs have failed to satisfy the burden necessary to invalidate BCO § 18-59 on substantive due process grounds, it must be sustained.

C. PROCEDURAL DUE PROCESS

1. LEGAL FRAMEWORK

We turn now from the claim that the City may not, by virtue of BCO § 18-59, deprive plaintiffs of their as-

[55] These include a structure that became unsafe as a result of an event beyond the owner's control, including, but not limited to, fire, windstorm, tornado, flood, or other act of God.

serted property interest without first affording them the opportunity to repair a structure deemed unsafe by the City, to plaintiffs' procedural due process claim that the City may not order demolition on the basis of the procedures BCO § 18-59 provides. Well established is the assurance that deprivation of a significant property interest cannot occur except by due process of law.[56] While the meaning of the Due Process Clause and the extent to which due process must be afforded has been the subject of many disputes, there can be no question that, at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard.[57] To comport with these procedural safeguards, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[58] As recognized by the U.S. Supreme Court,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[59]

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[56] See *Cleveland Bd of Ed v Loudermill*, 470 US 532, 538; 105 S Ct 1487; 84 L Ed 2d 494 (1985).

[57] *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950).

[58] *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965).

[59] *Mathews*, 424 US at 334-335. See also *Goldberg v Kelly*, 397 US 254, 263-271; 90 S Ct 1011; 25 L Ed 2d 287 (1970).

2. APPLICATION

To determine whether BCO § 18-59 provides property owners the process to which they are constitutionally entitled, we first review in some detail the procedures the City has employed through this ordinance. The City's demolition process ordinarily begins with an inspection of a particular structure followed by a determination by the city manager, or some other agent designated by the City, that the structure is unsafe pursuant to any one or more of the ten factors delineated in BCO § 18-46 and is, therefore, subject to demolition. This determination triggers BCO § 18-59, which requires that the city manager, or the city manager's designee, determine the cost to repair the structure and compare that cost to the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe. If the cost to repair exceeds the structure's true cash value, then the structure is presumed to be a public nuisance subject to demolition. If not, the structure remains in its unsafe condition but may not, at this point, be subject to demolition. In either case, the city manager must then serve the structure's owner with written notice pursuant to BCO § 18-52.[60] If the city manager has determined that the structure at issue can be made safe, the notice must

[60] BCO § 18-52(c) prescribes the specific notice contents and provides in its entirety:

> The notice shall:
>
> (1) Be in writing;
>
> (2) Include a description of the real estate sufficient for identification;
>
> (3) Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined that the structure cannot be made safe, indicate that the structure is to be demolished;

identify the required repairs and improvements with which the property owner must comply within a reasonable time or face demolition. However, if, as in this case, the city manager determines that the structure cannot be made safe, the notice must indicate that demolition will ensue. Moreover, following either determination, the notice must inform the property owner of the right to appeal the city manager's determination to the city council pursuant to BCO § 18-61. Within ten calendar days of receipt of this notice, the property owner must notify the City of his or her intent to accept or reject the terms of the notice.

If the owner rejects the terms of the notice and submits a written appeal that "state[s] the basis for the appeal," "[t]he owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting."[61] The city council then has the discretion to "affirm, modify, or reverse all or part of the determination of the city manager, or his designee."[62] If the owner receives an adverse final decision from the city council, the owner "may appeal th[at] decision to the county circuit court by filing a complaint within 20 calendar days from the date of the decision."[63]

Because this is a facial constitutional challenge,

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(4) Specify a reasonable time within which the repairs and improvements must be made or the structure must be demolished;

(5) Include an explanation of the right to appeal the decision to the city council within ten calendar days of receipt of the notice in accordance with section 18-61;

(6) Include a statement that the recipient of the notice must notify the city manager within ten calendar days of receipt of the notice of his intent to accept or reject the terms of the notice.

[61] BCO § 18-61.

[62] *Id*.

[63] BCO § 18-63.

plaintiffs do not argue that the City failed to properly execute or enforce this procedural system.[64] Instead, plaintiffs contend that the City's procedural system results in an unconstitutional deprivation of a property interest absent due process of law because it fails to give the owner of an unsafe structure the procedural protection of a repair option before that property may be demolished. Because this argument is simply the substantive due process argument recast in procedural due process terms, the argument meets with the same fate.

Nevertheless, the Court of Appeals determined that although BCO § 18-61 comports with procedural due process to the extent that it provides notice, a hearing, and a decision by an impartial decision-maker, "the [C]ity should have also provided for a reasonable opportunity to repair the unsafe structure" in order for the ordinance to pass constitutional scrutiny.[65] We disagree. At least as it pertains to this facial challenge, due process was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court.

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."[66] All that is necessary, then, is that the procedures at issue be tailored to "the capacities and circumstances of those who are to be heard"[67] to ensure that they are given a

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[64] In any event, however, there is no question that the building official made a determination that the structures at issue were unsafe and that it was unreasonable to repair them, that he served plaintiffs with written notice of these determinations, and that the notice included the requisite contents.

[65] *Bonner*, 298 Mich App at 716.

[66] *Joint Anti-Fascist Refugee Comm v McGrath*, 341 US 123, 171-172; 71 S Ct 624; 95 L Ed 817 (1951) (Frankfurter, J., concurring).

[67] *Goldberg v Kelly*, 397 US at 268-269.

meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake.[68] Here, there is no dispute that if the city manager orders a structure to be demolished under BCO § 18-59, aggrieved parties, such as plaintiffs, have the right to appeal that determination to the city council under BCO § 18-61. Although BCO § 18-59 creates a presumption that an unsafe structure shall be demolished as a public nuisance if the cost to repair the structure would exceed 100 percent of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe, this presumption is rebuttable. To rebut this presumption and avoid demolition, the aggrieved party need only show that the repair is reasonable, a showing that may be achieved by economic or noneconomic means. It is then within the city council's discretion to "affirm, modify, or reverse all or part of the determination of the city manager, or his designee."[69] When the city council decides, as it did here, to affirm the determination of the building official based on the evidence before it, that adverse ruling does not render an aggrieved party's opportunity to be heard any less meaningful. To the contrary, it shows that the procedures in place are sufficient to provide property owners with notice and a meaningful opportunity to be heard.

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[68] See *Loudermill*, 470 US at 542.

[69] BCO § 18-61. As previously noted, if the city manager determines that a structure is "unsafe" and that the costs to repair that structure would exceed 100 percent of the structure's pre-deteriorated true cash value, it will be presumed under BCO § 18-59 that such repairs are *unreasonable*. The appeal to the city council afforded by BCO § 18-61 is thus the property owner's opportunity to rebut the unreasonable-to-repair presumption by showing that repairs are *reasonable*. Clearly, then, the same reasonableness standard necessary to rebut the unreasonable-to-repair presumption applicable to BCO § 18-59 also applies to an appeal before the city council pursuant to BCO § 18-61.

Furthermore, vital to the assessment of what process is due in this case is the tenet that substantial weight must be given to the procedures provided for by those individuals holding legislative office—including members of a city council with whom the electorate has entrusted the duty of protecting the health and safety of all citizens—for "[i]t is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a coordinate branch of our State government. . . ."[70] This is especially so where, as here, in addition to providing the aggrieved party with an effective process for asserting his or her claim before any demolition, the prescribed procedures also ensure the right to a hearing, as well as to subsequent judicial review, before the denial of the aggrieved party's claim becomes final.[71] For these reasons, we conclude that plaintiffs have failed to demonstrate a facial procedural due process violation where they received all the process to which they were constitutionally entitled. Accordingly, the Court of Appeals reversibly erred by holding to the contrary. We therefore conclude that affording a property owner an option to repair as a matter of right is not required before the demolition of an unsafe structure and, furthermore, existing procedures in BCO § 18-59 comport entirely with due process.

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[70] *Dearborn Twp v Dail*, 334 Mich at 680.

[71] To this end, plaintiffs further contend that the appellate process was constitutionally deficient because plaintiffs did not receive a decision from an impartial decision-maker given that, according to plaintiffs, the city council is part of the same group that enacted the ordinance in the first place. We reject this argument for the simple reason that it overlooks the fact that a city council is authorized to exercise legislative and administrative functions and that the administrative function may include quasi-judicial powers. See, e.g., *Babcock v Grand Rapids*, 308 Mich 412, 413; 14 NW2d 48 (1944); *Prawdzik v Grand Rapids*, 313 Mich 376, 390-391; 21 NW2d 168 (1946); and *In re Payne*, 444 Mich 679, 708, 720; 514 NW2d 121 (1994). Plaintiffs' bare assertion that the city council is somehow not impartial is therefore untenable.

IV. CONCLUSION

The Court of Appeals erroneously determined that BCO § 18-59 is facially violative of due process. BCO § 18-59 does not, on its face, deprive plaintiffs of substantive due process when the ordinance's unreasonable-to-repair presumption is reasonably related to the City's interest in protecting the health, safety, and general welfare of its citizens from unsafe or dangerous structures. Furthermore, the presumption set forth in BCO § 18-59 is neither arbitrary nor unreasonable because there are circumstances under which the presumption could be overcome and repairs permitted.

Nor does § 18-59, on its face, deprive plaintiffs of procedural due process. BCO § 18-61 affords an aggrieved party notice and a meaningful opportunity to present evidence to rebut the unreasonable-to-repair presumption in BCO § 18-59 before an impartial decision-maker, and plaintiffs have not satisfied their burden of showing that they are constitutionally entitled to further processes in order to satisfy due process requirements. We therefore reverse the decision of the Court of Appeals and remand this case to the Livingston Circuit Court for further proceedings consistent with this opinion.

YOUNG, C.J., and CAVANAGH, MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with KELLY, J.

WURTZ v BEECHER METROPOLITAN DISTRICT

Docket No. 146157. Argued December 10, 2013 (Calendar No. 9). Decided April 25, 2014. Rehearing denied at 495 Mich 1010.

Richard L. Wurtz brought an action in the Genesee Circuit Court against the Beecher Metropolitan District (a water and sewage district), Jacquelin Corlew, Leo McClain, and Sheila Thorn, alleging a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and wrongful termination in violation of public policy. Wurtz had served as the district's administrator from February 1, 2000, until February 1, 2010, pursuant to a contract he drafted earlier while he was the district's attorney. The individual defendants were those members of the district's five-member board who voted not to renew Wurtz's contract. The tension between Wurtz and the board began in May 2008 when he reported an alleged violation of the Open Meetings Act by the individual defendants and continued through November 2009 when he reported to the sheriff's department and the newspaper what he alleged were improprieties in reimbursements to the board for attendance at an out-of-state conference. The board voted to not renew Wurtz's contract, but allowed him to finish his full 10-year term, and he received all his salary and benefits during that term. Defendants moved for summary disposition, arguing that Wurtz had not been fired because his contract expired by its own terms. The court, Judith A. Fullerton, J., dismissed the public-policy claim, holding that the WPA provided Wurtz's exclusive avenue of relief. The court also concluded that Wurtz could not satisfy the WPA's elements because he had worked the entire term of his contract and not been discharged. Wurtz appealed, and the Court of Appeals, WHITBECK, P.J., and JANSEN, J. (K. F. KELLY, J., dissenting), reversed, holding that summary disposition was inappropriate because an employer's failure to renew a contract employee's fixed-term contract satisfied the WPA's requirement that the employee suffer an adverse employment action. 298 Mich App 75 (2012). The Supreme Court granted defendants' application for leave to appeal. 494 Mich 862 (2013).

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

Under MCL 15.362, a plaintiff must demonstrate three elements to establish a prima facie case that the defendant employer violated the WPA: (1) the employee was engaged in a protected activity listed in the WPA, (2) the employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment, and (3) a causal connection existed between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. By its express language, the WPA applies only to individuals who experience one or more of the statute's enumerated adverse employment actions with respect to their status as employees. A contract employee seeking a new term of employment should be treated the same as a prospective employee for purposes of the WPA. The WPA has no application in the hiring context. It excludes job applicants and prospective employees from its protections and, therefore, does not apply when an employer declines to renew a contract employee's contract. Absent some express obligation stating otherwise, a contract employee has absolutely no claim to continued employment after his or her contract expires. Wurtz had no recourse under the WPA because he alleged only that his former employer declined to renew his contract, not that the employer took some adverse action against him during his contractual term of employment. Wurtz's claim failed as a matter of law, and summary disposition was not premature because no amount of additional discovery could have shown that Wurtz came within the WPA's protections.

Reversed and remanded.

Justice CAVANAGH concurred in the result.

EMPLOYERS AND EMPLOYEES — WHISTLEBLOWERS' PROTECTION ACT — CONTRACT EMPLOYEES — REFUSAL TO REHIRE.

The Whistleblowers' Protection Act, MCL 15.361 *et seq*., applies only to individuals who experience one or more of the statute's enumerated adverse employment actions with respect to their status as employees; it excludes from its protections job applicants and prospective employees and therefore does not apply when an employer declines to renew a contract employee's contract; absent some express obligation stating otherwise, a contract employee has absolutely no claim to continued employment after his or her contract expires.

Charles A. Grossmann for plaintiff.

Landry, Mazzeo & Dembinski, PC (by *Nancy Vayda Dembinski*), for defendants.

Amicus Curiae:

Eardley Law Offices, PC (by *Eugenie B. Eardley* and *Nicholas F. X. Gumina*), for the Michigan Association for Justice.

ZAHRA, J. This case requires the Court to consider the application of Michigan's Whistleblowers' Protection Act (WPA)[1] to a contract employee whose contract is not renewed ostensibly because of the employee's whistleblowing activities. A contract employee whose term of employment has expired without being subject to a specific adverse employment action identified in the WPA and who seeks reengagement for a new term of employment occupies the same legal position as a prospective employee. The WPA, by its express language, only applies to current employees; the statute offers no protection to prospective employees. Because the WPA does not apply when an employer decides not to hire a job applicant, it likewise has no application to a contract employee whom the employer declines to rehire for a new term of employment. The plaintiff in this case has no recourse under the WPA because he alleges only that his former employer declined to renew his contract, not that the employer took some adverse action against him during his contractual term of employment. Accordingly, we reverse the Court of Appeals' contrary decision and remand this case to the circuit court for entry of summary disposition in defendants' favor.

I. FACTS AND PROCEEDINGS

The Beecher Metropolitan District (the District) manages water and sewage for a portion of Genesee County. The District has five elected board members

[1] MCL 15.361 *et seq*.

and also employs a part-time district administrator who manages District operations on a day-to-day basis. The District has 11 full-time employees who do various maintenance and clerical jobs. The District's full-time employees operate under a union contract; only the district administrator historically operates under a separate contract with the District.

Plaintiff Richard Wurtz began his tumultuous tenure as the district administrator on February 1, 2000, and served until February 1, 2010. Before becoming district administrator, Wurtz was the District's attorney. In his capacity as attorney, he drafted the contract that would govern his term as district administrator. The contract provided for a 10-year term beginning on February 1, 2000, and ending on February 1, 2010. The board approved the contract and Wurtz became district administrator.

Tension between Wurtz and the board developed in May 2008 when Wurtz reported an alleged violation of the Open Meetings Act (OMA)[2] to the Genesee County Prosecutor. In a letter dated May 22, 2008, Wurtz informed the prosecutor that board members Sheila Thorn, Leo McClain, and Jacquelin Corlew—the three individual defendants in this case—had met with a labor attorney outside of a public meeting to discuss retaining the attorney. The prosecutor, however, declined to prosecute. Several months later, Wurtz demanded a benefits increase commensurate with those given to the District's unionized employees. He told the board that he was the one who filed the OMA complaint and said that he would treat the board's failure to capitulate as retaliation for his reporting the alleged OMA violations. The board granted Wurtz the increase

[2] MCL 15.261 *et seq*.

he desired, with two of the defendant board members voting against his benefits increase and one voting in favor.

In early 2009, Wurtz sent a proposal to the board regarding his contract. Wurtz said he could save the District money by reducing his salary and cutting off all of his benefits except life insurance. But the proposal also would have extended Wurtz's already tumultuous term for an additional 2½ years. A motion to accept Wurtz's proposal was defeated by a vote of 3 to 2. Thorn, McClain, and Corlew voted against Wurtz's proposal.

Relations between Wurtz and the board further deteriorated in the spring of 2009. The board had plans to attend the American Water Works Association conference in San Diego. Wurtz told the board that he had concerns about the cost of the trip and the manner of reimbursement. He noted several recreational items that he thought it would be inappropriate to subsidize with taxpayer funds. Wurtz nonetheless reimbursed the board for the expenses.

Despite having issued the reimbursement checks himself, Wurtz contacted the Genesee County Sheriff's Department and the Flint Journal regarding the board's trip to San Diego. This resulted in the sheriff's department raiding the District's office and public outcry about the board members' actions. Wurtz cooperated with the investigation conducted by the sheriff's department. The board members were criminally charged in connection with the trip, but all were acquitted of wrongdoing or had the charges against them dismissed.

Events came to a head in November 2009, several months before Wurtz's contract was set to expire. At the November 11, 2009 meeting, Wurtz warned the

board that he would consider the board's failure to extend his contract to be retaliation for the criminal investigation. The board, however, refused to heed Wurtz's warning and voted 3 to 2 not to renew Wurtz's contract and to begin the search for a new district administrator. The majority once again consisted of Thorn, McClain, and Corlew. Wurtz's attorney wrote a letter to the board informing it that Wurtz intended to file a claim under the WPA. But the board replied that it would not change its mind, citing other, legitimate reasons for deciding not to renew Wurtz's contract. The board explained that the tumultuous relationship between Wurtz and the board members far preceded any alleged whistleblowing activities, and furthermore, that it wished to make the administrator job full-time. Wurtz could not hold the position full-time because of his law practice.

Despite the total breakdown of the working relationship, the board allowed Wurtz to finish out his contract. Wurtz's employment with the District expired on February 1, 2010, by the terms of the contract. One essential and undisputed fact bears emphasis: Wurtz suffered no adverse consequences in the context of his self-drafted 10-year contract. He received all of the salary and benefits to which he was entitled, and he was employed as district administrator for each and every day of the agreed-to term.

After his employment ended, Wurtz brought suit in Genesee Circuit Court against the District and the three board members who voted not to renew his contract, alleging a violation of the WPA and wrongful termination in violation of public policy. Defendants moved for summary disposition, arguing that Wurtz had not been fired because his contract expired by its own terms. Wurtz argued that his employment was

terminated and, further, that summary disposition was premature because discovery was incomplete. But the court agreed with defendants. First, the court dismissed the public policy claim, holding that the WPA provided the exclusive avenue of relief to Wurtz. Then the court concluded that Wurtz could not satisfy all of the WPA's elements because he had worked through the entirety of his contract and was not discharged.

Wurtz appealed the circuit court's decision to the Court of Appeals, which reversed in a split opinion.[3] The majority concluded that summary disposition was inappropriate because, in its view, an employer's failure to renew a contract employee's fixed-term contract satisfied the WPA's requirement that the employee suffer an adverse employment action.[4] The dissent, on the other hand, would have held as a matter of law that Wurtz could not satisfy the WPA's elements based on the nonrenewal of a fixed-term contract.[5] Defendants sought leave to appeal in this Court, which we granted.[6] We asked the parties to address "(1) whether the plaintiff suffered an adverse employment action under the [WPA] when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term; and (2) whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery."[7]

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[3] *Wurtz v Beecher Metro Dist*, 298 Mich App 75; 825 NW2d 651 (2012).

[4] *Id*. at 88.

[5] *Id*. at 91 (K. F. KELLY, J., dissenting).

[6] *Wurtz v Beecher Metro Dist*, 494 Mich 862 (2013).

[7] *Id*.

II. STANDARD OF REVIEW

The interpretation of the WPA presents a statutory question that this Court reviews de novo.[8] The Court also reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10).[9]

III. ANALYSIS

This case invites the Court to decide whether the WPA applies when an employer declines to renew an employee's fixed-term contract following alleged whistleblowing by the employee. To answer this question, we first conclude that a contract employee seeking a new term of employment should be treated the same as a prospective employee for purposes of the WPA. The question then becomes whether a spurned job applicant can bring a claim under the WPA. We hold that the WPA, by its express language, has no application in the hiring context. Thus, the WPA does not apply when an employer declines to renew a contract employee's contract.

Absent some express obligation stating otherwise, a contract employee has absolutely no claim to continued employment after his or her contract expires.[10] Rather, the employer must weigh the pros and cons of engaging the applicant for a new employment term, just as an employer must weigh the pros and cons of hiring a person in the first place. And as with any employment decision, the employer can make its decision for good reasons, bad reasons, or no reasons at all, as long as the reasons are not unlawful, such as those based on

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[8] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

[9] *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).

[10] *Bd of Regents of State Colleges v Roth*, 408 US 564, 578; 92 S Ct 2701; 33 L Ed 2d 548 (1972).

discrimination.[11] Therefore, in the context of the present case, no relevant difference exists between a new job applicant and a current contract employee seeking a new term of employment.

We then ask whether a prospective employee who attempts to blow the whistle on a would-be employer may invoke the WPA's protections. When interpreting a statute, this Court must, of course, identify and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the language of the statute itself. If the statutory language clearly and unambiguously states the Legislature's intent, then further judicial construction is neither required nor permitted, and the statute must be enforced as written.[12]

The relevant provision of the WPA, MCL 15.362, states the following:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Drawing from the statutory language, this Court has identified three elements that a plaintiff must demon-

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[11] See *Mich Employment Relations Comm v Reeths-Puffer Sch Dist*, 391 Mich 253, 259; 215 NW2d 672 (1974) ("[A]n employee may be terminated for a 'good reason, bad reason, or no reason at all'."), quoting *NLRB v Century Broadcasting Corp*, 419 F2d 771, 778 (CA 8, 1969).

[12] *Whitman*, 493 Mich at 311.

strate to make out a prima facie case that the defendant employer has violated the WPA:

(1) The employee was engaged in one of the protected activities listed in the provision.[13]

(2) the employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.[14]

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[13] The protected activities listed in the act consist of reporting or being about to report a violation of a law, regulation, or rule, or being requested by a public body to participate in an investigation, hearing, inquiry, or court action. MCL 15.362. See also *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998); *Brown v Detroit Mayor*, 478 Mich 589, 594; 734 NW2d 514 (2007).

[14] Many courts, including this one, have at times grouped the collection of retaliatory acts that an employer might take toward a whistleblower under the broader term "adverse employment actions." See, e.g., *Whitman*, 493 Mich at 313; cf. *Chandler*, 456 Mich at 399 (drawing the second element of a prima facie WPA claim directly from the statutory language). But the way that the term has obtained meaning resembles the telephone game in which a secret is passed from person to person until the original message becomes unrecognizable. The term "adverse employment action" was originally developed and defined in the context of federal antidiscrimination statutes to encompass the various ways that an employer might retaliate or discriminate against an employee on the basis of age, sex, or race. See *Crady v Liberty Nat'l Bank & Trust Co of Indiana*, 993 F2d 132, 136 (CA 7, 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."). The term "adverse employment action" appeared in this Court's jurisprudence for the first time in an age discrimination case, *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997), though the statute at issue in that case, as here, did not contain the term. Michigan courts then adopted the federal definition of "adverse employment action" in the context of making out a prima facie case under Michigan's Civil Rights Act. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 362-366; 597 NW2d 250 (1999). Finally, the term crept into WPA cases. See *Debano-Griffin v Lake Co*, 493 Mich 167, 175-176; 828 NW2d 634

(3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee.[15]

Significantly, as gleaned from the WPA's express language, the statute only applies to individuals who currently have the status of an "employee."[16] The Legislature defined an "employee" in the WPA as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral,

(2013); *Brown v Detroit Mayor*, 271 Mich App 692, 706; 723 NW2d 464 (2006), aff'd in relevant part, 478 Mich 589 (2007).

While the term "adverse employment action" may be helpful shorthand for the different ways that an employer could retaliate or discriminate against an employee, this case illustrates how such haphazard, telephone-game jurisprudence can lead courts far afield of the statutory language. That is, despite courts' freewheeling transference of the term from one statute to another, the WPA actually prohibits *different* "adverse employment actions" than the federal and state antidiscrimination statutes. So we take this opportunity to return to the express language of the WPA when it comes to the necessary showing for a prima facie case under that statute. Put another way, a plaintiff's demonstration of some abstract "adverse employment action" as that term has developed in other lines of caselaw will not be sufficient. Rather, the plaintiff must demonstrate one of the specific adverse employment actions listed in the WPA.

[15] MCL 15.362 (stating that an employer may not take prohibited action against an employee "*because*" of an employee's engagement in a protected activity) (emphasis added). See *Chandler*, 456 Mich at 399; *Debano-Griffin v Lake Co*, 493 Mich at 175 (2013).

[16] We recognize that plaintiff was an employee at the time he engaged in protected activity. Significantly, however, plaintiff makes no claim that his employment contract was in any way breached or that he was subject to a specific adverse employment action enumerated by the WPA during his contract term. Rather, plaintiff maintains that because he engaged in protected activity during his contract term, he has a right under the WPA to renewal of his contract. For the reasons set forth in this opinion, we reject plaintiff's claim.

express or implied."[17] Noticeably absent from the WPA's definition of "employee" is any reference to prospective employees or job applicants. And indeed, the actions prohibited under the WPA could only be taken against a current employee. Only an employee could be discharged and only an employee could be threatened or discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment. Thus, the WPA simply excludes job applicants and prospective employees from its protections.

In this regard, the WPA stands in stark contrast to Michigan's Civil Rights Act (CRA). Whereas the WPA makes no mention of pre-employment conduct, the CRA refers to an employer's failure to hire or recruit someone:

> An employer shall not do any of the following:
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> (a) *Fail or refuse to hire or recruit*, discharge, or otherwise discriminate against *an individual* with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.[18]

The same is true of the federal Age Discrimination in Employment Act (ADEA)[19] and Title VII of the federal Civil Rights Act (Title VII).[20] Each of these statutes provides protection during the recruitment and hiring

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[17] MCL 15.361(a).

[18] MCL 37.2202(1) (emphasis added).

[19] 29 USC 623(a)(1) (stating that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . because of such individual's age").

[20] 42 USC 2000e-2(a)(1) (stating that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin").

process; the WPA does not. Moreover, whereas the WPA protects "employees," the CRA, the ADEA, and Title VII protect the broader class of "individuals" from prohibited employer actions.[21] Thus, when discussing the protections afforded prospective employees, any comparison to these antidiscrimination statutes offers little help.[22]

In light of this analysis, caselaw applying the antidiscrimination statutes to contract renewals offers no insight into how the WPA should operate in the same situation. For example, consider *Leibowitz v Cornell Univ*,[23] a case extensively relied on by Wurtz and the Court of Appeals majority, which involved a nontenured professor at Cornell.[24] The professor sued the school for violation of Title VII and the ADEA after it declined to renew her fixed-term contract.[25] The *Leibowitz* court held that "where an employee seeks renewal of an employment contract, non-renewal of an employment contract constitutes an adverse employment action for purposes of Title VII and the ADEA."[26] But any reliance on *Leibowitz* for its application in the WPA context ignores the logic that the court used to reach its conclusion. In fact, the court held that nonrenewal of a contract fell within the antidiscrimination statutes' reach *precisely because* the statutes protect new job

[21] MCL 37.2202; 29 USC 623(a)(1); 42 USC 2000e-2(a)(1).

[22] This, of course, does not mean that courts interpreting the WPA should *never* look to the CRA or federal antidiscrimination statutes for help. But in doing so, courts must be cognizant of the textual differences that exist.

[23] *Leibowitz v Cornell Univ*, 584 F3d 487 (CA 2, 2009).

[24] *Id*. at 492-493.

[25] *Id*. at 495.

[26] *Id*. at 501.

applicants.[27] But the WPA has no application during the hiring process. The floor underlying the *Leibowitz* court's conclusion collapses when attempting to apply *Leibowitz* to the WPA. While the ADEA and Title VII may apply in the context of a contract renewal, that fact has no bearing on the application of the WPA in the same situation.

This Court need not inquire why the Legislature chose to confine the WPA's protections by the bookends of employment while extending the CRA's protections to the hiring context. The Legislature elected to craft its legislation that way, and we decline to second-guess the wisdom of the Legislature's policy decisions.[28] Indeed, any number of policy justifications could be advanced for limiting the WPA's application to current employees.[29] The mere fact that the Legislature chose to extend

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[27] *Id*. at 500-501 ("It is beyond cavil that employers subject to the strictures of the ADEA and Title VII may not discriminate on the basis of age or gender in deciding whether or not to hire prospective employees. . . . Were we to accept defendants' argument here, we would effectively rule that *current* employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination laws as *prospective* employees. . . . An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA.").

[28] See *Petripren v Jaskowski*, 494 Mich 190, 212 n 50; 833 NW2d 247 (2013).

[29] For example, the Legislature might have considered the possibility of a situation like that which has arisen under the Energy Reorganization Act (ERA), 42 USC 5851, a federal whistleblowing statute that has been interpreted to protect prospective hires. A single litigant, Syed Hasan, has sued at least a dozen companies that refused to hire him. Hasan, who has raised nonmeritorious whistleblowing allegations in the past, methodically seeks employment and informs the prospective employers of his whistleblowing history. Then, when the companies decline to hire him, Hasan promptly brings an action for violation of the ERA's whistleblowing provisions. Despite his unmitigated waste of judicial

the CRA to the hiring context is insufficient to extend the WPA that far too, particularly when the WPA's statutory language requires the opposite result.

Lest today's holding be misapplied, we find it necessary to mention several things that this opinion does not say. While we hold that the WPA does not apply to decisions regarding contract renewal, we emphasize that the WPA does protect employees working under fixed-term contracts from prohibited employer actions taken with respect to an employee's service under such a contract. Indeed, the WPA's definition of "employee" expressly denotes a person working "under a contract for hire." Thus, when an employer discharges, threatens, or discriminates against a contract employee serving under a fixed-term contract because the employee engaged in a protected activity, the WPA applies.

Today's holding also has no bearing on at-will employees. While an at-will employee cannot maintain any expectation of future employment, the employment continues indefinitely absent any action from the employer.[30] Thus, an at-will employee does not need to reapply for the job for the employment to continue beyond a certain date. Once hired, an at-will employee will not later find himself or herself in the same position as a new applicant. A current at-will employee therefore

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resources all around the country, this Court has not turned up a single case in which Hasan prevailed on the merits. See, e.g., *Hasan v US Dep't of Labor*, 545 F3d 248 (CA 3, 2008); *Hasan v US Dep't of Labor*, 400 F3d 1001 (CA 7, 2005); *Hasan v US Dep't of Labor*, 298 F3d 914 (CA 10, 2002); *Hasan v US Dep't of Labor*, 301 F Appx 566 (CA 7, 2008); *Hasan v Secretary of Labor*, 90 F Appx 5, (CA 1, 2004); *Hasan v US Dep't of Labor*, 102 F Appx 341 (CA 4, 2004); *Hasan v US Dep't of Labor*, 107 F Appx 184 (CA 11, 2004).

[30] *McNeil v Charlevoix Co*, 484 Mich 69, 86; 772 NW2d 18 (2009).

stands squarely within the WPA's protections.[31] An employee working under a fixed-term contract, on the other hand, essentially becomes a new applicant when seeking a new term of employment. In sum, we do not base our decision today on whether a person can maintain an expectation of future employment but merely on whether the person falls within the WPA's protections. At-will employees do; contract employees seeking a new term of employment do not.

The WPA's language governs this case without any additional judicial interpretation. The WPA simply does not extend to the pre-employment context. Because we discern no legal difference between a contract employee seeking a new term of employment and a new applicant, the WPA provides no protection to a contract employee in that context. If a contract employee alleges only that the employer declined to renew the employee's contract, and not some action taken against the employee with respect to an employee's service under the contract, the WPA has no application.

IV. APPLICATION

Wurtz cannot show any entitlement to relief under the WPA. Wurtz alleges that the District violated the WPA by deciding not to renew his contract. In other words, Wurtz only alleges that the District took some action against him in his capacity as an *applicant* for future employment. But as this opinion has shown, the WPA does not apply to job applicants, nor does it apply to contract employees seeking renewal of their con-

[31] See *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695 n 2; 316 NW2d 710 (1982).

tracts.[32] The trial court properly granted summary disposition in defendants' favor.

During Wurtz's ten years as an *employee*—when he enjoyed the protections of the WPA—he endured no action prohibited by the WPA. He was not discharged, threatened, or discriminated against regarding his compensation, terms, conditions, location, or privileges of employment. He served the District for the entire duration of his contract and received every cent and every benefit to which he was entitled. Thus, the District did not engage in any action prohibited by the WPA.

Moreover, the circuit court did not prematurely grant summary disposition in defendants' favor. Generally, a circuit court should not grant summary disposition unless no fair likelihood exists that additional discovery would reveal more support for the nonmoving party's position. Wurtz argues that additional discovery would have yielded employment records showing that the District routinely renewed its employees' fixed-term contracts. Accepting this as true, no additional discovery would change the outcome in this case. Wurtz worked for the District for the entirety of his contract and suffered no adverse employment action in the context of that contract. That the District may have renewed employees' contracts in the past does not transform the expiration of Wurtz's contract into a prohibited action. No amount of additional discovery would have yielded support for Wurtz's position, and summary disposition was not premature.

During his time as an *employee*, Wurtz experienced no action prohibited by the WPA and therefore has no recourse under the statute. As an *applicant* for future

[32] Wurtz's contract did not contain any renewal clause imposing some obligation or duty on the employer to act. Thus, we need not address the effect that such a clause would have on our analysis.

employment, Wurtz was not hired. But the WPA does not cover prospective employees whom an employer declines to hire, so Wurtz cannot claim relief under the statute.

V. CONCLUSION

The WPA does not provide Wurtz any recourse. The WPA does not apply to prospective employees and it does not apply to contract employees seeking renewal of their employment contract. Wurtz's only allegation of a prohibited action occurred in the context of his application for future employment, so his claim fails as a matter of law. Moreover, summary disposition was not premature because no amount of additional discovery would show that Wurtz came within the WPA's protections. Accordingly, we reverse the Court of Appeals' decision and remand this case to the circuit court for entry of summary disposition in defendants' favor.

YOUNG, C.J., and MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with ZAHRA, J.

CAVANAGH, J., concurred in the result.

HENRY v LABORERS' LOCAL 1191

RAMSEY v LABORERS' LOCAL 1191

Docket Nos. 145631 and 145632. Argued October 8, 2013 (Calendar No. 2). Decided May 5, 2014.

Anthony Henry and Keith White brought an action in the Wayne Circuit Court against Laborers' Local 1191 (a labor union that represents construction workers), Michael Aaron (the union's business manager), and Bruce Ruedisueli (the union's president), alleging that their indefinite layoff from employment at the union was unlawful retaliation under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Henry and White had worked as business agents for the union until their terminations. They alleged that defendants asked several union members to repair the façade of the Trade Union Leadership Council building. The union recorded payments for the work as picket duty even though the members did not engage in picket duty on those days. Henry and White believed that Aaron was involved in criminal activity, including fraud, an illegal kickback scheme, and misappropriation of union funds. They also believed that the union had required members to work without proper safety precautions and without receiving union wages. Henry circulated an unsigned open letter to the union's leadership and distributed it to the union's membership, the union's parent leadership, and local news outlets. The letter asked why the union was paying members out of its picket fund to work on a for-profit establishment and suggested that Aaron had received illegal kickbacks from the council in exchange for providing the council free construction labor. Henry and White subsequently contacted the United States Department of Labor with their suspicions and informed the union of their decision to report the allegations. The Department of Labor investigated the allegations and interviewed several union employees and officials. It referred the matter to an assistant United States attorney, who declined to intervene. Aaron later notified Henry and White that they had been indefinitely laid off from employment at the union. During the pendency of Henry and White's action, Michael Dowdy and Glenn Ramsey (also business agents for the union) were terminated from their employment. Dowdy and Ramsey filed a

separate WPA action in the Wayne Circuit Court against the union, Aaron, and Ruedisueli, claiming that they had been terminated for their cooperation in the Department of Labor's investigation and disclosing to investigators facts substantiating the allegations of criminal misconduct. Defendants moved for summary disposition in the Henry/White lawsuit and for partial summary disposition in the Dowdy/Ramsey lawsuit, alleging that the Labor-Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*., preempted plaintiffs' WPA claims and that, as a result, the court lacked subject-matter jurisdiction to hear them. The court, Jeanne Stempien, J., denied both motions, concluding that the WPA's protection of an employee against an employer's retaliatory employment actions does not contravene the LMRDA because the LMRDA only protects from retaliation the rights afforded union members. Defendants appealed in each case, reasserting their claim of LMRDA preemption and raising the new defense that the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., independently preempted the circuit court from exercising subject-matter jurisdiction. The Court of Appeals, RONAYNE KRAUSE, P.J., and SAAD and WILDER, JJ., consolidated the appeals and affirmed in an unpublished opinion per curiam, issued July 3, 2012 (Docket Nos. 302373 and 302710), agreeing that plaintiffs had not alleged any infringement of their membership rights and that, as a result, the LMRDA's protections did not cover their claims. The panel also held that the WPA did not undermine the LMRDA's purpose of giving elected union officials the discretion to implement policies that reflect the wishes of union membership because claims of wrongful discharge for refusing to commit or aid in committing a crime did not infringe the union leaders' discretion Finally, the panel held that the NLRA did not preempt plaintiffs' claims because a claim for retaliatory discharge arising out of an employee's report of suspected illegal activity or participation in an investigation of it is only of peripheral concern to the NLRA's purpose of protecting employees' rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Supreme Court granted defendants' applications for leave to appeal. 493 Mich 934 (2013).

In an opinion by Justice KELLY, joined by Chief Justice YOUNG and Justices CAVANAGH, MARKMAN, MCCORMACK, and VIVIANO, the Supreme Court *held*:

Neither the National Labor Relations Act nor the Labor-Management Reporting and Disclosure Act preempts Whistleblowers' Protection Act claims premised on retaliation for reporting

suspected criminal misconduct, and state courts have subject-matter jurisdiction over those claims.

1. Preemption is fundamentally a question of congressional intent. Congress can preempt state law either explicitly or implicitly. In the absence of explicit statutory language, state law is preempted when it regulates conduct in a field that Congress intended the federal government to occupy exclusively or when it actually conflicts with federal law. There is no single formula to apply preemption principles in all contexts. Rather, a court must examine congressional intent to preempt state law in the specific context of the statute or statutes at issue, in this case how the WPA operates against the background of the NLRA and the LMRDA.

2. With respect to the NLRA, § 7 of that act, 29 USC 157, states that employees have the rights to self-organization; form, join, or assist labor organizations; bargain collectively through representatives of their own choosing; and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1), 29 USC 158(a)(1), states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by § 7. The NLRA both creates federal rules regarding labor relations and delegates enforcement of that policy to an administrative agency, the National Labor Relations Board (NLRB). When an activity is arguably subject to § 7 or § 8 of the act, the states and the federal courts must defer to the exclusive competence of the NLRB to avert the danger of state interference with national policy. "Arguably subject" means that the party asserting preemption must advance an interpretation of the act that is not plainly contrary to its language and has not been authoritatively rejected by the courts or the board. There are two related exceptions to preemption of state law regulations that are arguably subject to § 7 or § 8. The first is when the activity regulated is merely a peripheral concern of the NLRA. The second is when the regulated conduct touches interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, a court could not infer that Congress had deprived the states of the power to act. Courts must consider whether there exists a significant state interest in protecting the citizen from the challenged conduct and whether the exercise of state jurisdiction over the state claim entails little risk of interference with the regulatory jurisdiction of the NLRB. When the conduct at issue in the state litigation is arguably prohibited by the NLRA and thus within the exclusive jurisdiction of the NLRB, the critical inquiry in determining whether an exception applies is whether the

controversy presented to the state court is identical with that which could be presented to the board. When it is identical, states cannot subject violators to a supplemental sanction for violations of the NLRA.

3. With respect to the LMRDA, 29 USC 411(a)(2) protects union members' freedom of expression and assembly by giving every member the right to meet and assemble freely with other members; express any views, arguments, or opinions; and express at meetings the member's views on any business properly before the meeting. It also gives union members procedural protections against discipline by the union. When a plaintiff has dual status as both an employee and a member of the union, the LMRDA only provides protection from discipline in the member's capacity as a member, not in his or her capacity as an employee. This limitation ensures the freedom of elected union leaders to choose staff whose views are compatible with their own, which is an integral part of the LMRDA's purpose of ensuring a union administration's responsiveness to the mandate of a union election. Because conduct protected under the LMRDA does not extend to a union member's rights as an employee, a state-law retaliation claim brought by a union employee as an employee is preempted to the extent that it conflicts with the LMRDA's purposes. Likewise, the LMRDA preempts state law that would unduly limit the discretion of union officials to select their employees. As a result, when a union employee brings a state-law retaliation claim as an employee, a court must analyze whether the claim conflicts with the LMRDA's purpose and goal of protecting democratic processes in union leadership. A state-law retaliation claim is not preempted when it does not conflict with the purposes of the LMRDA. The discretion the LMRDA affords unions to choose their employees is not limitless. The act does not preempt state wrongful-termination claims in cases in which elected union officials attempt to use their discretion as a shield to hide alleged criminal misconduct. Any other conclusion would undermine the explicit purpose of the LMRDA to eliminate or prevent improper practices on the part of labor organizations, employers, labor-relations consultants, and their officers and representatives. In fact, protecting union employees from retaliation when they raise claims of criminal wrongdoing helps to protect the interests of rank-and-file union members and safeguard union democracy and, as a result, achieve the purposes of the LMRDA.

4. The WPA specifically regulates an employer's retaliation against employees who report a violation or suspected violation of law. MCL 15.362 provides that an employer shall not discharge,

threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee reports or is about to report a violation or a suspected violation of a law or regulation or rule to a public body or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body or a court action.

5. When assessing claims of NLRA preemption, it is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus. The specific conduct plaintiffs alleged in their WPA claims is that defendants unlawfully retaliated against them for reporting suspected wrongdoing to the Department of Labor. Plaintiffs' allegations of wrongdoing fell into two general categories: (1) improper working conditions (that workers were paid unfairly and were not provided with necessary safety precautions) and (2) criminality (that defendants were engaged in fraud, embezzlement, and misuse of union funds). Basic to the right guaranteed to employees in § 7 of the NLRA to form, join or assist labor organizations is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. The mutual-aid-or-protection clause in § 7 protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, among other activities intended to improve working conditions. Similarly, the relevant inquiry when examining whether activity is concerted is whether the employee acted with the purpose of furthering group goals.

6. The NLRA preempted plaintiffs' WPA claims related to improper working conditions. Plaintiffs unquestionably acted with the purpose of furthering group goals when they disputed the working conditions for union members. Their claims of unfair wages and an unsafe work environment were prototypical issues of dispute under the NLRA. Therefore, plaintiffs' conduct to improve unfair wages and an unsafe work environment was arguably protected under § 7 of the NLRA, and § 8 specifically prohibited defendants from retaliating against plaintiffs for engaging in conduct protected under § 7. Neither of the two exceptions to NLRA preemption applied to plaintiffs' concerted activity regarding working conditions because those conditions are of central, not peripheral, concern to the NLRA's purposes. Because this protection has been central to the NLRA's purposes for nearly 80 years, the more recent attempt of the WPA to regulate retaliation for an alleged unfair labor practice does not touch interests so deeply rooted in local feeling and responsibility that a court could not

infer that Congress intended the NLRB to have exclusive jurisdiction over a state whistleblower claim arising out of complaints regarding an employer's improper working conditions.

7. The NLRA did not preempt the WPA with respect to plaintiffs' claims alleging retaliation for reporting defendants' criminal wrongdoing. While the NLRA regulates employees' concerted activities for their mutual aid or protection, it does not regulate the reporting of federal and state crimes. Section 7 is not so broad that it protects all concerted activities by employees. At some point the relationship between the concerted activity and the employees' interests as employees becomes so attenuated that an activity cannot fairly be deemed to come within the mutual-aid-or-protection clause. The allegations of criminal misconduct that plaintiffs communicated to the Department of Labor did not relate to the employer's labor practices. Rather, a state court can adjudicate the underlying allegations of embezzlement and other criminal misconduct without having to consider an employer's labor practices or whether employees engaged in protected activity when reporting those allegations. Moreover, Michigan has a deeply rooted and substantial interest in enforcing its criminal laws, which the NLRB has no authority to enforce and which the WPA assists by protecting employees who report allegations of criminal misconduct, interests that are separate from the interests articulated in the NLRA.

8. Plaintiffs' WPA claims premised on reporting defendants' alleged criminal misconduct also survived defendants' assertion of LMRDA preemption. Although the LMRDA does not provide union employees who have been terminated a cause of action for retaliation taken against them as employees, states are not completely forbidden from restricting a union leader's discretion to terminate a union employee. If a union retaliates against a union employee as an employee, any underlying state-law retaliation claim is preempted only to the extent that it conflicts with the purposes of the LMRDA. States are afforded considerably more freedom to supplement the LMRDA federal scheme as long as no conflict arises between state law and the LMRDA. A union employer's discretion in employment decisions must yield in cases in which elected union officials attempt to use that discretion as a shield to hide alleged criminal misconduct. As a result, the LMRDA allows state-law retaliation claims to proceed in state courts.

Affirmed in part and remanded.

Justice ZAHRA, concurring in part and dissenting in part, joined the majority's opinion in Parts I, II, III(A), (C), (D), and IV(B), but

dissented from Parts III(B) and IV(A) and the outcome of the case. Justice ZAHRA agreed that the LMRDA did not preempt plaintiffs' WPA claims but disagreed with the majority's conclusion that the NLRA did not preempt those claims. Conduct is arguably prohibited by the NLRA if the underlying activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8. Plaintiffs' WPA claims were arguably subject to the NLRA because plaintiffs' reporting of alleged wrongful conduct was done to assist their labor organization by revealing that the organization's assets might be subject to depletion through fraud, embezzlement, and misuse of union funds. The union officials, in their capacity as employers, were prohibited by the NLRA from discharging their employees simply because the employees reported their suspicions of illegal activity that would harm the union. Moreover, plaintiffs' claims did not fall within what is effectively one exception to NLRA preemption for deeply rooted state interests that are of peripheral concern to the NLRA. In general, when courts determine the applicability of the exception, they effectively presume that claims grounded in state law reflect deeply rooted state interests and inquire instead whether the conduct at issue is of peripheral concern to the NLRA, engaging in a fact-intensive inquiry to decide whether both the NLRA and the state statute, as applied, prohibit the complained-of activity. When the NLRA and state law do not prohibit the same conduct, the preemption exception will apply. Plaintiffs' claims here sounded in retaliatory discharge. They reported alleged criminal conduct that triggered protection under the WPA and simultaneously assisted a labor organization, which entitled their activity to NLRA protection. Thus, both the WPA and the NLRA prohibited discharge for the protected action, and the NLRA preempted the WPA. In addition, plaintiffs' WPA claims represented a classic example of unacceptable NLRA circumvention through artful pleading. Justice ZAHRA would have reversed the judgment of the Court of Appeals and dismissed plaintiffs' WPA claims because they were preempted by the NLRA.

EMPLOYERS AND EMPLOYEES — WHISTLEBLOWERS' PROTECTION ACT — NATIONAL LABOR RELATIONS ACT — LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT — FEDERAL PREEMPTION OF WHISTLEBLOWER CLAIMS — CRIMINAL CONDUCT.

Neither the National Labor Relations Act, 29 USC 151 *et seq*., nor the Labor-Management Reporting and Disclosure Act, 29 USC 401 *et seq*., preempts claims brought under the Whistleblowers' Protection Act, MCL 15.361 *et seq*., that are premised on retaliation

for reporting suspected criminal misconduct, and state courts have subject-matter jurisdiction over those claims.

Joel B. Sklar and *Robert Dinges* for Anthony Henry and Keith White.

Giarmarco, Mullins & Horton, PC (by *Ben M. Gonek*) for Michael Ramsey and Glenn Dowdy.

Legghio & Israel, PC (by *Christopher P. Legghio* and *Michael J. Bommarito*) for Laborers' Local 1191 and Michael Aaron.

Law Offices of J. Douglas Korney (by *J. Douglas Korney*) for Bruce Ruedisueli.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Susan Przekop-Shaw*, *Jason Hawkins*, and *Bradley A. Fowler*, Assistant Attorneys General, for the Attorney General.

KELLY, J. This case involves whether, and the extent to which, plaintiffs' claims asserted under the Michigan Whistleblowers' Protection Act (WPA)[1] are preempted by the National Labor Relations Act (NLRA)[2] and the Labor-Management Reporting and Disclosure Act (LMRDA).[3] Plaintiffs allege that defendants violated the WPA when they discharged plaintiffs in retaliation for reporting to the United States Department of Labor their suspicions of fraud, embezzlement, improper wages, and unsafe working conditions or for participating in the Department of Labor's ensuing investigation.

[1] MCL 15.361 *et seq*.

[2] 29 USC 151 *et seq*.

[3] 29 USC 401 *et seq*.

Defendants argue that the NLRA and LMRDA preempt plaintiffs' WPA claims and, as a result, the state court must dismiss those claims.

Congress enacted the NLRA and the LMRDA to protect the rights of employees and union members from infringement by employers and unions. The NLRA established the National Labor Relations Board (NLRB), which has exclusive jurisdiction over activity "arguably subject" to §§ 7[4] and 8[5] of the NLRA.[6] These provisions forbid an employer from interfering with an employee's right to engage in concerted activities for the mutual aid or protection of employees.[7] The LMRDA safeguards a union member's ability to elect union leadership, provides broad discretion for elected union officials to implement their policies, and protects union members who exercise their freedom of expression from retaliation by union officials.[8] More recently, the Michigan Legislature enacted the WPA to protect employees from retaliation for reporting violations or suspected violations of laws and regulations to a public body.[9]

We hold that neither the NLRA nor the LMRDA preempts WPA claims premised on reporting suspected criminal misconduct. The NLRA does not cover the reporting of suspected criminal misconduct, while the LMRDA does not provide a union official with discretion to cover up suspected criminal misconduct by retaliating against employees who report their allegations. However, plaintiffs' allegations of retaliation for

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[4] 29 USC 157.

[5] 29 USC 158.

[6] *San Diego Bldg Trades Council v Garmon*, 359 US 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959).

[7] 29 USC 157; 29 USC 158(a)(1).

[8] 29 USC 411(a)(1), (2), and (5).

[9] MCL 15.362.

their reporting of improper wages and an unsafe work environment cover conduct "arguably prohibited" by the NLRA and, as a result, must be litigated exclusively before the NLRB. Accordingly, we affirm in part the decision of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with our opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant Laborers' Local 1191 is a Wayne County labor union that represents construction workers. At all times relevant to these consolidated appeals, the union's member-elected leadership included its president (defendant Bruce Ruedisueli) and its business manager (defendant Michael Aaron). The union also employed several unelected business agents who serve at the pleasure of the business manager. Plaintiffs Anthony Henry and Keith White (Docket No. 145631) and Michael Ramsey and Glenn Dowdy (Docket No. 145632) all worked as business agents until their terminations.

While the facts leading up to plaintiffs' terminations are contested, it is undisputed that in September 2009, defendants asked several Local 1191 members to repair the crumbling façade of the Trade Union Leadership Council (TULC) building.[10] The work lasted for two days, and each member received $30 a day. Although Local 1191 recorded these payments as "picket duty" on the memo line of the checks used for payment and in the union's treasury, it admits that its members did not engage in picket duty on those days.

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[10] The parties dispute the nature of the TULC. Defendants characterize the TULC as a "community-focused, non-profit entity" that provides training for laid-off employees, while plaintiffs claim that it is a "private entity separate and distinct from Local 1191" that "is licensed to sell liquor."

Henry witnessed the work. He and the three other plaintiffs suspected that Aaron was involved in criminal activity, including fraud, an illegal kickback scheme, and misappropriation of union funds. They also believed that Local 1191 required members to work without proper safety precautions and without receiving union wages. As a result, on September 25, 2009, Henry circulated an unsigned open letter to Local 1191's leadership and distributed that letter to union membership, the union's parent leadership, and local news outlets. In the letter, Henry asked why Local 1191 was paying members out of its picket fund to work on a for-profit establishment (the TULC) and suggested that Aaron had received illegal kickbacks from the TULC in exchange for providing the TULC with free construction labor. The letter also complained that union members received only $60 for two full days of work.

In October 2009, Henry and White contacted the United States Department of Labor with their suspicions and informed the union of their decision to report the allegations.[11] The Department of Labor investigated the allegations and interviewed several union employees and officials.[12] It subsequently referred the matter to an Assistant United States Attorney, who declined to intervene.[13]

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[11] Henry and White also claim that they contacted the Michigan Department of Labor, although the lower court record only contains a formal report from the United States Department of Labor.

[12] Defendants frame plaintiffs' conduct in this case as primarily focused on working conditions, not about alleged criminal misconduct. However, the record belies this assertion and confirms that plaintiffs reported alleged criminal behavior to a public body. Indeed, the Department of Labor report focuses on the alleged criminal misconduct.

[13] Although major portions of the Department of Labor report are redacted in the record presented to this Court, including the reason that the Assistant United States Attorney declined to intervene, the report indicates that the Department of Labor considers the matter closed.

On November 11, 2009, Aaron notified Henry and White that they were indefinitely laid off from employment at Local 1191. The letters claimed that the "extremely difficult economic climate" necessitated the layoffs. Henry and White disputed that stated rationale and, instead, filed a complaint in the Wayne Circuit Court against Local 1191 as an entity and against Aaron and Ruedisueli individually, in which they alleged unlawful retaliation under the WPA.

During the pendency of that initial action, Dowdy and Ramsey were terminated from their employment at Local 1191. Dowdy and Ramsey claim that they were terminated for their cooperation in the Department of Labor investigation and for disclosing to investigators facts substantiating the allegations of criminal illegality.[14] They also filed a separate WPA complaint against Local 1191 as an entity and against Aaron and Ruedisueli individually.

Defendants moved for summary disposition in the Henry/White lawsuit and for partial summary disposition in the Dowdy/Ramsey lawsuit,[15] alleging that the LMRDA preempted plaintiffs' WPA claims and that, as a result, the circuit court lacked subject-matter jurisdiction to hear them.[16] The court denied the motions from the bench, concluding that the WPA's protection of an employee against an employer's retaliatory employment actions does not contravene the LMRDA because the LMRDA only protects from retaliation the rights afforded union members.

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[14] Ramsey also claimed that Ruedisueli asked him to lie at a deposition in the Henry/White lawsuit and that his refusal to do so constituted another reason for his termination.

[15] Defendants did not seek summary disposition on Ramsey's allegation that he was terminated for refusing to lie at his deposition. As a result, it is not part of the appeal before this Court.

[16] MCR 2.116(C)(4).

On appeal, defendants reasserted their claim of LMRDA preemption and raised the new defense that the NLRA independently preempted the circuit court from exercising subject-matter jurisdiction. The Court of Appeals affirmed the circuit court's ruling in an unpublished opinion.[17] The Court agreed with the circuit court that plaintiffs "have not alleged any infringement on their membership rights" and that, as a result, the LMRDA's protections did not cover plaintiffs' claims.[18] The Court also examined whether the WPA undermined the LMRDA's democratic purpose to give elected union officials the discretion to implement policies that reflect the wishes of union membership. The Court concluded that plaintiffs' claims did not infringe union leaders' discretion "where a union employee claims wrongful discharge for refusing 'to commit or aid in committing a crime' . . . ."[19] Finally, the Court held that the NLRA did not preempt plaintiffs' claims because "[a] claim for retaliatory discharge arising out of an employee's report of suspected illegal activity or participation in investigation thereof is only of peripheral concern to the NLRA's purpose of protecting employees' rights to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.' "[20]

This Court granted defendants' applications for leave to appeal and requested that the parties brief

> (1) whether, regardless of the public body involved, the National Labor Relations Act (NLRA), 29 USC 151 *et*

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[17] *Henry v Laborers Local 1191*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2012 (Docket Nos. 302373 and 302710).

[18] *Id*. at 5.

[19] *Id*. at 3, quoting *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 146; 796 NW2d 94 (2010).

[20] *Henry*, unpub op at 6, citing *Roussel v St Joseph Hosp*, 257 F Supp 2d 280, 285 (D Maine, 2003).

> *seq*., or the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*., preempt Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA; (2) whether a union employee's report to a public body of suspected illegal activity or participation in an investigation thereof is of only peripheral concern to the NLRA or the LMRDA so that the employee's claims under the WPA are not preempted by federal law; and, (3) whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act.[21]

II. STANDARD OF REVIEW

Defendants assert that federal law preempts plaintiffs' WPA claims and precludes Michigan courts from exercising subject-matter jurisdiction over them. As a result, they argue, they are entitled to summary disposition pursuant to MCR 2.116(C)(4).

Jurisdictional questions under MCR 2.116(C)(4), including whether federal statutory law preempts state law,[22] are questions of law that we review de novo.[23] In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(4), a court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties . . . ."[24]

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[21] *Henry v Laborers Local 1191*, 493 Mich 934, 934-935 (2013). Only Local 1191 and Aaron appealed the Court of Appeals' decision.

[22] Whether federal statutory law preempts state law is a question of statutory interpretation. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

[23] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001).

[24] MCR 2.116(G)(5).

III. ANALYSIS

A. GENERAL PREEMPTION PRINCIPLES

In *M'Culloch v Maryland*, Chief Justice John Marshall addressed the relationship between the federal and state governments in our constitutional republic:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it . . . .[25]

To this end, the Framers of the Constitution drafted, and the people ratified, the Supremacy Clause, which states the core principle of preemption:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[26]

Justice Cooley observed that the Supremacy Clause requires "[a] State law [to] yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they

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[25] *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 405; 4 L Ed 579 (1819).

[26] US Const, art VI, cl 2.

come in collision . . . ."[27] However, because a state's traditional police powers are broad, the United States Supreme Court has explained that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' "[28]

Preemption "fundamentally is a question of congressional intent . . . ."[29] Congress can preempt state law either explicitly or implicitly.[30] "[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively"[31] or when "it actually conflicts with federal law."[32] Nevertheless, "[i]n the final analysis, there can be no one crystal clear distinctly marked formula" to apply preemption principles in all contexts.[33] Rather, we

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[27] Cooley, Constitutional Law (1880), p 32.

[28] *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992), quoting *Rice v Santa Fe Elevator Corp*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947).

[29] *English v Gen Electric Co*, 496 US 72, 78-79; 110 S Ct 2270; 110 L Ed 2d 65 (1990).

[30] *Id*. Of course, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *Id*. at 79.

[31] *Id*. Determining whether Congress intended the federal government to occupy an entire field requires examining whether " 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Id.*, quoting *Rice*, 331 US at 230.

[32] *English*, 496 US at 79. The Court had held that federal law conflicts with state law "where it is impossible for a private party to comply with both state and federal requirements," or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.*, quoting *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941).

[33] *Hines*, 312 US at 67.

must examine congressional intent to preempt state law in the specific context of the statute or statutes at issue—in this case, how the Michigan WPA operates against the background of the NLRA and the LMRDA.

B. THE NLRA

Congress enacted the National Labor Relations Act in 1935 after it concluded that "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . . ."[34] The NLRA's enactment "marked a fundamental change in the Nation's labor policies."[35] Congress replaced "[t]he earlier notion that union activity was a species of 'conspiracy' and that strikes and picketing were examples of unreasonable restraints of trade" with "an unequivocal national declaration of policy establishing the legitimacy of labor organization and encouraging the practice of collective bargaining."[36]

Section 7 of the NLRA states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[37] Section 8(a)(1) states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees

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[34] 29 USC 151.

[35] *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters*, 436 US 180, 190; 98 S Ct 1745; 56 L Ed 2d 209 (1978).

[36] *Id*. The Court upheld the constitutionality of the NLRA against a Commerce Clause challenge in *NLRB v Jones & Laughlin Steel Corp*, 301 US 1; 57 S Ct 615; 81 L Ed 893 (1937).

[37] 29 USC 157.

in the exercise of the rights guaranteed in section 7,"[38] while § 10(a) empowers the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[39]

The structure of the NLRA not only creates federal rules of decision regarding labor relations, but also delegates enforcement of that policy to an administrative agency. The United States Supreme Court has acknowledged this dual purpose of the NLRA:

> [T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:
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> > . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.[40]

Indeed, the Court has explained that "nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law."[41]

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[38] 29 USC 158(a)(1).

[39] 29 USC 160(a).

[40] *Garmon*, 359 US at 242-243, quoting *Garner v Teamsters, Chauffeurs & Helpers Local Union No 776*, 346 US 485, 490-491; 74 S Ct 161; 98 L Ed 228 (1953).

[41] *Amalgamated Ass'n of Street, Electric R & Motor Coach Employees v Lockridge*, 403 US 274, 286; 91 S Ct 1909; 29 L Ed 2d 473 (1971).

San Diego Building Trades Council v Garmon is the "watershed" case analyzing "the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily supplants the operation of the more traditional legal processes in this field"—that is, state regulation.[42] In *Garmon*, the Court explained:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.[43]

Moreover, even when it is unclear "whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections," the Court held that "[i]t is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."[44] Therefore, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[45]

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[42] *Id*. at 276.

[43] *Garmon*, 359 US at 244.

[44] *Id*. at 244-245.

[45] *Id*. at 245.

The Court subsequently clarified the "arguably subject" standard to mean that "the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor."[46] In other words, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board."[47]

Nevertheless, the Court "has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . .' "[48] To this end, *Garmon* recognized two related exceptions to preemption of state law regulations that are "arguably subject" to §§ 7 or 8 of the NLRA. The exceptions each "examin[e] the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme."[49]

The first *Garmon* exception is "where the activity regulated [is] a merely peripheral concern" of the NLRA.[50] For example, even though the NLRA permits employers to hire replacement workers during a strike, the Court allowed a replacement worker's breach of contract and misrepresentation claims to proceed against the employer.[51] In explaining that the agreements between employers and replacement workers

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[46] *Int'l Longshoreman's Ass'n v Davis*, 476 US 380, 395; 106 S Ct 1904; 90 L Ed 2d 389 (1986).

[47] *Id*.

[48] *Farmer v United Brotherhood of Carpenters & Joiners*, 430 US 290, 295-296; 97 S Ct 1056; 51 L Ed 2d 338 (1977), quoting *Lockridge*, 403 US at 289.

[49] *Farmer*, 430 US at 297.

[50] *Garmon*, 359 US at 243.

[51] *Belknap, Inc v Hale*, 463 US 491, 500; 103 S Ct 3172; 77 L Ed 2d 798 (1983).

were only peripheral concerns of the NLRA, the Court concluded that the NLRA did not require courts "to hold that either the employer or the union is . . . free to injure innocent third parties without regard to the normal rules of law governing those relationships."[52]

The second, and related, *Garmon* exception is "where the regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[53] Courts must consider whether "there exist[s] a significant state interest in protecting the citizen from the challenged conduct" and whether "the exercise of state jurisdiction over the [state] claim entail[s] little risk of interference with the regulatory jurisdiction of the [NLRB]."[54] Under this exception, the Court has held, for example, that the NLRA does not preempt certain state law claims alleging intentional torts—including threats of violence,[55] trespass,[56] intentional infliction of emotional distress,[57] malicious interference with a lawful occupation,[58] and malicious libel.[59]

When the conduct at issue in the state litigation is "arguably prohibited" by the NLRA and thus within the exclusive jurisdiction of the NLRB, the critical inquiry

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[52] *Id*.

[53] *Garmon*, 359 US at 244.

[54] *Sears, Roebuck*, 436 US at 196.

[55] *Youngdahl v Rainfair, Inc*, 355 US 131, 139; 78 S Ct 206; 2 L Ed 2d 151 (1957).

[56] *Sears, Roebuck*, 436 US at 207.

[57] *Farmer*, 430 US at 302.

[58] *UAW v Russell*, 356 US 634, 646; 78 S Ct 932; 2 L Ed 2d 1030 (1958).

[59] *Linn v United Plant Guard Workers*, 383 US 53, 62; 86 S Ct 657; 15 L Ed 2d 582 (1966).

in determining whether an exception applies "is whether the controversy presented to the state court is identical with that which could be presented to the Board."[60] When it is identical, the Court has determined that states cannot subject violators to "a supplemental sanction for violations of the NLRA . . . ."[61]

C. THE LMRDA

Congress enacted the Labor-Management Reporting and Disclosure Act in 1959 as "the product of congressional concern with widespread abuses of power by union leadership."[62] The United States Supreme Court explained that "allegations of union wrongdoing led to extended congressional inquiry" and resulted in "enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution; not surprisingly, these amendments . . . were introduced under the title of 'Bill of Rights of Members of Labor Organizations.' "[63]

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[60] *Belknap*, 463 US at 510. Of course, a conclusion that the NLRA preempts a state law claim does not require the claim to have been presented to the NLRB. Rather, the claim is preempted if it *could* have been presented there and neither of the exceptions applies. Moreover, even if a claim is preempted, the NLRB may decide *not* to exercise its jurisdiction on a particular claim. Nevertheless, whether the NLRB will *exercise* its jurisdiction (or has been given an option to exercise its jurisdiction) is distinct from whether the NLRB has jurisdiction over the claim. *Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 264; 685 NW2d 313 (2004).

[61] *Wisconsin Dep't of Indus, Labor & Human Relations v Gould Inc*, 475 US 282, 288; 106 S Ct 1057; 89 L Ed 2d 223 (1986).

[62] *Finnegan v Leu*, 456 US 431, 435; 102 S Ct 1867; 72 L Ed 2d 239 (1982). The LMRDA is also known as the Landrum-Griffin Act. *Black's Law Dictionary* (9th ed), p 957. One of the LMRDA's principal coauthors, then Representative Robert P. Griffin, served on this Court from 1987 to 1994.

[63] *Finnegan*, 456 US at 435.

The LMRDA's Bill of Rights of Members of Labor Organizations protects union members' freedom of expression and assembly:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings[.][64]

It also provides union members with procedural protections against discipline by the union:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.[65]

"Any person whose rights secured by the [Bill of Rights of Members of Labor Organizations] have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."[66]

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[64] 29 USC 411(a)(2).

[65] 29 USC 411(a)(5).

[66] 29 USC 412. The LMRDA also contains two saving provisions. The title containing the Bill of Rights specifies that "[n]othing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." 29 USC 413. Additionally, the LMRDA generally states:

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organiza-

In *Finnegan v Leu*, the Supreme Court explained that "[i]t is readily apparent, both from the language of these provisions and from the legislative history . . . , that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect."[67] The Court explained that when plaintiffs have "dual status as both employees and members of the Union,"[68] the LMRDA only provides a member/employee with protection from discipline in his or her capacity as a member, not in his or her capacity as an employee:

> [T]he term "discipline" . . . refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. . . . In contrast, discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees.[69]

This limitation ensures "the freedom of an elected union leader to choose a staff whose views are compatible with his own."[70] This is "an integral part" of the LMRDA's purpose "of ensuring a union administration's responsiveness to the mandate of the union election."[71]

Finnegan did not examine the LMRDA in the context of preemption—no Supreme Court decision has—but several lower courts have done so. Because conduct

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tion is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State. [29 USC 523(a).]

[67] *Finnegan*, 456 US at 436-437.

[68] *Id.* at 437.

[69] *Id.* at 437-438.

[70] *Id.* at 441.

[71] *Id.*

protected under the LMRDA does not extend to a union member/employee's rights as *an employee*, a state-law retaliation claim brought by a union employee as an employee is preempted to the extent that it conflicts with the LMRDA's purposes. Because "the courts have been reluctant to interfere with the right of elected union officers to select their own administrators,"[72] which is protected under the LMRDA, we likewise hold that the LMRDA preempts state law that would unduly limit the discretion of union officials to select their employees.

As a result, when a union employee brings a state-law retaliation claim as an employee, we must analyze whether the claim conflicts with the LMRDA's "purpose and goal of protecting democratic processes in union leadership."[73] In *Packowski v United Food & Commercial Workers Local 951*, for example, the Court of Appeals explained that "[i]f union members cannot choose their leaders, or if the chosen leaders cannot implement the policies they were elected to implement, then the rights of union members (as represented by their elected leaders) would be thwarted, or at least diminished."[74]

Nevertheless, a state-law retaliation claim is not preempted when it does not conflict with the purposes of the LMRDA. Indeed, courts have recognized that the discretion the LMRDA affords unions to choose their employees is not limitless. In *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union*, the United

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[72] *Cehaich v UAW*, 710 F2d 234, 239 (CA 6, 1983).

[73] *Packowski*, 289 Mich App at 149.

[74] *Id*. Because the instant WPA claims implicate allegations of criminal wrongdoing not existing in *Packowski*, we need not—and do not—determine the validity of the LMRDA preemption doctrine used by the Court of Appeals in *Packowski*.

States Court of Appeals for the Ninth Circuit held that the LMRDA did not preempt a state claim for wrongful discharge after a union employee refused to illegally alter the minutes of a union meeting.[75] The court balanced the state's interest in deterring crime with the purpose of the LMRDA, explaining that "[i]f federal labor law preempts such a cause of action, the deterrent effect is lost and nothing prevents unscrupulous employers from forcing employees to choose between committing crimes and losing their jobs."[76] Furthermore, "[t]he kind of discharge alleged, retaliation for refusal to commit a crime and breach a trust, is not the kind sanctioned by the Act" to further the goals and policies of elected union officials.[77] Rather, "[p]rotecting such a discharge by preempting a state cause of action based on it does nothing to serve union democracy or the rights of union members; it serves only to encourage and conceal such criminal acts and coercion by union leaders."[78]

We adopt the exception to LMRDA preemption articulated in *Bloom* and related cases. Accordingly, we hold that the LMRDA does not preempt state wrongful-termination claims in cases in which elected union officials attempt to use their discretion as a shield to hide alleged criminal misconduct. To hold otherwise would undermine the explicit purpose of the LMRDA

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[75] *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union*, 783 F2d 1356 (CA 9, 1986).

[76] *Id.* at 1361

[77] *Id.* at 1362.

[78] *Id.* Similarly, two years after *Bloom*, the Colorado Court of Appeals held that the LMRDA did not preempt a state-law wrongful-discharge claim "insofar as [the plaintiff] allege[d] that he was discharged because he refused to aid [the union's business manager] in his alleged criminal misuse of union funds." *Montoya v Int'l Brotherhood of Electrical Workers Local Union III*, 755 P2d 1221, 1224 (Colo App, 1988).

"to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives . . . ."[79] In fact, protecting union employees from retaliation when they raise claims of criminal wrongdoing helps to protect the interests of rank-and-file union members and safeguard union democracy and, as a result, achieve the purposes of the LMRDA.

D. THE WPA

The Legislature enacted the WPA in 1980 to " 'provide protection to employees who report a violation or suspected violation of state, local, or federal law . . . .' "[80] The WPA "remove[s] barriers that may interfere with employee efforts to report those violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law."[81]

MCL 15.362 specifically regulates an employer's retaliation against employees who report a violation or suspected violation of law:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report,

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[79] 29 USC 401(c). See also 29 USC 401(b) (finding that "there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct").

[80] *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013), quoting the title of 1980 PA 469.

[81] *Whitman*, 493 Mich at 312, citing *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997).

> verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Defendants argue that federal law preempts plaintiffs' WPA claims. Because courts examine preemption under the NLRA separately from preemption under the LMRDA, as shown earlier, we will likewise consider each federal statute separately in determining whether federal law preempts plaintiffs' WPA actions.[82]

IV. APPLICATION

A. NLRA PREEMPTION

In assessing claims of NLRA preemption, the Supreme Court has clarified that "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."[83] The specific conduct alleged in plaintiffs' WPA claims is that defendants unlawfully retaliated against them for their reporting of suspected wrongdoing to the United States Department of Labor. Plaintiffs' allegations of wrongdoing fall into two general categories: (1) improper working conditions—that workers were paid unfairly and were not provided with necessary safety

[82] Although defendants raised this issue of NLRA preemption for the first time before the Court of Appeals, preemption is a question of subject-matter jurisdiction. As such, this Court must consider it. *Davis*, 476 US at 393 ("A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court.").

[83] *Lockridge*, 403 US at 292.

precautions—and (2) criminality—that defendants were engaged in fraud, embezzlement, and misuse of union funds. Because a court may separate preempted claims from nonpreempted claims,[84] we will examine each category of claims separately in determining whether the NLRA preempts plaintiffs' claims.

As stated, the threshold inquiry in determining whether the NLRA preempts state-law claims is to determine whether "an activity is arguably subject to § 7 or § 8 of the Act . . . ."[85] Among other protections, § 7 of the NLRA provides employees the right "to form, join, or assist labor organizations" and "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[86] These rights are intertwined: "Basic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection."[87] Defendants claim that all of plaintiffs' activities are "arguably subject" to § 7.

The Court has held that the "mutual aid or protection clause" in § 7 "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," among other activities intended to improve working conditions.[88] Similarly, the relevant inquiry in

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[84] See *Farmer*, 430 US at 301-302 (noting that a rigid application of *Garmon* might support the conclusion that the "entire action was preempted by federal law" but in this case allowing only a claim of intentional infliction of emotional distress to proceed in state court).

[85] *Garmon*, 359 US at 245.

[86] 29 USC 157.

[87] *NLRB v Drivers, Chauffeurs, Helpers, Local Union No 639*, 362 US 274, 279; 80 S Ct 706; 4 L Ed 2d 710 (1960).

[88] *Eastex, Inc v NLRB*, 437 US 556, 566; 98 S Ct 2505; 57 L Ed 2d 428 (1978).

examining whether activity is "concerted" within the meaning of the NLRA is "whether the employee acted with the purpose of furthering group goals."[89]

Plaintiffs unquestionably acted with the purpose of furthering group goals when they disputed the working conditions for union members. Their claims of unfair wages and an unsafe work environment are prototypical issues of dispute under the NLRA.[90] As a result, plaintiffs' conduct to improve unfair wages and an unsafe work environment is arguably protected under § 7 of the NLRA. Furthermore, § 8 specifically prohibits defendants from retaliating against plaintiffs for engaging in conduct protected under § 7. Accordingly, plaintiffs' conduct regarding working conditions satisfies the initial *Garmon* threshold, such that federal law would preempt state law unless one of the two exceptions applies.[91]

Moreover, neither of the two exceptions to the NLRA applies to plaintiffs' concerted activity regarding work-

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[89] *Compuware Corp v NLRB*, 134 F3d 1285, 1288 (CA 6, 1998).

[90] See *Platt v Jack Cooper Transp, Co, Inc*, 959 F2d 91, 94 (CA 8, 1992) ("Platt's claim that he was discharged in retaliation for making safety complaints satisfies the threshold test for *Garmon* preemption.").

[91] Plaintiffs argue that union members were not employees within the meaning of the NLRA and that, as a result, they were not engaging in concerted activities. Rather, plaintiffs characterize the union members who worked on the TULC project as volunteers who are not protected by the NLRA. Indeed, the NLRB has stated that unpaid volunteers are not employees within the meaning of the NLRA because "there is no economic aspect to their relationship with the Employer, either actual or anticipated." *WBAI Pacifica Foundation and United Electrical, Radio & Machine Workers of America*, 328 NLRB 1273, 1275 (1999). Nevertheless, we reject this argument as it applies to plaintiffs. The union members who worked on the TULC project *did* have an economic aspect to their relationship with the union—they were engaged in work for hire and "receive[d] compensation for labor or services" in the amount of $30 a day. *Id*. More importantly, there is no question that *plaintiffs* were employees within the meaning of the NLRA and that they were allegedly retaliated against for complaining to their employer about its labor practices.

ing conditions. First, working conditions are of central, not peripheral, concern to the NLRA's purposes. As stated, the NLRA specifically sought to protect the right of employees to organize to improve their working conditions. Relatedly, because this protection has been central to the NLRA's purposes for nearly 80 years, the more recent attempt of the WPA to regulate retaliation for an alleged unfair labor practice does not "touch[] interests so deeply rooted in local feeling and responsibility"[92] that the Court could not infer that Congress intended the NLRB to have exclusive jurisdiction over a state whistleblower claim arising out of complaints regarding an employer's improper working conditions. Indeed, allowing plaintiffs' WPA claim regarding defendants' working conditions would amount to "a supplemental sanction for violations of the NLRA," which the NLRA prohibits.[93]

Nevertheless, in addition to their claims of retaliation for reporting working conditions, plaintiffs also make independent assertions that defendants retaliated against them for reporting allegations of criminal misconduct.[94] Plaintiffs reported to the Department of Labor and reiterated in the instant WPA complaints that union members were receiving money "paid out of the Union treasury . . . attributed to 'Picket line' duty when that clearly was not the case" and that they reported "their suspicions of fraud and illegal activity on the part of their employer."[95] Indeed, in recognizing the potential illegal nature of the union officials' ac-

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[92] *Garmon*, 359 US at 244.

[93] *Gould*, 475 US at 288.

[94] These assertions are independent in the sense that they do not rely on the working-condition assertions for their validity and, accordingly, can be assessed separately from them.

[95] The Department of Labor's investigation report corroborates this claim and states that the department investigated allegations that Aaron "stole or misused strike/picket funds."

tions, the Department of Labor referred the matter for investigation by an Assistant United States Attorney.

While the NLRA regulates employees' concerted activities for their mutual aid or protection, it simply does not regulate the reporting of federal and state crimes.[96] Section 7 is not so broad as to protect *all* employees' concerted activities. "[A]t some point the relationship" between the concerted activity and the "employees' interests as employees . . . becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."[97] The NLRB has explained that protection under § 7 "can be lost whenever employee communications to third parties do not relate to [the] labor practices of the employer . . . ."[98] The allegations of criminal misconduct that plaintiffs communicated to the Department of Labor do not relate to the employer's labor practices. Rather, a state court can adjudicate the underlying allegations of embezzle-

[96] That the Department of Labor referred the matter to the United States Attorney's office corroborates this claim. While the partial dissent correctly identifies 29 USC 501(c), the federal law prohibiting embezzlement from a union, as relevant to this case, its significance as a criminal offense *outside* the NLRA shows why reporting a suspected violation of 29 USC 501(c) does not arguably fall within the protections of the NLRA. Significantly, while the NLRB "is empowered . . . to prevent any person from engaging in any unfair labor practice," 29 USC 160(a), the power of the NLRB does not extend to enforce 29 USC 501(c) or, indeed, any criminal law. See *Republic Steel Corp v NLRB*, 311 US 7, 10; 61 S Ct 77; 85 L Ed 6 (1940) (stating that the NLRA "does not carry a penal program declaring the described unfair labor practices to be crimes" and "does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees").

[97] *Eastex*, 437 US at 567-568.

[98] *Handicabs, Inc and Trail*, 318 NLRB 890, 896 (1995). The fact that the NLRB provided nonexclusive examples of unprotected conduct when stating this rule does not render the rule any less relevant to this circumstance—there must be a relationship between the communication and the employees' interests *as employees*.

ment and other criminal misconduct without having to consider an employer's labor practices or whether employees engaged in protected activity in reporting those allegations.[99] By contrast, the relationship between allegations of improper working conditions and employees' protected activity gets to the heart of the employer's labor practices.

The crux of the partial dissent's disagreement with our analysis is over whether plaintiffs' assertions of defendants' violations of the federal laws regarding their fiduciary obligations toward the union and protecting union funds from embezzlement are arguably within the right of an employee under § 7 to "assist labor organizations." Courts ordinarily have examined the phrase "form, join, or assist labor organizations" in § 7 in its entirety, suggesting a continuum of protections. Yet when the term "assist" has been given independent force, it appears in the context of a *nonmember's* assistance to the labor organization.[100] Furthermore,

[99] Indeed, one hypothetical scenario suffices to illustrate why this is so. Suppose that plaintiffs' claim of improper wage and unsafe working conditions simply did not exist and, instead, that defendants paid union members a bargained-for wage and the members repaired the TULC building under safe working conditions. In this scenario, plaintiffs would still be able to allege that defendants misappropriated union funds for unlawfully paying those union members their bargained-for wage out of the picket fund when the members did not actually engage in picket duty and that defendants received illegal kickbacks from the TULC. By stripping away plaintiffs' claims of unsafe working conditions and unfair wages that are preempted by the NLRA, it becomes clear that plaintiffs' criminal-misconduct claims exist independently.

[100] *Southern Greyhound Lines and Anderson*, 169 NLRB 627, 628 (1968) ("It is well settled that Section 7 of the Act protects an employee in his right to assist a labor organization regardless of whether he is eligible for membership in it . . . ."). See also *Signal Oil & Gas Co v NLRB*, 390 F 338, 343 (CA 9, 1968) (affirming the trial

even when interpreting the term "assist" independently, courts have examined it in the context of the phrase "mutual aid or protection,"[101] perhaps because assisting a labor organization is supposed to be for the mutual aid or protection of the employees that it represents. For all these reasons, the partial dissent's focus on the phrase "assist[ing] labor organizations" without reference to the "mutual aid or protection" analysis is unpersuasive.

Even if the underlying allegations of criminal misconduct brought to light by concerted activity *arguably* relate to an employer's labor practices, enforcement of well-established criminal law is at the heart of a state's police power and is "so deeply rooted in local feeling and responsibility"[102] that we cannot infer that Congress intended when it enacted the NLRA to relieve states from enforcing that well-established criminal law or protecting from retaliation employees who report allegations of criminal wrongdoing.[103] A state's prohibition of adverse employment actions resulting from the reporting of suspected criminal misconduct does not " 'frustrate

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examiner's finding that the employee's prounion speech " 'may be regarded as an expression of support for the proposed union activity of his fellow employees, made in anticipation that he or his group might receive similar support should the occasion arise' ").

[101] *NLRB v Rockaway News Supply Co*, 197 F2d 111, 113 (CA 2, 1952) (stating that a nonmember's refusal to cross a picket line "is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense *directed to mutual aid or protection*"), aff'd 345 US 71 (1953) (emphasis added).

[102] *Garmon*, 359 US at 244.

[103] See, e.g., *Metro Life Ins Co v Massachusetts*, 471 US 724, 756; 105 S Ct 2380; 85 L Ed 2d 728 (1985) (holding that the NLRA does not preempt state police power even to the extent that the police power prescribes minimum labor standards applicable to employers).

effective implementation of the Act's processes.' "[104] Moreover, when there are "discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens."[105] In this case, the state has a deeply rooted and substantial interest in enforcing its criminal law,[106] which the NLRB has no authority to enforce[107] and which the WPA assists by protecting employees who report allegations of criminal misconduct.[108] Because these interests are separate from the interests articulated in the NLRA, we hold that the NLRA does not preempt the WPA with respect to

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[104] *Int'l Ass'n of Machinists & Aerospace Workers v Wisconsin Employment Relations Comm*, 427 US 132, 148; 96 S Ct 2548; 49 L Ed 2d 396 (1976), quoting *Brotherhood of R Trainmen v Jacksonville Terminal Co*, 394 US 369, 380; 89 S Ct 1109; 22 L Ed 2d 344 (1969).

[105] *Farmer*, 430 US at 304.

[106] In addition to alleging violations of federal criminal statutes, plaintiffs also alleged violation of MCL 750.174, the state-law crime of embezzlement.

[107] *Republic Steel*, 311 US at 10 ("[The NLRA] does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees.").

[108] The partial dissent cites *Kilb v First Student Transp, LLC*, 157 Wash App 280; 236 P3d 968 (2010), for the proposition that the NLRA preempted a state-law retaliation claim alleging that the plaintiff was discharged for attempting to assist a union. However, the retaliation in *Kilb* did not implicate the state's interest in enforcing its criminal law. Rather, the plaintiff claimed that he was discharged from his supervisory position for refusing to undertake antiunion tactics and that "his discharge violated the right of employees to organize and form unions, . . . in contravention of Washington State's clearly established public policy against interfering with these rights." *Id*. at 284 (citation omitted). Unlike here, then, the conduct at issue in *Kilb* was directly within the NLRA's protections. *Id*. at 288 ("An employer's discharge of a supervisor for refusing to commit unfair labor practices is, at least arguably, a violation of [29 USC 158(a)(1)].").

plaintiffs' claims alleging retaliation for reporting defendants' criminal wrongdoing.

B. LMRDA PREEMPTION

Defendants also assert that the LMRDA preempts plaintiffs' WPA claims.[109] As stated, the LMRDA safeguards union democracy by protecting union members' right to free expression and by providing democratically elected union leaders wide discretion in pursuing the policies that they were elected to accomplish. The Supreme Court held in *Finnegan* that "the freedom of an elected union leader to choose a staff whose views are compatible with his own" is "an integral part" of the LMRDA's protections because an elected union leadership must be responsive "to the mandate of the union election."[110] However, *Finnegan* does not stand for the proposition that the LMRDA gives an elected union leader unfettered discretion with respect to employment matters. Although the LMRDA does not provide union employees who have been terminated a cause of action for retaliation taken against them as employees, this does not lead to the conclusion that states are completely forbidden from restricting a union leader's discretion to terminate a union employee. Rather, if a union retaliates against a union employee as an employee, then any underlying state-law retaliation claim is only preempted to the extent that it conflicts with the purposes of the LMRDA. The LMRDA is contrasted against the more expansive federal preemption doctrine

[109] Because we hold that the NLRA preempts plaintiffs' WPA claims to the extent that they allege defendants' unfair labor practices related to working conditions, we need not examine those preempted claims within the context of the LMRDA. Accordingly, our analysis of the LMRDA focuses only on plaintiffs' claims relating to their allegations of defendants' criminal activity.

[110] *Finnegan*, 456 US at 441.

of the NLRA—states are afforded considerably more freedom to supplement the LMRDA federal scheme as long as no conflict arises between state law and the LMRDA.[111] Moreover, although the saving clauses of the LMRDA do not directly apply to save plaintiffs' civil action, they do support a finding that the LMRDA both recognizes a strong state interest in protecting against criminal misconduct and implicitly approves plaintiffs' cause of action.[112]

Accordingly, the exception to a union employer's discretion for allegations of criminal misconduct is conclusive in this case. A union employer's discretion in employment decisions must yield in cases in which elected union officials attempt to use that discretion as a shield to hide alleged criminal misconduct. Of course, while *Bloom* involved union employees who claim that they were fired for refusing to commit crimes themselves, this case involves union employees who claim that they were fired for reporting union officials' alleged crimes. This distinction is without a difference because, in both cases, the relationship between the state-law claim and the LMRDA is identical: the union employer is retaliating against employees and, in doing so, trying to shield alleged criminal misconduct from union rank-and-file membership and the public. Moreover, in both cases, the state-law claims are consistent with the LMRDA's expressly stated purposes of abating union corruption and breaches of trust. As a result, the LMRDA allows state-law retaliation claims to proceed in state courts. Therefore, we hold that plaintiffs' WPA claims premised on their reporting of defendants' al-

[111] We also note that, unlike the NLRA, the LMRDA does not create a separate administrative board to consider violations of its provisions. Rather, it creates a cause of action that a union member may pursue in a district court of the United States. 29 USC 412.

[112] See *Bloom*, 783 F2d at 1361-1362.

leged criminal misconduct survive defendants' assertion of LMRDA preemption.

V. CONCLUSION

The Court of Appeals correctly determined that federal law did not preempt plaintiffs' WPA claims premised on their allegations of criminal misconduct. However, the court did not distinguish these WPA claims from plaintiffs' claims involving defendants' working conditions. As a result, we affirm the Court of Appeals' decision only in part. Going forward, plaintiffs may only pursue in state court their WPA claims involving retaliation for their reporting of alleged illegal conduct to a public body or bodies.[113]

Because neither the NLRA nor the LMRDA preempts plaintiffs' WPA claims to the extent that they allege retaliation for reporting criminal misconduct such as fraud and embezzlement, state courts have subject-matter jurisdiction over those claims. Accordingly, we affirm in part the decision of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with our opinion.

YOUNG, C.J., and CAVANAGH, MARKMAN, MCCORMACK, and VIVIANO, JJ., concurred with KELLY, J.

ZAHRA, J. (*concurring in part and dissenting in part*). Though I join the majority's opinion in Parts I, II, III(A), (C), and (D), and IV(B), I write separately to dissent from Parts III(B) and IV(A) and the outcome of the case. I agree with the majority's conclusion that the

[113] As stated, this decision does not involve Ramsey's separate and individual allegation that he was terminated for refusing to perjure himself.

Labor-Management Reporting and Disclosure Act[1] does not preempt plaintiffs' Whistleblowers' Protection Act (WPA)[2] claims. But I respectfully dissent from the majority's conclusion that the National Labor Relations Act (NLRA)[3] does not preempt plaintiffs' WPA claims. I conclude that plaintiffs' WPA claims are arguably subject to the NLRA because plaintiffs' reporting of alleged wrongful conduct was done to assist their labor organization. I further conclude that plaintiffs' WPA claims do not fall within any preemption exception. Finally, I conclude that plaintiffs' WPA claims represent a classic example of unacceptable NLRA circumvention through artful pleading. I would reverse the judgment of the Court of Appeals and dismiss plaintiffs' WPA claims because they are preempted by the NLRA.

I. APPLICABLE LAW: NLRA PREEMPTION AND ITS EXCEPTIONS

I am in agreement with the *general* legal propositions stated by the majority with regard to NLRA preemption and its exceptions. As noted by the majority, *San Diego Bldg Trades Council v Garmon*[4] is the seminal case governing the extent of NLRA preemption. *Garmon* provides the following preemption rule: "When an activity is arguably subject to § 7[5] or § 8[6] of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."[7] But I also find guidance from the United

[1] 29 USC 401 *et seq*.

[2] MCL 15.361 *et seq*.

[3] 29 USC 151 *et seq*.

[4] *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959).

[5] 29 USC 157.

[6] 29 USC 158.

[7] *Garmon*, 359 US at 245.

States Supreme Court's subsequent case, *Local 100, United Ass'n of Journeymen & Apprentices v Borden*, in which the Court stated:

> [I]n the absence of an overriding state interest . . . , state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which *the activity that is the subject matter of the litigation* is arguably subject to the *protections* of § 7 or the *prohibitions* of § 8 of the National Labor Relations Act.[8]

The standard for "arguably subject" is permissive. An activity that is the subject matter of the litigation at hand is "arguably subject" to the protections of § 7 or the prohibitions of § 8 if it "is not plainly contrary to [the NLRA's] language and . . . has not been 'authoritatively rejected' by the courts or the Board."[9]

The majority relies on *Belknap, Inc v Hale* for the proposition that conduct is "arguably prohibited" by the NLRA when "the controversy presented to the state court is identical with that which could be presented to the Board."[10] While this is a correct statement of the law, I take issue with the majority's interpretation of this passage as whether the "state law *claim* . . . could have been presented [to the NLRB]."[11] This is, in my view, an incorrect interpretation. The more precise interpretation is whether the underlying "activity that is the *subject matter* of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8"[12]—the same inquiry as in *Garmon*.

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[8] *Local 100, United Ass'n of Journeymen & Apprentices v Borden*, 373 US 690, 693; 83 S Ct 1423; 10 L Ed 2d 638 (1963) (emphasis added).

[9] *Int'l Longshoreman's Ass'n v Davis*, 476 US 380, 395, 106 S Ct 1904, 90 L Ed 2d 389 (1986).

[10] *Belknap, Inc v Hale*, 463 US 491, 510; 103 S Ct 3172; 77 L Ed 2d 798 (1983).

[11] Emphasis altered.

[12] *Borden*, 373 US at 693 (emphasis added).

After a court determines that certain activity is arguably subject to the protections of § 7 or the prohibitions of § 8 of the NLRA, the matter will only be preempted if it is also determined that no exception to NLRA preemption applies. A claim arising from an "activity" that is "arguably subject" to the NLRA may be adjudicated by a state or federal court if the

> activity that otherwise would fall within the scope of *Garmon* . . . was a merely *peripheral concern* of the [NLRA] or touched interests so *deeply rooted* in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[13]

II. APPLICATION OF THE LAW TO THE FACTS

A. "ARGUABLY SUBJECT" TO THE NLRA

Unlike the majority, I conclude that plaintiffs' WPA claims are "arguably subject" to the NLRA. I start my analysis by reviewing the activity that is the subject matter of this litigation—plaintiffs' claims that they were wrongfully discharged for reporting their suspicions of wrongdoing to the United States Department of Labor (USDOL). Accepting as true plaintiffs' assertions of wrongdoing, plaintiffs were assisting their labor organization, Laborers' Local 1191, by exposing that the organization's assets might be subject to depletion through fraud, embezzlement, and misuse of union funds. By exposing this conduct, plaintiffs clearly hoped to bring an end to this activity, thereby preserving the integrity, effectiveness, and financial assets of their union.

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[13] *Farmer v United Brotherhood of Carpenters & Joiners*, 430 US 290, 296-297; 97 S Ct 1056; 51 L Ed 2d 338 (1977) (emphasis added) (quotation marks, citation, and original alterations omitted).

The provisions of the NLRA clearly give plaintiffs the right to engage in the conduct that they did. That right may be found in § 7 of the NLRA, which states that all "[e]mployees shall have the right to . . . assist labor organizations . . . ."[14] Additionally, employers are prohibited from engaging in "unfair labor practice[s]" by § 8 of the NLRA, which bars "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7[.]"[15] These two NLRA provisions apply in this case. Plaintiffs are undoubtedly employees of the labor union, entitled to the protections of § 7.[16] The labor union, in its relationship to plaintiffs as their employer, is clearly subject to the restrictions in the NLRA.[17] Plaintiffs' discharges, if the allegations are true, would violate the NLRA.

The majority opinion erroneously asserts that when the term "assist" has been given independent legal

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[14] 29 USC 157. Section 7 states in full:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [29 USC 158(a)(3)].

[15] 29 USC 158(a)(1).

[16] See, e.g., *Rider v MacAninch*, 424 F Supp 2d 353, 359 (D RI, 2006) (holding that the defendants in that case, one of whom was a union business agent and one of whom was the union's secretary/treasurer, were "employees" of the union). Indeed, this Court unanimously agrees that plaintiffs were employees of the labor union entitled to the protections of § 7.

[17] *Office Employees Int'l Union, Local 11 v NLRB*, 353 US 313, 316; 77 S Ct 799; 1 L Ed 2d 846 (1957) (holding that, when a union acts as an employer, it is deemed an employer within the meaning of the NLRA and subject to the jurisdiction of the NLRB).

force, it has only been in the context of a *nonmember*'s assistance to the labor organization. But its own citation demonstrates that this is not so. The majority cites *Southern Greyhound Lines and Anderson*, which states: "It is well-settled that Section 7 of the Act protects an employee in his right to assist a labor organization *regardless of whether he is eligible for membership in it* . . . ."[18] This quotation implies that both members and nonmembers may assist a union and be protected under § 7. Furthermore, in *United States Dep't of Justice, INS, Border Patrol v Fed Labor Relations Auth*, the court noted that the right to assist any labor organization "confer[s] the right to wear a union lapel pin . . . ."[19] *Border Patrol* did not distinguish between members who wear a pin and nonmembers who may choose to do the same, nor would it be sensible to do so.

It is of no legal consequence that plaintiffs have not specifically asserted their right to assist their labor organization under § 7 because reporting suspected criminal activity to the USDOL is per se "assist[ance] [to a] labor organization[]."[20]

Specifically, plaintiffs based their claims of criminal activity on 29 USC 501(a) and (c), which detail the fiduciary responsibilities of officers of labor organizations.[21] 29 USC 501(a) states that "officers . . . of a labor organization occupy positions of trust in relation to

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[18] *Southern Greyhound Lines and Anderson*, 169 NLRB 627, 628 (1968).

[19] *United States Dep't of Justice, INS, Border Patrol v Fed Labor Relations Auth*, 955 F2d 998, 1003 (CA 5, 1992).

[20] 29 USC 157.

[21] See U.S. Department of Labor, Office of Inspector General, Investigative Report, File No 52-803C-0005-LC-J (February 8, 2010), Appellants' Appendix, p 1099a (investigating Local 1191's leaders for a violation of 29 USC 501(c)); Plaintiffs' Answers to Defendants' First Set of Interrogatories, Appellants' Appendix, p 56a (answering a request that

such organization and its members as a group" and that each officer therefore has a duty "to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization." Similarly, 29 USC 501(c) prohibits an officer of a labor organization from embezzling, stealing, or converting any "assets of a labor organization of which he is an officer . . . ." To point out when a union officer may not be complying with his or her fiduciary responsibilities is, without question, "assist[ing] a union," irrespective of how plaintiffs characterize their complaints. The NLRA not only protects employees who assist unions in their formation, but also those employees who help unions continue to exist for the benefit of the union members.[22]

Likewise, employees who notice and report corruption of union leadership, particularly when that corruption suggests embezzlement from the union itself or gaining an unfair profit at the union's expense, assist the union by enabling the members to be well represented in a manner consistent with the members' best interests. In this consolidated case, the union officials, in their capacity as employers, were prohibited by the NLRA from discharging their employees simply because the employees reported their suspicions of illegal activity that would harm the union. To permit the employer to do otherwise would "interfere with . . . employees in the exercise of the rights guaranteed in section 7[.]"[23]

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plaintiffs "[s]pecifically identify by citation every Federal law, regulation and/or rule upon which Plaintiffs based their 'suspicions of fraud and illegal activity' ").

[22] See, e.g., *Eastex, Inc v NLRB*, 437 US 556, 570; 98 S Ct 2505; 57 L Ed 2d 428 (1978).

[23] 29 USC 158(a)(1).

The majority, in my view, errs by calling plaintiffs' claims of criminal misconduct "independent assertions" because this implies that those assertions of criminal misconduct had nothing to do with unions or union assistance. It then states that "[w]hile the NLRA regulates employees' concerted activities for their mutual aid or protection, it simply does not regulate the reporting of federal and state crimes." The majority focuses on the wrong activity. The issue is not whether the NLRA regulates the reporting of federal and state crimes. Rather, the issue is whether reporting a federal or state crime in this instance would fall under the protections of the NLRA.[24] Because the purpose of reporting the federal and state crimes was to aid or assist the union, the activity falls under § 7 of the NLRA.[25]

Likewise, the majority's focus on *Eastex, Inc v NLRB*[26] is misplaced. The *Eastex* case focuses on the provision in § 7 that states, "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." In determining the scope of "other mutual aid or protection, *Eastex* states that "at some point the relationship" between concerted activity and

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[24] The majority states that the NLRB has no authority to *enforce* the penal aspects of 29 USC 501(c). This is correct, but beside the point. In this case, when plaintiffs filed their complaints in the Michigan circuit court, they did not seek enforcement of any criminal statute. All they sought was relief for their wrongful discharge. This claim—wrongful discharge—is the selfsame claim that plaintiffs could have and therefore should have brought before the NLRB.

[25] Certainly, the mere reporting of a suspected crime by one's employer would not fall under the NLRA in all cases. But in this case, the employees did so for the protection of the union and its members, as indicated by plaintiffs' interrogatories, listing violations of a federal duties-of-union-officials statute.

[26] *Eastex*, 437 US 556.

the "employees' interests as employees . . . becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."[27] Though *Eastex* guides us with regard to the meaning of "mutual aid and protection," it does not aid us in determining what activities "assist" a labor union.

I also conclude that the majority has erroneously applied *Handicabs, Inc and Trail*[28] to the case at hand. True enough, *Handicabs* states that protection under § 7 "can be lost whenever employee communications to third parties do not relate to [the] labor practices of the employer . . . ."[29] But the majority omits two important details of *Handicabs* that suggest that its rule does not apply in the instant case. First, *Handicabs* addresses the "mutual aid or protection" aspect of § 7, not its provision related to "assist[ing]" a labor organization.[30] Second, the portion quoted by the majority truncates language that is not superfluous, but is important to an understanding of the quotation's context; *Handicabs* states that NLRA "protection can be lost whenever employee communications to third parties do not relate to labor practices of the employer, *such as disparaging*

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[27] *Id*. at 567-568.

[28] *Handicabs, Inc and Trail*, 318 NLRB 890 (1995).

[29] *Id*. at 896.

[30] The majority argues that communications to third parties do not "assist a labor organization" within the meaning of § 7 unless there is a "relationship between the communication and the employees' interests as employees." (Emphasis omitted.) The majority then concludes that speaking out about union leadership's embezzling union funds does not have any connection to the employees' interests as employees. But existing caselaw calls into question either the majority's premise or its conclusion. For example, in *American Federation of Government Employees v Fed Labor Relations Auth*, 278 US App DC 358, 363; 878 F2d 460 (1989), the court stated that "an employee's broad 'right to . . . assist' a labor organization" "includes the right to speak out on union-management issues, without fear of reprisal[.]"

the employer's reputation or quality of its product, or whenever those communications are maliciously motivated."[31] The employee complaints described in *Handicabs* are a far cry from those in the case at hand, in which the employees reported that the union manager was violating his federal, statutorily created fiduciary duties to the union and its members.

B. THE PREEMPTION EXCEPTIONS

Controversies that would otherwise be preempted by the NLRA are not preempted when a plaintiff's claim reflects "deeply rooted" state interests or are matters of "peripheral concern" to the NLRA.[32] Thus, the issue is whether Michigan has a deeply rooted state interest in applying the WPA in plaintiffs' cases or whether the claims are of peripheral concern to the NLRA.

Though these appear to be two exceptions, in application they amount to one. In practice, courts effectively presume that claims grounded in state law reflect deeply rooted state interests.[33] Thus, the critical inquiry is whether the conduct at issue is of peripheral concern to the NLRA. Generally speaking, courts make this determination by engaging in a fact-intensive inquiry to decide whether the NLRA and the state statute, as applied, prohibit the same activity. When the NLRA and state law do not prohibit the same conduct, the preemption exception will apply.

The United States Supreme Court case *Farmer v United Brotherhood of Carpenters & Joiners*[34] is instrumental in demonstrating how to apply the NLRA pre-

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[31] *Handicabs*, 318 NLRB at 896 (emphasis added).

[32] *Farmer*, 430 US at 296-297 (quotation marks and citation omitted).

[33] See, generally, notes 50-58 of this opinion and accompanying text.

[34] *Farmer*, 430 US 290.

emption exception. In *Farmer*, to determine whether a state-law claim for intentional infliction of emotional distress (IIED) was exempt from NLRA preemption, the Court focused on whether the NLRA's prohibitions protected the plaintiff from the same complained-of conduct as the state-law IIED claim.[35] The Court contrasted the plaintiff's IIED claim, which protected the plaintiff from conduct that no reasonable person in civilized society should be required to endure, with the plaintiff's potential NLRA claim, which would ask whether the alleged employer conduct rose to the level of an unfair labor practice under § 8.[36] The Court noted that the two inquiries would be different because the NLRA did not punish outrageous conduct as outrageous conduct, but merely insofar as the conduct would have constituted an unfair labor practice.[37] The Court wrote: "No provision of the National Labor Relations Act protects the 'outrageous conduct' complained of by petitioner . . . . [T]here is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in civilized society should be expected to endure it.' "[38] Therefore, the Court determined that the NLRA preemption exception applied to the plaintiff's claim for IIED because "the

[35] See *id*. at 294 ("[T]he National Labor Relations Board would not have jurisdiction to compensate petitioner for injuries such as emotional distress, pain and suffering, and medical expenses, nor would it have authority to award punitive damages.").

[36] *Id*. at 304 ("[T]he focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination . . . . Whether the statements or conduct . . . also caused [the complainant] severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award [the complainant] damages for pain, suffering, or medical expenses.").

[37] *Id*.

[38] *Id*. at 302 (citation omitted).

state-court tort action [could] be adjudicated without resolution of the 'merits' of the underlying labor dispute."[39]

The United States Supreme Court clarified this rule in *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters*, pronouncing that the preemption exception depends upon whether the "controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board."[40] The Court's rationale for this rule was that "it is only [when the *controversy* would be identical] that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board . . . ."[41]

In this case, plaintiffs' claims sound in retaliatory discharge. As discussed previously, I conclude that the alleged retaliatory discharges are not only prohibited by the WPA but also by the NLRA. Plaintiffs reported alleged criminal conduct that triggered protection under the WPA and simultaneously assisted a labor organization, which entitles plaintiffs' activity to NLRA protection. Thus, both the WPA and the NLRA prohibit discharge for the protected action. For this reason, ours is a much weaker case for the preemption exception than any other United States Supreme Court case granting the exception. As noted by the majority, the Court has excepted from the NLRB's exclusive purview causes of action for IIED,[42] threats of violence,[43] tres-

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[39] *Id*. at 304.

[40] *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters*, 436 US 180, 197; 98 S Ct 1745; 56 L Ed 2d 209 (1978).

[41] *Id*.

[42] *Farmer*, 430 US at 302.

[43] *Youngdahl v Rainfair, Inc*, 355 US 131, 139; 78 S Ct 206; 2 L Ed 2d 151 (1957).

pass,[44] malicious interference with a lawful occupation,[45] and malicious libel.[46] Beyond this, the Supreme Court, lower federal courts, and other state courts have consistently held that one type of wrongful-discharge case is not preempted—wrongful discharge for claiming workers' compensation benefits.[47] But in most other cases that involve union activity, claims for wrongful discharge are preempted.

The wrongful-discharge cases in which courts have found no NLRA exception more closely resemble the case at hand than those in which they have found an exception. Courts have extended preemption to cases alleging wrongful discharge under state constitutions, state statutes, state common law, and violations of state public policy. In some, if not all, of these cases, the state has an interest in regulating the conduct at issue.[48] However, the prevailing consideration is not whether the state has an interest in protecting a plaintiff from some employer action, but whether that interest is distinct from the actions the NLRA guards against.[49]

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[44] *Sears*, 436 US at 207.

[45] *UAW v Russell*, 356 US 634, 646; 78 S Ct 932; 2 L Ed 2d 1030 (1958).

[46] *Linn v United Plant Guard Workers*, 383 US 53, 62; 86 S Ct 657; 15 L Ed 2d 582 (1966).

[47] See *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 108 S Ct 1877; 100 L Ed 2d 410 (1988); *Peabody Galion v Dollar*, 666 F2d 1309 (CA 10, 1982); *Veal v Kerr-McGee Coal Corp*, 682 F Supp 957 (SD Ill, 1988) (holding that three of four claims of wrongful discharge were preempted by the NLRA, excepting only wrongful discharge for exercising rights under workers' compensation law); *Ruiz v Miller Curtain Co, Inc*, 702 SW2d 183 (Tex, 1985).

[48] Indeed, in some of these cases, the state's interests may be considered deeply rooted.

[49] Cf. *Sears*, 436 US at 197 (asking whether the "controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board"); *Farmer*, 430 US at 294 (deciding that "the National Labor Relations Board would not

Courts have held that wrongful-discharge claims are preempted by the NLRA despite strong state interests in regulating the conduct. Consider, for example, that at least one federal court and several state courts have held that claims of wrongful discharge in violation of public policy are preempted by the NLRA.[50] In one of these violation-of-public-policy cases, *Lontz v Tharp*, the factual background was similar to this case insofar as plaintiffs in both cases allege facts that demonstrate that they had tried to assist unions.[51] Additionally, one federal court has held that a claim for wrongful discharge based in the common law of contracts was preempted by the NLRA.[52] In that case, *Morris v Chem-Lawn Corp*, the court looked through the plaintiff's breach-of-employment-contract claim and held that it was preempted because the substance of the claim was that she had been discharged for supporting a union.[53] In another case similar to this one, a state appeals court held that the NLRA preempted a state statutory claim for wrongful discharge.[54] That case, *Kilb v First Student Transp, LLC*, is akin to our case both because it presents a conflict between the NLRA and a state statutory claim and because it is a case in which the plaintiff was discharged for attempting to

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have jurisdiction to compensate petitioner for injuries such as emotional distress, pain and suffering, and medical expenses, nor would it have authority to award punitive damages").

[50] See *Hussaini v Gelita USA, Inc*, 749 F Supp 2d 909 (ND Iowa, 2010); *Robbins v Harbour Indus, Inc*, 150 Vt 604; 556 A2d 55 (1988); *Lontz v Tharp*, 220 W Va 282; 647 SE2d 718 (2007).

[51] See, e.g., *Lontz*, 647 SE2d at 722 (holding as preempted an employee's claim that she was wrongfully discharged for refusing to have a union organizer arrested, in violation of public policy).

[52] See *Morris v Chem-Lawn Corp*, 541 F Supp 479 (ED Mich, 1982).

[53] *Id*. at 483.

[54] See *Kilb v First Student Transp, LLC*, 157 Wash App 280; 236 P3d 968 (2010).

assist a union.[55] Finally, at least one federal court has held as preempted a claim for wrongful discharge in violation of the most deeply rooted state interest of all, a state constitutional right.[56] In that case, *Veal v Kerr-McGee Coal Corp*, the court went out of its way to explain that NLRA preemption did not depend on how strong the state's interest was in protecting its citizens.[57] Rather, the cases governing the NLRA preemption exception base their holdings on whether the state constitution and the NLRA governed the same conduct. Because the two laws attempted to govern the same employer conduct, the claim was preempted because permitting any tribunal but the NLRB to adjudicate the claim presented a great risk that the state constitutional right would conflict with the "federal regulatory scheme."[58]

This case bears a greater resemblance to the aforementioned no-exception cases than to the cases that find a preemption exception. In this case, plaintiffs were employees of a union who noticed that certain union officials were incorrectly reporting the union members' activities for the purpose of paying them out of the strike fund when the members had actually been making repairs on a building. Alarmed, plaintiffs reported to the USDOL, on the union members' behalf, that a union official might

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[55] *Id*. at 283-284 (holding as preempted the plaintiff's claim that he was wrongfully discharged for refusing to discharge pro-union employees and refusing to engage in the employer's anti-union efforts, in violation of state law).

[56] *Veal*, 682 F Supp at 957.

[57] *Id*. at 960-961.

[58] *Id*. at 960 ("While it cannot be seriously argued that the interest of the State of Illinois in protecting its workers from wrongful discharge for exercising their state constitutional right to association deserves little weight, it is manifest that this Court's judicial recognition of that interest poses a serious threat of interference with the federal regulatory scheme embodied by Congress' creation of the NLRB . . . .").

have embezzled union funds or otherwise violated his statutory duty not to profit from his position as a union official.[59] This was an attempt to assist the union members; the fact that the claims were criminal in nature is immaterial. The unfair labor practice in this case is *not* the alleged criminal actions—embezzlement or breach of fiduciary duty. Plaintiffs never alleged a cause of action for embezzlement or breach of fiduciary duty in the circuit court; therefore, the employer's alleged criminal conduct does not constitute the unfair labor practice. The unfair labor practice here is the wrongful discharge of these employees. In this case, the claim for wrongful discharge under the WPA essentially prohibits the same employer conduct as a claim of unfair labor practices under § 8 of the NLRA. An employer may not discharge an employee for attempting to assist a labor organization. Thus, because the conduct of the employer would be prohibited by the NLRA in the same way that it would be prohibited under Michigan law, Michigan has no deeply rooted interest in hearing plaintiffs' WPA claims, which allege the very same unlawful conduct as an unfair-labor-practice claim under the NLRA.[60] And because the employer's discharge of plaintiffs for protected activities is a preeminent rather than a peripheral concern of the NLRA, any claims arising from the wrongful discharge must "be left in the first instance to the National

[59] See Plaintiffs' Answers to Defendants' First Set of Interrogatories, Appellants' Appendix, p 56a.

[60] Compare *Farmer*, 430 US at 304, which held that the plaintiff's IIED claim was not preempted because the state court would not have to reach the "merits of the underlying labor dispute." (Quotation marks omitted.) In this case, the WPA wrongful-discharge claim jeopardizes the NLRB's exclusive jurisdiction over labor disputes because of the risk that the WPA would adjudicate the same, federally protected and prohibited conduct differently.

Labor Relations Board."[61]

Though the majority is correct that Michigan's WPA statute protects important state interests that are often different than the NLRA's main concerns, this is not the question that we must answer. This case is not about whether the WPA protects an *area of law* that is of peripheral concern to the NLRA; indeed, if it did not, it would be completely preempted by the NLRA. Instead, the issue is whether the *controversy* is of peripheral concern to the NLRA. Because a discharge for assisting a labor union would be an unfair labor practice under the NLRA, Michigan has no deeply rooted state interest in deciding that controversy for its citizens, and the NLRA will provide the relevant relief.

III. ANTICIRCUMVENTION AND NLRA PREEMPTION

Plaintiffs' WPA claims represent a classic example of unacceptable NLRB circumvention by artful pleading. Courts adjudicating NLRA preemption are rightfully concerned about circumvention, which would undermine the NLRB's exclusive jurisdiction over labor disputes. One example of circumvention through artful pleading that courts have struck down is the identical-elements test, under which plaintiffs incorrectly allege that, because the elements of their state-law claim and the elements of unfair labor practices under the NLRA are not identical, their state-law claim should not be preempted. Courts reject the identical-elements test because it undermines the NLRB's exclusive jurisdiction. For example, in *Hussaini v Gelita USA, Inc*, the United States District Court for the Northern District of Iowa stated that there was no identical-elements test because an "NLRB proceeding and a state-law cause of

[61] *Garmon*, 359 US at 244-245.

action will, by definition, deal with different claims and if this lack of identity were conclusive, state claims would never be preempted."[62] Likewise, the court in *Robbins v Harbour Indus, Inc* eschewed formalism in holding that "[t]he characterization of the claim under state law has little, if any, bearing on the outcome of the preemption issue. Rather, cases applying the exception for conduct which is only of peripheral concern to the NLRA almost always involve an analysis of the facts underlying the state action" to determine whether the "controversy presented to the state court is identical to . . . or different from" the controversy that could have been presented to the NLRB.[63] It does not matter what terms a plaintiff's state claim is couched in when the "basis of [the plaintiff's] claim, as revealed [by discovery], is that [the] employer discharged [the employee] because of [the employee's] support of" a union[64]—whether that be aid in its formative stages or assistance sometime down the road.

The majority's ruling enables plaintiffs to circumvent the exclusive jurisdiction of the NLRB simply because they alleged criminal conduct to the USDOL. In doing so, the majority overlooks the fact that plaintiffs alleged that the criminal conduct violated a federal labor statute, 29 USC 501(a) and (c), which leads to the key conclusion that plaintiffs took the steps that they did to assist the members of the labor union. Labor union members are in need of this type of assistance because any right to bargain for the members' collective good might be undermined by corrupt union leadership that embezzles union funds

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[62] *Hussaini*, 749 F Supp 2d at 921.

[63] *Robbins*, 556 A2d at 57, quoting *Sears*, 436 US at 197 (quotation marks omitted).

[64] *Morris*, 541 F Supp at 482.

or prioritizes its own profit over the interests of the members. Because the NLRA preempts plaintiffs' WPA claims in full, I dissent.

RAMBIN v ALLSTATE INSURANCE COMPANY

Docket No. 146256. Argued October 23, 2013. Decided May 20, 2014.

Lejuan Rambin brought an action in the Wayne Circuit Court against Allstate Insurance Company and Titan Insurance Company, seeking payment of personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. Rambin had been injured while riding a motorcycle owned by and registered to Scott Hertzog. At the time of the accident, Rambin did not own a motor vehicle. The car involved in the accident was uninsured, but Rambin averred that Hertzog owned a car that Allstate insured. Allstate denied Rambin's claim for PIP benefits. Rambin alternatively alleged that if Allstate was not the responsible insurer, he was entitled to PIP benefits from Titan, the insurer to which the Michigan Assigned Claims Facility had assigned his claim. Titan and Allstate moved for summary disposition, asserting that Rambin had taken the motorcycle unlawfully and was therefore barred from recovering PIP benefits by the unlawful-taking exclusion of MCL 500.3113(a). Rambin also moved for summary disposition, asserting (1) that he had joined a motorcycle club even though he did not own a motorcycle, (2) that Hertzog's motorcycle was subsequently stolen, (3) that Rambin needed a motorcycle to participate in a club ride, (4) that a person named Andre Smith had offered to loan him a motorcycle, and (5) that during the ride he collided with the uninsured automobile while operating that motorcycle. The court, Susan D. Borman, J., granted both defendants summary disposition, and Rambin appealed. The Court of Appeals, DONOFRIO, P.J., and BOONSTRA, J. (RONAYNE KRAUSE, J., concurring in part and dissenting in part), reversed and remanded, holding that Rambin had not taken the motorcycle unlawfully within the meaning of MCL 500.3113(a). The Court of Appeals further stated that there was no dispute that Rambin had not taken the motorcycle in violation of the Michigan Penal Code, MCL 750.1 *et seq*., and that from his perspective, there had been no unlawful taking. 297 Mich App 679 (2012). Allstate applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 493 Mich 973 (2013).

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

MCL 750.414, which prohibits the unlawful taking of a vehicle, is not a strict-liability crime, but contains the *mens rea* element that the taker must have intended to take the vehicle without authority.

1. MCL 500.3113(a) provides that a person is not entitled to PIP benefits for accidental bodily injury if at the time of the accident the person was using a motor vehicle or motorcycle that he or she had taken unlawfully unless the person reasonably believed that he or she was entitled to take and use the vehicle. MCL 750.414, informally called a joyriding statute, provides that any person who takes or uses without authority a motor vehicle without the intent to steal the vehicle or is a party to the unauthorized taking or using is guilty of a misdemeanor. In *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), the Supreme Court held that any person who takes a vehicle contrary to a provision of the Michigan Penal Code (including MCL 750.414) has taken the vehicle unlawfully for purposes of MCL 500.3113(a). Unlike *Spectrum Health*, however, this case did not involve the taking of a vehicle against the express prohibition of the vehicle's owner. Rather, Rambin presented evidence that in his opinion showed that the person who gave him permission to take the motorcycle was the rightful owner.

2. Allstate maintained that Rambin's good faith was legally irrelevant because MCL 750.414 is a strict-liability crime and that absent express consent from the actual owner for the taking, Rambin was barred from recovering PIP benefits. Strict-liability offenses, however, are generally disfavored. Courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the Legislature intended the imposition of strict criminal liability. Further, the presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime.

3. MCL 750.414 expressly precludes the necessity of having an intent to steal. Accordingly, while the statute prohibits the unauthorized use or taking of a motor vehicle, it does not require showing that the perpetrator intended to permanently deprive the owner of the vehicle. Although the Legislature expressly eliminated this common-law element of larceny crimes, it did not dispense with *mens rea* altogether. MCL 750.414 is not a strict-liability offense. While it is clear that an intent to steal is not an element of the offense,

MCL 750.414 nonetheless requires an intent to take without authority or an intent to use without authority.

4. For a person to take personal property without the authority of the actual owner, there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property. Rambin was entitled to present evidence to establish that because he did not knowingly lack authority to take the motorcycle in light of his belief that he had authority to do so, he did not run afoul of MCL 750.414 and, therefore, did not unlawfully take the motorcycle under MCL 500.3113(a). Accordingly, the Court of Appeals was correct insofar as it held that Rambin would be entitled to PIP benefits if the evidence established that he did not know the motorcycle was stolen.

5. The Court of Appeals, however, incorrectly concluded that Rambin was entitled to a finding as a matter of law that he did not take the motorcycle unlawfully given the substantial circumstantial evidence to the contrary. The Court of Appeals improperly made findings in regard to facts in this case that were still disputed.

Affirmed in part, reversed in part, and remanded for further proceedings.

Justice CAVANAGH, concurring in part and dissenting in part, stated that for the reasons given in his dissent in *Spectrum Health*, he continued to believe that the phrase "taken unlawfully" in MCL 500.3113(a) includes only vehicle thefts. Because he agreed that a question of fact remained regarding whether Rambin stole the motorcycle, however, Justice CAVANAGH agreed with reversing the Court of Appeals' decision in part and remanding the case to the trial court.

1. CRIMINAL LAW — JOYRIDING — SPECIFIC INTENT — INTENT TO TAKE MOTOR VEHICLE WITHOUT AUTHORITY.

MCL 750.414, often referred to as a joyriding statute, provides that any person who takes or uses without authority a motor vehicle without the intent to steal the vehicle or is a party to the unauthorized taking or using is guilty of a misdemeanor; MCL 750.414 does not create a strict-liability crime but contains the *mens rea* element that the taker must have intended to take the vehicle without authority.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — EXCLUSION FOR VEHICLES TAKEN UNLAWFULLY.

MCL 500.3113 provides that a person is not entitled to personal protection insurance (PIP) benefits under the no-fault act,

MCL 500.3101 *et seq*., for accidental bodily injury if at the time of the accident the person was using a motor vehicle or motorcycle that he or she had taken unlawfully unless the person reasonably believed that he or she was entitled to take and use the vehicle; any person who takes a vehicle contrary to a provision of the Michigan Penal Code, MCL 750.1 *et seq*., has taken the vehicle unlawfully for purposes of MCL 500.3113(a); a violation of the joyriding statute, MCL 750.414, requires an intent to take the vehicle without authority or an intent to use it without authority, and a person being denied PIP benefits under MCL 500.3113(a) on the basis of MCL 750.414 is entitled to show that he or she did not knowingly lack authority to take the vehicle because of the person's belief that he or she had authority to do so.

Donald M. Fulkerson and *Bruce K. Pazner* for Lejuan Rambin.

Garan Lucow Miller, PC (by *Daniel S. Saylor*), for Allstate Insurance Company.

ZAHRA, J. In this case we are called on to examine the meaning of MCL 750.414, the misdemeanor joyriding statute, in the context of MCL 500.3113(a), which excludes certain individuals from entitlement to personal protection insurance benefits (commonly known as "PIP benefits") under the no-fault act. Specifically, under MCL 500.3113(a), a person who was injured while "using a motor vehicle or motorcycle which he or she had taken unlawfully," is not entitled to PIP benefits. We recently examined these statutory provisions in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*.[1] We held that a person injured while driving a motor vehicle that was taken contrary to the express prohibition of the vehicle owner cannot receive PIP benefits. We further held "that any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, infor-

[1] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012).

mally known as the 'joyriding' statutes—has taken the vehicle unlawfully for purposes of MCL 500.3113(a)."[2]

Unlike *Spectrum Health*, the present case does not involve the taking of a vehicle against the express prohibition of the vehicle owner. Rather, plaintiff presented evidence that, in his view, showed that the person who granted him permission to take the motorcycle on which he was injured was the rightful owner. Against this background, we examine whether MCL 750.414, which makes it a misdemeanor to take or use a vehicle without authority of its owner, is a strict liability crime for purposes of applying MCL 500.3113(a). We hold that MCL 750.414 is not a strict liability crime and that it contains a *mens rea* element that the taker must intend to take a vehicle "without authority." Accordingly, we affirm the Court of Appeals' decision insofar as it holds that plaintiff is entitled to PIP benefits if the evidence establishes he did not know the motorcycle he had taken was stolen.

We nonetheless disagree with the Court of Appeals' conclusion that plaintiff was entitled to a finding as a matter of law that he did not take the motorcycle unlawfully, given the circumstantial evidence presented in this case. The Court of Appeals improperly made findings in regard to the facts of this case that were still very much in dispute. We affirm in part and reverse in part the opinion of the Court of Appeals, and remand to the circuit court for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff Lejuan Rambin filed a complaint in circuit court against Allstate Insurance Company (Allstate)

[2] *Id*. at 509 (citation omitted).

and Titan Insurance Company (Titan), claiming PIP benefits pursuant to the Michigan No Fault Act, MCL 500.3105 *et seq*. Plaintiff alleged that on August 23, 2009, he sustained bodily injury when the motorcycle he was operating was involved in an accident. In the complaint, plaintiff admitted that he did not own a motor vehicle at the time of the accident, and that the motorcycle he was riding was owned by and registered to Scott Hertzog. Plaintiff noted that the car involved in the accident was also uninsured. Plaintiff nonetheless averred that Scott Hertzog owned a car that was insured by Allstate.[3] Plaintiff asserted a right to PIP benefits from Allstate, but Allstate denied his claim. Plaintiff alternatively alleged that if Allstate was not the responsible insurer, he was entitled to PIP benefits from Titan, the insurer to which the claim was assigned by the Michigan Assigned Claims Facility (ACF).[4]

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[3] MCL 500.3114(5) provides that

> [a] person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> * * *
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

[4] See MCL 500.3172(1), which provides, in pertinent part:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle . . . in this state may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the

After the parties had engaged in discovery,[5] including taking plaintiff's deposition, Titan filed a motion for summary disposition, arguing that plaintiff is barred from recovery of PIP benefits if he was involved in the theft of the motorcycle. Allstate likewise filed a motion for summary disposition claiming plaintiff had taken the motorcycle unlawfully, and was thus barred from recovery of PIP benefits by MCL 500.3113(a).

Not to be left out, plaintiff also filed a motion for summary disposition. Plaintiff maintained that discovery had revealed several facts, many of which he claimed were "undisputed." Plaintiff asserted that, in June 2009, he joined the Phantom Motorcycle Club though he did not own a motorcycle. On August 4, 2009, Scott Hertzog's motorcycle was stolen. On August 22, 2009, members of the club informed plaintiff that he

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equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed.

[5] To the extent no fault liability was at least in part enacted to reduce litigation, the procedural history of this case would cause one to question whether this end has been achieved. Titan filed an answer to the complaint generally denying plaintiff's allegations, but also filed a cross-complaint against Allstate. In the cross-complaint, Titan acknowledged that the ACF had assigned Titan to provide benefits for plaintiff's no-fault claim as an insurer of last resort, but asserted that Allstate occupied a higher order of priority for payment of plaintiff's benefits. Allstate then filed an answer to plaintiff's complaint generally denying plaintiff's allegations. Allstate also filed an answer to Titan's cross-complaint in which it acknowledged that it had issued a no-fault policy insuring Scott Hertzog's motor vehicle, but otherwise denied the allegations that it was the responsible insurer. Allstate then filed a third-party complaint against Auto Club Insurance Association (ACIA) alleging that ACIA had issued a no-fault policy to a member of plaintiff's household that was in effect at the time of the accident, and therefore ACIA occupied a higher order of priority for payment of plaintiff's benefits. ACIA filed an answer to the third-party complaint denying the allegations. Ultimately, the parties stipulated to ACIA's dismissal.

needed a motorcycle to participate in the club ride that night. Plaintiff claimed that a person named Andre Smith offered to loan him a motorcycle for the club ride. Plaintiff claims that on August 22, 2009, at 7:00 p.m., he went to a house on Kentfield in Detroit, where Andre Smith handed plaintiff the keys to the motorcycle and told him that he could use the motorcycle for the club ride. On August 23, 2009, at approximately 1:20 a.m., plaintiff collided with an uninsured automobile while operating the motorcycle he had taken from Andre Smith. Following the accident, plaintiff informed police that he had borrowed the motorcycle from a friend, Andre Smith, who lived on Kentfield. Plaintiff, however, was unable to inform the police which house Andre resided in and plaintiff was unable to provide the police any information to reach Andre.[6]

The circuit court issued an order that granted summary disposition in favor of Allstate and Titan.[7]

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[6] As developed later in this opinion, there are many facts that weigh against plaintiff's claim that he did not know the motorcycle was stolen. See Part III(B) of this opinion.

[7] The circuit court, without the benefit of our opinion in *Spectrum Health*, relied on *Amerisure Ins Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009) when granting judgment against plaintiff. Specifically, the circuit court relied on *Plumb*'s discussion of an unlawful taking under MCL 500.3113(a). In *Plumb*, the Court of Appeals did not cite a violation of the Michigan Penal Code (or any other prohibitive law) to establish an unlawful taking under MCL 500.3113(a). Rather, the *Plumb* Court focused exclusively on whether there was evidence that Plumb had received permission from an owner to take the motor vehicle. The *Plumb* Court reached this conclusion despite later noting that "[i]f Plumb received the keys from someone who appeared to own the [vehicle], it would have been reasonable for her to believe that she was entitled to take the [vehicle] within the meaning of § 3113(a)." In short, the *Plumb* Court addressed an unlawful taking under MCL 500.3113(a) in terms of the owner's perspective. But, as we stated in *Spectrum Health*, "MCL 500.3113(a) does not contain language regarding *an owner's* 'express or implied consent or knowledge' because it examines the legality of the taking from the *driver's* perspective . . . ."

Plaintiff appealed as of right the court's decision in the Court of Appeals. Before the Court of Appeals, plaintiff maintained that he did not unlawfully take the motorcycle and that he had a reasonable belief that he was entitled to take and use it. Plaintiff claimed that he did not take the motorcycle with the willful intent to do so unlawfully or with knowledge that he lacked authority. The Court of Appeals reversed the circuit court's grant of summary disposition to Allstate and Titan, holding "that plaintiff did not take [the motorcycle] unlawfully [within the meaning of] MCL 500.3113(a)."[8] The Court of Appeals concluded that, "[i]n this case, there is no dispute that plaintiff did not take the [motorcycle] in violation of the Michigan Penal Code, and that, viewed from plaintiff's (the driver's) perspective, there was no 'unlawful taking.' "[9] The Court of Appeals further concluded that based on the record evidence, there was no genuine issue of material fact that plaintiff did not take the motorcycle unlawfully, and it remanded the case to the trial court for further proceedings.

Allstate applied for leave to appeal in this Court. We

Spectrum, 492 Mich at 522. Thus, we disagree with *Plumb* to the extent it can be read to suggest a person has unlawfully taken a vehicle or motorcycle under the no-fault act solely on the basis that a person takes a vehicle without the owner's permission. Rather, we reassert the notion that the phrase "taken unlawfully" must be considered from the driver's perspective.

[8] *Rambin v Allstate Ins Co*, 297 Mich App 679, 702; 825 NW2d 95 (2012). Judge RONAYNE KRAUSE issued a separate opinion concurring in part and dissenting in part. Judge RONAYNE KRAUSE agreed "with the result reached by the majority."

[9] *Id*. at 702. The Court of Appeals did not reach the later portion of MCL 500.3113(a), which again provides that "even if an injured person had 'taken [a motorcycle] unlawfully' ." MCL 500.3113(a) does not apply if "the person reasonably believed that he or she was entitled to take and use the [motorcycle]." *Id*. at 703.

directed the Clerk to schedule oral argument on whether to grant the application or take other action.[10] We specifically requested that the parties address

> whether the plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person . . . using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414; *People v Laur*, 128 Mich App 453 (1983), and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case.[11]

II. STANDARD OF REVIEW

We review de novo the denial of a motion for summary disposition.[12] A motion for summary disposition under MCR 2.116(C)(10) requires the reviewing court to consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[13] Also, this case involves interpretation of a statute, a question of law that we review de novo on appeal.[14]

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[10] MCR 7.302(H)(1).

[11] *Rambin v Allstate Ins Co*, 493 Mich 973 (2013).

[12] *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012), citing *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[13] *Id*., citing *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

[14] *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

III. ANALYSIS

A. TAKING UNLAWFULLY UNDER MCL 500.3113

MCL 500.3113 provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

In each of the *Spectrum Health* companion cases, our application of MCL 500.3113(a) was straightforward. The dispositive issue in each case was "whether a person injured while driving a motor vehicle that the person had taken contrary to the *express* prohibition of the owner may avail himself or herself of [PIP benefits] . . . under the no-fault act, notwithstanding the fact that MCL 500.3113(a) bars a person from receiving PIP benefits for injuries suffered while using a vehicle that he or she 'had taken unlawfully . . . .' "[15] In both cases, the owner had expressly told each person injured while driving the motor vehicle that they could not use the motor vehicle. In essence, we rejected these claims premised on the notion that a person cannot take a vehicle contrary to an owner's express prohibition and maintain that he or she did not "unlawfully take" the vehicle under MCL 500.3113(a). We concluded that "any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, informally known as the 'joyriding' statutes—has taken the vehicle unlawfully within the

[15] *Spectrum*, 492 Mich at 508 (emphasis added).

meaning of MCL 500.3113(a)."[16] Because in *Spectrum* the owners had expressly told each person injured while driving the motor vehicle that they could not use the motor vehicle, we did not have occasion to reach the question whether MCL 500.3113(a) requires the "person . . . using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner.

The facts of the present case stand in contrast to those in *Spectrum*. Plaintiff claims he did not knowingly lack authority to take the motorcycle because he believed that the person who gave him access to the motorcycle was the rightful and legal owner of it. In support, he cites *People v Laur*, which held that MCL 750.414 is a general intent crime.[17] Allstate however maintains that plaintiff's good faith is legally irrelevant because MCL 750.414 is a strict liability crime. Allstate maintains that absent express consent from the actual owner, plaintiff is barred from recovering PIP benefits.

1. LIABILITY FOR CRIMINAL OFFENSES GENERALLY

As a general rule, "strict-liability offenses are disfavored."[18] To that end, "courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed."[19] Further, this presumption in favor of a criminal intent or *mens rea*

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[16] *Id*. at 537.

[17] *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983).

[18] *People v Likine*, 492 Mich 367, 391; 823 NW2d 50 (2012).

[19] *Id*. at 391-392, quoting *People v Kowalski*, 489 Mich 488, 499 n 12; 803 NW2d 200 (2011), in turn citing *People v Tombs*, 472 Mich 446, 452-456; 697 NW2d 494 (2005), *United States v X-Citement Video, Inc*, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994), *Staples v United States*,

requirement applies to each element of a statutory crime.[20] This presumption stems from the "[u]nqualified acceptance of this doctrine by English common law in the Eighteenth Century."[21] For this reason, the existence of *mens rea* " 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' "[22] With this general rule in mind, we examine the language of the statute itself to determine whether the statute imposes strict liability or requires proof of a guilty mind.[23]

2. MCL 750.414

MCL 750.414 provides:

> Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $1,500.00. However, in case of a first offense, the court may reduce the punishment to imprisonment for not more than 3 months or a fine of not more than $500.00. However, this section does not apply to any person or persons employed by the owner of said motor vehicle or anyone else, who, by the nature of his or her employment, has the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent.

As this Court noted in *Spectrum*, "MCL 750.414 contains disjunctive prohibitions: it prohibits someone

511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994), and *Morissette v United States*, 342 US 246; 72 S Ct 240, 96 L Ed 288 (1952).

[20] *Tombs*, 472 Mich at 454-455.

[21] *Morrissette*, 342 US at 251.

[22] *Staples*, 511 US at 605, quoting *United States v United States Gypsum Co*, 438 US 422, 436; 98 S Ct 2864; 57 L Ed 2d 854 (1978).

[23] *Tombs*, 472 Mich at 451, citing *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992).

from 'tak[ing]' a motor vehicle 'without authority' and, alternatively, it prohibits someone from 'us[ing]' a motor vehicle 'without authority.' "[24] Significantly, however, MCL 750.414 expressly precludes "an intent to steal." Thus, while the statute prohibits the unauthorized use or taking of a motor vehicle, it does not require a showing that the perpetrator intended to permanently deprive the owner of the vehicle. The omission of the "intent to steal" requirement is understood when considering the statute's historical context:

> The social problem back of this legislation is well known. When the automobile began to appear and was limited to the possession of a few of the more fortunate members of the community, many persons who ordinarily respected the property rights of others, yielded to the temptation to drive one of these new contrivances without the consent of the owner. This became so common that the term "joyrider" was coined to refer to the person who indulged in such unpermitted use of another's car.[25]

" '[T]he prevalence of this kind of trespass made it very difficult to secure convictions in cases of outright larceny of motor vehicles, because the claim of an intent to return usually seemed plausible.' "[26] Thus, while the " 'statutory offense may be designated larceny, the common-law definition of larceny is changed by eliminating the requirement of intent permanently to deprive the owner of his property.' "[27] Further, " '[w]hile the elements of the offense depend upon the wording of the statute, they usually consist of taking possession of a vehicle, driving or taking it away, willfulness, and lack

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[24] *Spectrum*, 492 Mich at 517 n 24.

[25] *People v Hayward*, 127 Mich App 50, 62; 338 Mich App 50 (1983), quoting Perkins on Criminal Law (2d ed), pp 272-273.

[26] *Id*. at 62-63, quoting Perkins on Criminal Law (2d ed), pp 272-273.

[27] *Id*. at 61, quoting 7A Am Jur 2d, Automobiles and Highway Traffic, § 349, at 534-535.

of authority; proof of intent to permanently deprive the owner of the property is not required.' "[28] We conclude that the phrase "without an intent to steal" in MCL 750.414 reflects the Legislature's intention to expressly eliminate the common-law requirement in larceny of an intent to permanently deprive the owner of his or her property.

However, simply because the Legislature made clear that this specific element of common-law larceny need not be shown to establish this statutory offense does not suggest that the Legislature intended to dispense with *mens rea* altogether.[29] Indeed, from a historical perspective it is clear that the Legislature used the phrase "without an intent to steal" merely to preclude an offender from arguing he or she lacked the specific intent to permanently deprive the owner of his or her property. The Legislature readily could have substituted the phrase "without an intent to steal" with "without regard to intent" and created a strict liability offense, but it did not. To that end, it is reasonable to infer that the Legislature's elimination of "an intent to steal" without a complete elimination of intent altogether reflects an intent to retain an element of *mens rea*. For this reason, we conclude that the phrase "without an intent to steal" is not an express or implied indication that our Legislature intended to dispense with the element of *mens rea* under MCL 750.414.

3. THE RELATIONSHIP BETWEEN MCL 750.414 AND MCL 750.413

Allstate urges us to consider MCL 750.414 in the context of MCL 750.413, which was first enacted in its

[28] *Id*. at 62, quoting 7A Am Jur 2d, Automobiles and Highway Traffic, § 349, at 534-535.

[29] *Tombs*, 472 Mich at 454-455.

current form along with MCL 750.414.[30] MCL 750.413 prohibits a person from "wilfully and without authority, tak[ing] possession of and driv[ing] or tak[ing] away . . . any motor vehicle, belonging to another . . . ." Allstate contrasts the absence of any express *mens rea* element in the text of MCL 750.414 with the Legislature's affirmative placement of such elements in MCL 750.413, a related and similar statute, and asserts that MCL 750.414 must be applied, as written, as a strict liability offense.

We reject Allstate's assertion and conclude that MCL 750.414 is not a strict liability offense. First, as previously discussed, we believe that the Legislature, in stating "without an intent to steal," intended to eliminate the specific intent to permanently deprive the owner of his or her property. While it is very clear that "an intent to steal" is not an element of this offense, this language does not preclude an understanding of MCL 750.414 that requires an intent to take without authority or an intent to use without authority.

Second, MCL 750.413 does not contain prohibitions against both unlawfully taking and unlawfully using an automobile. The statute must be viewed as a whole to determine the existence of an element of *mens rea*. Allstate parses MCL 750.414 and mentions only the prohibition relevant under MCL 500.3113, *i.e.*, the unlawful taking. Allstate then compares its selected language under MCL 750.414 to MCL 750.413, but that statute does not likewise prohibit the unlawful use of a vehicle. In short, even though the unlawful use of a vehicle under MCL 750.414 is not relevant under the unlawful taking language in MCL 500.3113, the prohibition against unlawful use is relevant to determining

[30] 1931 PA 238.

the existence of *mens rea* under MCL 750.414, which is central to this case.

4. ANALYSIS

Considering MCL 750.414 as a whole, we conclude that it properly requires a showing of knowingly taking without authority or knowingly using without authority. There are several indications within the statute that militate toward the existence of the element of *mens rea*. The phrase "without authority" along with the terms "take" and "use" all plainly have expansive meanings. "Authority" in this context refers to the "right to control, command or determine."[31] "Take" means "to get into one's hands or possession by voluntary action."[32] "Use" means "to employ for some purpose."[33] By themselves, these terms all contemplate voluntary and knowing conduct on the part of the accused.[34] For a person to take personal property without the authority of the actual owner, there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property. And the terms "take" and "use" require at the least some voluntary action. Further, if there were no *mens rea* element respecting the taking or using of a vehicle, the statute could punish otherwise innocent conduct.[35] Accordingly, we conclude that MCL 750.414 is not the exceptional statute that imposes strict liability, but a

[31] *Random House Webster's College Dictionary* (1996).

[32] *Id*.

[33] *Id*.

[34] *Tombs*, 472 Mich at 457.

[35] *X-Citement Video*, 513 US at 69.

statute that corresponds with the common-law rule that presumes *mens rea* as to each element of the offense.[36]

5. APPLICATION

In this case, plaintiff may present evidence to establish that he did not run afoul of MCL 750.414, and thus did not unlawfully take the motorcycle under MCL 500.3113, because he did not knowingly lack authority to take the motorcycle because he believed that he had authority to do so. Stated differently, plaintiff's argument that he did not unlawfully take the motorcycle under MCL 500.3113 is subject to the criminal statute that prohibits an unlawful taking, MCL 750.414, under

[36] Moreover, the Legislature appears to have recognized that its description of the unlawful use of a motor vehicle under MCL 750.414 was particularly cumbersome in one respect. That is, before it was amended in 2002, former MCL 750.414 "[p]rovided further, That the provisions of this section shall be construed to apply to any person or persons employed by the owner of said motor vehicle or any one else, who, by the nature of his employment, shall have the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent." This provision clearly was intended to ensure that employees using work vehicles would be subject to the same standard as anyone else using someone else's vehicle. By amending MCL 750.414 through the enactment of 2002 PA 672 the Legislature provided employees much greater latitude to use a work vehicle without the owner's knowledge or consent. The change, in essence, worked to remove a presumption that operated against allowing an employee any discretion in using an owner's vehicle, and replaced it with a presumption in favor of an employee's discretion to use the vehicle in excess of the owner's knowledge or consent.

In our view, the Legislature's amendment of MCL 750.414 in this respect is entirely consistent with our view that MCL 750.414 contemplates that the unlawful use of a motor vehicle without an owner's authority may sometimes be a matter of the degree of excessive use. Our Legislature's recognition of this point in enacting 2002 PA 672 reinforces our conclusion that MCL 750.414 does indeed contain a *mens rea* requirement.

which plaintiff may present evidence to show that he did not knowingly take the motorcycle without the owner's authority.

B. IMPROPER FACT-FINDING BY THE COURT OF APPEALS

Having provided a basis on which plaintiff may present evidence in this case to establish that he did not violate MCL 750.414, and thereby not be excluded from entitlement to PIP benefits under MCL 500.3113, we nonetheless agree with the circuit court's conclusion that an issue of fact remains with regard to the unlawful taking. The Court of Appeals apparently disregarded the circuit court's statement[37] and opined that "[t]he material facts are undisputed." This was clear error.

Our review of the lower court record reveals compelling evidence to counter plaintiff's claim that he was not complicit in the unlawful taking of the motorcycle. The circuit court correctly found a question of material fact regarding whether the motorcycle was taken unlawfully.

Plaintiff was in possession of a stolen motorcycle only 18 days after it had been stolen. In the early morning hours of August 23, 2009, plaintiff was riding the stolen motorcycle and travelling on the Davison Freeway with another member of the motorcycle club when a car entered the freeway and instantaneously crossed several lanes to cut in front of plaintiff's motorcycle. This action caused plaintiff to lay the motorcycle down and collide with the car. Plaintiff sustained serious and substantial injuries yet neither he nor the other member of his motorcycle club called the police or summoned emergency medical care. To the contrary, the

[37] In ruling from the bench, the circuit court expressly stated that "there's an issue of fact as to the unlawful taking."

two left the motorcycle on the side of the freeway, fled the scene of the accident and drove to the hospital. At the hospital, plaintiff was eventually confronted by police and he fabricated a story that denied his connection to the motorcycle. Specifically, plaintiff told police he was walking across the freeway on his way home from the bar when he was struck and dragged down the freeway by a car. Plaintiff later recanted his story, claiming that he lied to police only to avoid getting a ticket. When plaintiff finally confessed involvement in the accident involving the stolen motorcycle, he told police that it was an Andre "Smith I presume" who had loaned him the motorcycle. Yet, plaintiff had never met Andre before Andre loaned him the motorcycle, did not have Andre's phone number, did not know where Andre lived, and did not try to contact Andre after the accident. Plaintiff maintains that it is his belief that the motorcycle remains in the police compound. "Possession of the fruits of a robbery plus certain other facts and circumstances permits the inference that the possessor is the thief."[38] This evidence is more than sufficient for a reasonable fact-finder to conclude plaintiff knew that the motorcycle had been stolen and violated MCL 750.414.

The record also reveals, contrary to the claims of plaintiff, that throughout the proceedings Allstate has maintained that plaintiff did not have express or im-

[38] *People v Gordon*, 60 Mich App 412, 418; 231 NW2d 409 (1975). See *People v Tutha*, 276 Mich 387, 395; 267 NW 867 (1936) ("Possession of stolen property within a short time after it is alleged to have been stolen raises a presumption the party in possession stole it, and this presumption is either weak or strong, depending upon the facts."), and *People v Quigley*, 217 Mich 213, 225; 185 NW 787 (1921) ("Possession of recently stolen property, accompanied by an active and hurried effort, under an assumed name, to dispose thereof, is evidence to go to the jury upon the issue of whether the accused stole the same.").

plied authority to take the motorcycle. Early on in the proceedings it became clear that "Allstate has asserted that [p]laintiff is barred from collecting PIP benefits pursuant to MCL 500.3113 because he was involved in the theft of the motorcycle that was involved in the accident." Titan relied on Allstate's assertion to argue "[i]f Allstate prevails with this argument, [p]laintiff is barred from collecting PIP benefits from *any carrier* which is involved in this litigation." Further, Allstate's brief to the Court of Appeals states: "[p]laintiff claims he came into possession of the stolen Honda motorcycle when he went to the clubhouse of Phantom Motorcycle Club (although he did not have a motorcycle) and one of the club members, Andre (presumably the ubiquitous) 'Smith,' told him he could use the subject motorcycle that had been stolen from Scott Hertzog." Allstate further maintained on appeal that if plaintiff "is successful in overturning the trial court ruling, a factual issue still remains as to whether . . . plaintiff had a reasonable belief that he was entitled to take and use the vehicle based on the suspicious unsupported assertions by plaintiff regarding his possession and use of the motorcycle in question." Accordingly, for all these reasons we disagree with plaintiff and the Court of Appeals that plaintiff's factual assertions that he did not unlawfully take the motorcycle were undisputed.

IV. CONCLUSION

We conclude that plaintiff may present evidence that he did not knowingly lack authority to take the motorcycle. In the context of this case, such evidence is admissible to establish plaintiff did not run afoul of MCL 750.414, thereby unlawfully taking the motorcycle under MCL 500.3113, because he allegedly took the motorcycle believing that he had authority to do so.

We further conclude the Court of Appeals improperly made findings in regard to the facts of this case that were still very much in dispute. We therefore affirm in part and reverse in part the judgment of the Court of Appeals, and remand to the circuit court for further proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 544-545; 821 NW2d 117 (2012), I continue to believe that the phrase "taken unlawfully," as used within MCL 500.3113(a), includes only vehicle thefts. However, I agree that there remains a question of fact regarding whether plaintiff stole the motorcycle in question. Accordingly, I agree with the majority's reversal of the Court of Appeals' decision in part and remand to the trial court.

ACORN INVESTMENT CO v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION

Docket No. 146452. Argued December 11, 2013. Decided May 20, 2014.

Acorn Investment Co. brought an action in the Wayne Circuit Court against the Michigan Basic Property Insurance Association, which had issued a fire insurance policy to Acorn, seeking to recover losses suffered in a fire on Acorn's property. Michigan Basic had denied coverage on the basis that the policy had been canceled before the fire occurred. The case proceeded to case evaluation, which resulted in an award of $11,000 in Acorn's favor. Acorn accepted the award, but Michigan Basic rejected it. The court, Daphne Means Curtis, J., granted summary disposition in Acorn's favor, ruling that the notice of cancellation was insufficient to effectively cancel the policy. The parties then agreed to submit the matter to an appraisal panel as permitted in the insurance policy and MCL 500.2833(1)(m). The appraisal panel determined that Acorn's claim was worth $20,877. Acorn moved for entry of a judgment and also sought interest under the Uniform Trade Practices Act, MCL 500.2001 *et seq*., case evaluation sanctions under MCR 2.403(O)(1), and expenses for the removal of debris. The court entered a judgment in Acorn's favor for $20,877 plus interest but declined to award case evaluation sanctions or debris-removal expenses. Michigan Basic paid the judgment, and Acorn appealed the denial of those sanctions and expenses. The Court of Appeals, FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ., affirmed. 298 Mich App 558 (2012). Acorn applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action with regard to whether the judgment amounted to a verdict that entitled Acorn to case evaluation costs under MCR 2.403(O)(2)(c). 494 Mich 863 (2013).

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

Under MCR 2.403(O)(2)(c), the definition of "verdict" includes a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

1. MCR 2.403(O)(1) provides that if a party rejects a case evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. Under MCR 2.403(O)(2)(c), a verdict includes a judgment entered as a result of a ruling on a motion after a rejection of the case evaluation. The court retains discretion regarding whether to award costs in certain circumstances. MCR 2.403(O)(11) provides that the court may refuse to award actual costs in the interests of justice if the verdict is the result of a motion as provided in MCR 2.403(O)(2)(c).

2. Pursuant to MCL 500.2833(1)(m), Michigan fire insurance policies provide that if the insured and insurer cannot agree on the actual cash value or amount of the loss, either party may demand that the amount of the loss or the actual cash value be set by appraisal. It was undisputed that Michigan Basic rejected the case evaluation in this case and that the outcome of the appraisal proceeding, even without the court's adding interest, was more favorable to Acorn than the case evaluation. This action proceeded to a judgment entered as a result of a ruling on a motion when the circuit court granted Acorn's motion for entry of a judgment and interest. Michigan Basic argued that the court rule contemplates resolution of a case by a dispositive motion in lieu of a trial, whereas the parties in this case agreed to resolve the issue of damages through the appraisal process. Michigan Basic also argued that Acorn's motion for entry of a judgment and interest was not required for the judgment to enter. While the case was not resolved as a result of the circuit court's ruling on a motion for summary disposition, it was nonetheless resolved by a ruling on a different motion, that for entry of a judgment. Moreover, it was the court, not the appraisal panel, that made the final determination of the parties' rights and obligations, and even if Michigan Basic had immediately paid the appraisal panel's award, the circuit court would still have had matters to attend to, including awarding interest. Therefore, the circuit court, not the appraisal panel, determined and entered the judgment. Thus, Acorn may recover its actual costs under MCR 2.403(O)(2)(c).

3. Michigan Basic contended that Acorn had waived its right to debris-removal expenses by failing to present evidence of them at the appraisal proceeding or raise the issue of jurisdiction in the circuit court before appraisal. There was no question that the insurance policy required compensation for debris-removal expenses. Acorn presented a colorable argument that it did not waive its right to collect debris-removal expenses at the appraisal pro-

ceeding. Debris-removal expenses were not mentioned in the circuit's court order permitting the parties to proceed to appraisal, and it would not have made sense for the appraisal panel to determine the amount of debris-removal expenses by engaging in a calculation of replacement cost less depreciation. But Acorn did request debris-removal expenses with its motion for entry of a judgment and interest. Because the circuit court did not set forth its reasons for denying debris-removal expenses, it was unclear whether it denied those costs because Acorn had waived the claim by not requesting those expenses before the appraisal panel or whether the court properly denied them on other grounds, such as forfeiture. Therefore, it was necessary to vacate the Court of Appeals' decision in that regard and remand the issue of debris-removal expenses for the circuit court to determine (1) whether the appraisal panel had the ability under MCL 500.2833 to determine debris-removal expenses, (2) if so, whether it erred by failing to award the expenses, and (3) if the appraisal panel did not have that authority, whether Acorn waived or forfeited its claim to debris-removal expenses.

Reversed in part with regard to the award of actual costs, vacated in part with regard to debris-removal expenses, and remanded for further proceedings.

Justice CAVANAGH, concurring, agreed that there was a verdict for purposes of MCR 2.403(O)(2). Justice CAVANAGH, further noted that the possibility of actual costs in cases such as this did not necessarily run afoul of the purpose of the court rule, as Michigan Basic's arguments implied. The court rule is not intended to punish parties but seeks instead to expedite and promote the settlement of cases by shifting the financial burden of paying actual costs to the party that imprudently rejected the proposed case evaluation award. Although Michigan Basic argued that its decision not to contest the appraisal panel's determination freed it from potential responsibility regarding actual costs, Michigan Basic nevertheless rejected the proposed case evaluation award, contested its liability until the circuit court granted Acorn's motion for summary disposition, and otherwise protracted the proceedings contrary to the aim of the rule. Accordingly, Justice CAVANAGH concurred with the decision to reverse and remand for further proceedings, including whether it was in the interests of justice to refuse to award actual costs under MCR 2.403(O)(11).

James C. Klemanski for Acorn Investment Company.

Patrick, Johnson & Mott, PC (by *John D. Honeyman*), for Michigan Basic Property Insurance Association.

ZAHRA, J. The issue in this case is whether plaintiff, Acorn Investment Co. (Acorn), may be awarded case evaluation costs under MCR 2.403(O)(1). Acorn had purchased property insurance from defendant Michigan Basic Property Insurance Association (Michigan Basic). When the insured property burned down, Acorn filed an insurance claim with Michigan Basic, which Michigan Basic disputed and did not pay. Acorn brought suit in the Wayne Circuit Court to recover under the insurance policy. The court submitted the case to case evaluation pursuant to MCR 2.403(A)(1), and the case evaluation panel rendered an award in Acorn's favor in the amount of $11,000. Acorn accepted the proposed award, but Michigan Basic rejected it. Because the parties failed to agree on the loss, Acorn demanded, pursuant to the terms of the insurance policy,[1] that the loss be set by appraisal. The appraisal panel determined that Acorn's claim was worth $20,877. Acorn filed a motion in the circuit court for entry of judgment and assessment of Uniform Trade Practices Act (UTPA) interest,[2] actual costs under MCR 2.403(O)(1) based on Michigan Basic's rejection of the case evaluation award, and debris-removal expenses pursuant to the insurance policy. The court granted the motion for entry of judgment, awarded Acorn $8,391.96 in interest, and ordered Michigan Basic to pay Acorn $6.86 per day until it satisfied the judgment. The court refused Acorn's requests for actual costs and for debris-removal expenses.

[1] MCL 500.2833(1)(m) required the inclusion of the appraisal provision in the policy.

[2] MCL 500.2001 *et seq*.

Acorn appealed, and the Court of Appeals affirmed.[3] We ordered and heard oral argument on whether to grant Acorn's application for leave to appeal or take other peremptory action.[4]

We hold that the circuit court may award actual costs to Acorn.[5] MCR 2.403(O)(1) requires a court to award actual costs when an opposing party rejects a case evaluation, the action proceeds to verdict, and the verdict is less favorable to the rejecting party than the case evaluation. The parties agree that Michigan Basic rejected the initial case evaluation and that the appraisal panel's award was less favorable to Michigan Basic than the initial case evaluation. We hold that the remaining requirement, that the action "proceed to verdict," was also satisfied. Under MCR 2.403(O)(2)(c), the definition of "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." In this case, the action proceeded to a judgment entered as a result of a ruling on a motion when the circuit court granted Acorn's motion for entry of judgment and interest.

Though we did not request that the parties address whether Acorn should have been awarded debris-removal expenses under the insurance policy,[6] we vacate the decision of the Court of Appeals in that regard and remand that issue to the circuit court. It is undisputed that Acorn's insurance policy included the right to recover for debris-removal expenses. But there is a

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[3] *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 298 Mich App 558; 828 NW2d 94 (2012).

[4] *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 494 Mich 863 (2013).

[5] We note that the circuit court has the discretion to refuse to do so in the interests of justice under MCR 2.403(O)(11).

[6] *Acorn*, 494 Mich 863 (2013).

dispute about whether the appraisal panel awarded them as part of its award, left them for the circuit court to determine, or whether Acorn waived its right to claim them. Acorn makes a colorable argument that the appraisal panel could not have determined the cost of debris removal because debris removal did not constitute "damages." Furthermore, debris removal costs could not logically be determined by using the formula ordered by the circuit court in its decision in limine—replacement cost less depreciation.

Accordingly, we reverse the decision of the Court of Appeals with regard to actual (case evaluation) costs and remand this case to the circuit court for further proceedings consistent with this opinion—including a determination whether Acorn is entitled to debris-removal expenses.

I. FACTS AND PROCEEDINGS

Acorn owned the property located at 12826 Marlowe in the City of Detroit (the Property). On April 10, 2007, Acorn applied to Michigan Basic for fire insurance for the Property. Michigan Basic issued Acorn Policy No. 4587875 (the Policy), which provided fire insurance for the Property for the period April 11, 2007, to April 11, 2008. On May 27, 2007, a fire occurred at the Property, causing significant damage. Acorn filed a claim with Michigan Basic, which was formally denied on the basis that the Policy was not in force at the time of the loss because it had been cancelled as of May 16, 2007.

Acorn filed suit against Michigan Basic. On June 27, 2008, Acorn filed a motion for summary disposition, seeking a declaration that Michigan Basic was required to provide coverage based on the Installment Payment Notice that Acorn received from Michigan Basic on May 11, 2007. Michigan Basic filed a cross-motion for

summary disposition, which stated that Acorn was not covered because Michigan Basic had sent two cancellation notices (on April 16, 2007, and May 16, 2007) to Acorn, both stating that coverage would be cancelled on May 16, 2007, because of the Property's ineligibility for coverage. The circuit court denied the motions for summary disposition, concluding that genuine issues of material fact precluded the entry of judgment.

Pursuant to MCR 2.403(A)(1), a case evaluation was performed on November 4, 2008, which resulted in an award for Acorn in the amount of $11,000. Acorn accepted the award, but Michigan Basic rejected it.

On April 23, 2009, Acorn filed a motion for summary disposition with regard to Michigan Basic's cancellation defense on the basis that Michigan Basic's notice of cancellation did not conform to the statutory requirement that the cancellation notice contain language advising the insured that any unused premium would be refunded on demand.[7] The circuit court granted Acorn's motion on July 14, 2009.

While Acorn's motion for summary disposition was pending, Acorn made a motion in limine that the fire damage value be determined by replacement cost less depreciation. The circuit court granted the motion. On November 19, 2009, Acorn made a motion to strike Michigan Basic's affirmative defense of misrepresentation. The circuit court granted the motion, concluding that Acorn was under no duty to advise Michigan Basic of changes in the occupancy of the rental dwelling.

Given that Michigan Basic's liability had already been determined, Acorn filed a motion to refer the issue of damages to a three-person appraisal panel and to

[7] See MCL 500.2833(1)(i).

appoint a presiding umpire for the panel, as permitted by the insurance policy and the enabling statute, MCL 500.2833(1)(m). Acorn also filed a motion asking the circuit court to require the appraisers to consider only replacement cost less depreciation when determining damages. The court granted both motions.

The appraisal panel issued the appraisal award on September 17, 2010, in the amount of $20,877. Michigan Basic did not pay the award and filed no pleadings with respect to the award. Upon Acorn's receipt of the award, Acorn wrote to the umpire of the appraisal panel, complaining that the award was too low because the panel did not award debris-removal costs, which were permitted by the insurance policy.

On November 17, 2010, Acorn filed a motion for entry of judgment in the appraisal amount, together with interest under the UTPA. Acorn also sought an award of case evaluation costs and for additional proceeds under the policy for the cost of debris removal services. Michigan Basic responded to the motion for entry of judgment, indicating that it did not contest Acorn's request for entry of judgment in the amount of the appraisal award or Acorn's claim to UTPA interest. Michigan Basic did object, however, to Acorn's request for case evaluation costs and for debris-removal expenses under the insurance policy, which Michigan Basic claimed could have been, but were not, part of the appraisal award. The circuit court entered a judgment in the amount of $20,877, together with UTPA interest in the amount of $8,391.96, plus future interest in the amount of $6.86 a day until Michigan Basic satisfied the judgment. The court denied Acorn's claims for case evaluation costs and debris-removal costs. The court denied Acorn's motion for reconsideration. Michigan Basic paid the judgment.

Acorn appealed in the Court of Appeals, seeking review of the circuit court's denial of case evaluation costs and debris-removal costs. The Court affirmed the court's decision in a published opinion per curiam.[8]

With regard to case evaluation costs, the Court of Appeals reasoned that "[t]he underlying purpose of case evaluation is to encourage settlement and deter protracted litigation by placing the burden of litigation costs on the party that rejected case evaluation and required the case to proceed to trial."[9] The Court noted that the statutory appraisal process under MCL 500.2833(1)(m) is "a substitute for the judicial determination of disputes" and "a simple and inexpensive method for the prompt adjustment and settlement of claims [that] effectively constitutes arbitration."[10] Furthermore, the Court stated that it had "previously rejected the notion that an order or judgment entered following arbitration or settlement constitutes a 'verdict' within the meaning of MCR 2.403(O)."[11] To support this proposition,[12] the Court cited *Jerico Constr, Inc v Quadrants, Inc*;[13] *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc, PC*;[14] and *Smith v Elenges*.[15] The Court of Appeals wrote: "[T]he appraisal process was effectively an arbitration, and an order or judgment entered pursuant to an arbitration or settlement is not a 'verdict' within the

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[8] *Acorn*, 298 Mich App 558.

[9] *Id*. at 561 (citations and quotation marks omitted).

[10] *Id*. at 562 (citations and quotation marks omitted).

[11] *Id*.

[12] *Id*. at 562-563.

[13] *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 666 NW2d 310 (2003).

[14] *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc*, 204 Mich App 278, 514 NW2d 516 (1994).

[15] *Smith v Elenges*, 156 Mich App 260, 401 NW2d 342 (1986).

meaning of MCR 2.403(O)(2)(c) . . . [T]he trial court properly denied plaintiff's request for case evaluation sanctions."[16]

With regard to debris-removal expenses, the Court of Appeals reasoned that

> [i]ssues involving an insurance policy's coverage are generally for the court to determine, and the appraisal process cannot legally settle coverage issues. Where the parties cannot agree on coverage, a court is to determine coverage in a declaratory action before an appraisal of the damage to the property.[17]

It further stated that a party

> waive[s] its coverage-based challenge and [is] bound by the appraisal award absent bad faith, fraud, misconduct, or manifest mistake when the parties stipulate[ ] to submit the plaintiff's claim for appraisal without first seeking court intervention to determine coverage issues.
>
> Here, plaintiff erroneously characterizes its argument regarding debris-removal expenses as a coverage issue and contends that the trial court, rather than the appraisal panel, should have determined the issue. To the contrary, defendant did not assert that debris-removal expenses were not covered under the policy. Rather, it appears that the case proceeded through the appraisal process without plaintiff raising the issue of debris removal expenses. In a letter accompanying the appraisal award, [the] appraiser . . . stated that "no allowance was made for debris removal, as no evidence ha[d] been presented that the insured incurred any debris removal expense." Thus, the appraisal panel would have addressed debris-removal expenses if plaintiff had submitted evidence showing that it had incurred debris-removal costs. While plaintiff contends that it did not incur such costs until after the appraisal proceedings, it is noteworthy that the appraisal award was

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[16] *Acorn*, 298 Mich App at 564.

[17] *Id*. (citations and quotation marks omitted).

> issued on September 17, 2010, and the fire occurred on May 27, 2007. By submitting its case for appraisal and proceeding through the appraisal process without raising the issue of debris-removal expenses, plaintiff waived its claim for such expenses.[18]

Acorn filed an application for leave to appeal in this Court. We directed the Clerk to schedule oral argument about whether to grant the application or take other action pursuant to MCR 7.302(H)(1) with regard to whether the judgment amounted to a "verdict" that entitled Acorn to case evaluation costs under MCR 2.403(O)(2)(c).[19]

II. STANDARD OF REVIEW

Whether Acorn is entitled to case evaluation costs depends on our interpretation of a court rule. The interpretation of a court rule is an issue that this Court reviews de novo.[20]

III. ANALYSIS

A. CONTROLLING LAW

Whether Acorn is entitled to actual costs because Michigan Basic rejected the case evaluation is determined by MCR 2.403(O). MCR 2.403(O)(1) states, in relevant part:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing

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[18] *Id*. at 564-565 (fifth alteration in original), citing *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 473-474, 717 NW2d 341 (2006).

[19] As mentioned, the Court did not request that the parties address whether the circuit court should have awarded Acorn debris-removal expenses.

[20] *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

> party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

MCR 2.403(O)(2) defines the meaning of the word "verdict":

> For the purpose of this rule "verdict" includes,
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> a) a jury verdict,
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> (b) a judgment by the court after a nonjury trial,
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

Despite the strong terminology in MCR 2.403(O)(1), stating that the party rejecting the case evaluation "*must* pay the opposing party's actual costs,"[21] the court retains discretion regarding whether to award costs in certain circumstances. MCR 2.403(O)(11) states that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs."

Under MCL 500.2833(1)(m), Michigan fire insurance policies contain the following provision:

> That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal.

It is undisputed that Michigan Basic rejected the case evaluation and that the outcome of the appraisal proceeding, even without the court adding interest, was more favorable to Acorn than the case evaluation. The parties further agree that Acorn is not entitled to actual costs under either MCR 2.403(O)(2)(a) or (b). The dispute is whether Acorn may be awarded costs under MCR 2.403(O)(2)(c).

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[21] Emphasis added.

To aid our comprehension of MCR 2.403(O)(1) and (2), we substitute the definition of "verdict" from subrule (O)(2)(c) (*italicized*) for the term "verdict" in subrule (O)(1). The resulting rule states as follows:

> If a party has rejected an evaluation and the action proceeds to *a judgment entered as a result of a ruling on a motion after rejection of the case evaluation*, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

Under this rule, Michigan Basic is liable for Acorn's actual costs if: (1) the action proceeded to a judgment, (2) the judgment entered as a result of a ruling on a motion, and (3) the judgment occurred after Michigan Basic rejected the case evaluation.

B. APPLICATION OF CONTROLLING LAW TO FACTS

Court rules are interpreted using the same principles that govern the interpretation of statutes.[22] When ascertaining the meaning of a court rule, the reviewing court should focus first on the plain language of the rule in question, and when the language of the rule is unambiguous, it must be enforced as written.[23]

In this case, under the plain meaning of the court rule, Michigan Basic is liable for Acorn's actual costs. All the elements of the three-part test have been satisfied. First, the action "proceeded to a judgment" when the circuit court granted Acorn's motion for entry of judgment and interest. Second, the judgment "entered as a result" of the court's ruling on a motion—

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[22] *Marketos v American Employers Ins Co*, 465 Mich 407, 412-413; 633 NW2d 371 (2001).

[23] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013).

here, the motion for entry of judgment and interest. Third, the court entered the judgment after Michigan Basic rejected the case evaluation.

Michigan Basic disputes that the judgment was entered as a result of a judge's ruling on a motion. Relying on this Court's opinion in *Haliw v Sterling Hts*,[24] Michigan Basic argues that the rule contemplates resolution of the case by a dispositive motion in lieu of a trial. Michigan Basic claims that, in contrast, the parties in this case agreed to resolve the issue of damages through the appraisal process. Further, Michigan Basic maintains that Acorn's motion for entry of judgment and interest was not required for judgment to enter.

Michigan Basic is correct that the case was not resolved as a result of the circuit court's ruling on a motion for summary disposition. This fact, however, is immaterial because the case nonetheless was resolved by a ruling on a different motion—the motion for entry of judgment.

We also disagree with Michigan Basic's contention that the motion for entry of judgment and interest was not necessary for judgment to enter. MCR 2.403(O)(1) and (2)(c) require that "the action proceed[ ] to" a "*judgment* entered as a result of a ruling on a motion." A "judgment" is "[a] court's final determination of the rights and obligations of the parties in a case."[25] In this case it was the court, not the appraisal panel, that made the final determination of the parties' rights and obligations. Even if Michigan Basic had immediately paid the appraisal panel's award, the circuit court would still have had matters to attend to, including awarding interest under MCL 500.2006 for defendant's failure to

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[24] *Haliw v Sterling Hts*, 471 Mich 700, 708, 691 NW2d 753 (2005).

[25] See *Black's Law Dictionary* (9th ed 2009).

pay in a timely fashion.[26] Therefore, the circuit court, not the appraisal panel, determined and entered the judgment.

Additionally, submitting the case to the appraisal panel to determine the amount of loss did not constitute a settlement. The circuit court retained the ability to overturn the appraisal panel's award if the panel acted in bad faith, engaged in fraud or misconduct, or made a manifest mistake.[27] For example, in this case, the circuit court ordered that the appraisal panel determine Acorn's loss by subtracting depreciation from replacement cost. Had the appraisal panel deviated from this formula when calculating the loss, the circuit court arguably could have overturned the appraisal award for bad faith or manifest mistake. Therefore, the court retained jurisdiction over the case and the award, and it entered a judgment as a result of its ruling on the motion for entry of judgment and interest.

Defendant's argument that *Haliw* requires a dispositive motion before case evaluation costs are awarded is also incorrect. Though this Court considered the meaning of MCR 2.403(O) in *Haliw*, that case is not directly on point because it addressed whether the term "costs" in MCR 2.403(O) includes appellate attorney fees.[28] However, while making that determination, we noted

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[26] See also, e.g., *Marketos*, 465 Mich at 407 (stating that, for the purposes of awarding sanctions under MCR 2.403(O), a "verdict" "must represent a finding of the amount that the prevailing party should be awarded," and the "dollar amount that the jury includes on the verdict form may or may not be the 'verdict' for that purpose"). Cf *Jacobs v Schmidt*, 231 Mich 200; 203 NW 845 (1925) (explaining the difference between arbitration and appraisal, noting that, in appraisals, the sole function is to determine value, whereas in arbitration the function is to "adjust disputed claims between the parties").

[27] See *Angott*, 270 Mich App at 473.

[28] *Haliw*, 471 Mich at 702.

that the 1997 amendment of the court rule in MCR 2.403(O)(1) made clear that a "verdict" includes a judgment entered by dispositive motion:[29]

> Until this Court amended MCR 2.403(O) in 1997, it was sufficiently unclear whether a judgment that entered as a result of a dispositive motion instead of a trial would engender sanctions [now called "costs"]. By amending the court rule, this Court clarified that case evaluation sanctions may indeed be available when a case is resolved after case evaluation by a dispositive motion.[30]

While *Haliw* involved an entry of judgment after a dispositive motion, and though we used the term "dispositive motion" when resolving *Haliw*, we clarify that *Haliw* does not *require* a dispositive motion before case evaluation costs are awarded. *Haliw* merely indicated that dispositive motions were now covered by the modified case evaluation rule. It did not hold that only such motions were covered. The plain language of the rule merely requires that "judgment enter[ ] as a result of a ruling on a *motion*."[31]

We now turn to a discussion of the Court of Appeal's reasoning. The Court of Appeals erroneously relied on four cases for its holding that Acorn is not entitled to case evaluation costs: *Jerico*,[32] *Saint George Greek Orthodox Church*,[33]

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[29] The 1997 amendment of MCR 2.403(O) changed the phrase "proceeds to trial" to "proceeds to verdict" in MCR 2.403(O)(1). See *id*. at 708.

[30] *Id*.

[31] MCR 2.403(O)(2)(c) (emphasis added).

[32] *Jerico*, 257 Mich App 22. The Court of Appeals cited *Jerico* for the proposition that a stipulated order of dismissal entered on the basis of a settlement agreement does not constitute a verdict under MCR 2.403(O)(2). *Acorn*, 298 Mich App at 563.

[33] *Saint George*, 204 Mich App 278. The Court of Appeals cited *Saint George* for the proposition that mediation sanctions could not be awarded under a prior version of MCR 2.403. *Acorn*, 298 Mich App at 562.

Auto-Owners Ins Co v Kwaiser,[34] and *Smith*.[35] Some of these cases are inapplicable because they offer interpretations of an earlier version of the court rule and are no longer controlling. Others are merely inapposite.

We conclude that the Court of Appeals' reliance on *Smith* was misplaced because it relied on a different court rule. *Smith* is a 1986 case that held that a consent judgment entered into after was not a "verdict." *Smith* refers to the Wayne Circuit Court Rule 403.15(c), which provided:

> When the board's evaluation is unanimous, and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent greater than the board's evaluation in order to avoid the payment of actual costs to the defendant.

We note that the above rule did not specifically define the term "verdict," as the current rule does. Futhermore, a consent judgment is not the kind of "judgment" required by MCR 2.403(O)(2)(c) because the court does not "determine . . . the rights and obligations of the parties" in a consent judgment.[36] Rather, a consent judgment is a "settlement" or a "contract" "that becomes a court judgment when the judge sanctions it."[37]

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[34] *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 476 NW2d 467 (1991). The Court of Appeals cited *Kwaiser* for the proposition that an appraisal effectively constitutes arbitration. *Acorn*, 298 Mich App at 564.

[35] *Smith*, 156 Mich App 260. The Court of Appeals cited *Smith* for the proposition that a consent judgment was not a verdict. *Acorn*, 298 Mich App at 563.

[36] See *Black's Law Dictionary* (9th ed 2009) (defining "judgment").

[37] *Black's Law Dictionary* (9th ed 2009) (defining "consent judgment" as "agreed judgment").

Likewise, the Court of Appeals was incorrect to rely on *Saint George*, a 1994 case that relied on the 1987 version of the court rule. At the time *Saint George* was decided, MCR 2.403(O) stated:

> (1) If a party has rejected an evaluation and the action *proceeds to trial*, that party must pay the opposing party's actual costs unless the *verdict* is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion filed after mediation. [Emphasis added.][38]

In *Saint George*, the Court of Appeals refused to award sanctions, holding that when a case first proceeds in mediation evaluation and then proceeds to arbitration, the process cannot satisfy the "proceeds to trial language" found in MCR 2.403(O)(1).[39] Because *Saint George*'s holding is based on language that has been removed from the present MCR 2.403(O)(1), we do not believe that its precedent is persuasive.

We conclude that the Court of Appeals' reliance on *Jerico* is misplaced for the same reason that it was incorrect to rely on *Smith*. *Jerico* held that a stipulated order of dismissal that the court entered on the basis of a settlement agreement did not constitute a verdict under MCR 2.403.[40] But *Jerico*'s holding does not extend to this case. A stipulated order of dismissal based

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[38] *Saint George*, 204 Mich App at 281-282.

[39] 204 Mich App at 283.

[40] *Jerico*, 257 Mich App at 31.

on a settlement agreement is not a "judgment" in the sense that it is not a final determination by the *court* of the rights and obligations of the parties.[41] In this case, there was neither a settlement agreement nor a stipulated order of dismissal. And though the parties proceeded to appraisal, the ultimate appraisal award did not constitute the entire judgment. The parties had not settled at the time that Acorn filed its motion for entry of judgment and interest because they were still in dispute with regard to the proper award. That is, Acorn still believed that it was entitled to debris-removal expenses, which Michigan Basic disputed. Thus the circuit court, not the appraisal panel, entered the judgment required to satisfy MCR 2.403(O)(2)(c). Accordingly, the Court of Appeals erred by concluding that *Jerico* compels the conclusion that the appraisal was akin to a settlement agreement or a stipulated order of dismissal and thus did not constitute a verdict under MCR 2.403.

Finally, the Court of Appeals' reliance on *Kwaiser* is misplaced because *Kwaiser* did not involve case evaluation costs and, thus, did not address the meaning of the term "verdict" within MCR 2.403(O)(2)(c). The *Kwaiser* Court noted that appraisal effectively constitutes arbitration.[42] Michigan Basic argues that this means that an order of judgment following an appraisal cannot be a verdict, particularly in light of holdings from previous caselaw from the Court of Appeals, such as *Saint George*. However, Michigan Basic's argument does not necessarily follow from *Kwaiser* because, as previously stated, *Saint George* is not dispositive, and in this case we are asked to determine a different issue than what was before the Court in *Kwaiser*: whether "a

[41] See *Black's Law Dictionary* (9th ed 2009) (defining "judgment").

[42] *Kwaiser*, 190 Mich App at 486.

judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). Here, there was no final determination of the rights and obligations of the parties after appraisal because the court would have been able to review the appraisal award for bad faith, fraud, misconduct, and manifest mistake.[43] If the appraisal panel had not followed the court's method for calculating damages, this would arguably have been bad faith or manifest mistake. Furthermore, the court added to the appraisal award by adding interest and thereby determining the full amount of the verdict. Judgment against Acorn did not enter until Acorn's rights and liabilities had been finally determined, and this did not occur until the court ruled on the motion for entry of judgment and interest. Michigan Basic's argument from analogy fails to focus on what entity enters the judgment. It was the circuit court, not the appraisal panel, that did so.

IV. DEBRIS-REMOVAL EXPENSES

In its motion for leave to appeal, Acorn argued that it was entitled to debris-removal expenses under the contract and that either the appraisal panel or the circuit court should have awarded them. Michigan Basic contends that Acorn waived its right to debris-removal expenses by failing to present evidence of them at the appraisal proceeding or raise the issue of jurisdiction in the circuit court before appraisal.

A "waiver is the intentional relinquishment or abandonment of a known right."[44] There is no question that

[43] See *Angott*, 270 Mich App at 472.

[44] *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) (citations and quotation marks omitted).

the Policy required compensation for debris-removal expenses. Under its "Incidental Coverages" section, the Policy states:

> Debris Removal — We pay for the cost to remove the debris of covered property after an insured loss. . . .
>
> We will not pay more for direct loss to property and debris removal combined than the limit that applies to the damaged property. However when the covered loss plus the cost of debris removal is more than the applicable limit, we will pay up to an extra 5% of the applicable limit to cover the cost of debris removal.

MCL 500.2833(1)(m) requires that every insurance policy in Michigan contain the following provision: "That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal." Acorn claims that MCL 500.2833(1)(m) only governs actual losses, not the cost of removing debris. Furthermore, Acorn argues that the circuit court's May 20, 2010 order made it impossible for the appraisal panel to determine the cost of debris removal because the panel was limited to determining losses in a particular way that would have excluded debris-removal expenses. That order stated:

> IT IS FURTHER ORDERED that the parties and the Appraisal Panel are limited to a determination of actual cash value that is consistent with the Court's prior Order *in Limine* and only evidence of replacement cost less depreciation may be considered by the Panel in rendering its Award.

We conclude that Acorn presents a colorable argument that it did not waive its right to collect debris-removal expenses at the appraisal proceeding. Debris-removal expenses were not mentioned in the circuit's

court order permitting the parties to proceed to appraisal. Neither would it have made sense for the appraisal panel to determine the amount of debris-removal expenses by engaging in a calculation of "replacement cost less depreciation." But Acorn did request debris-removal expenses alongside its motion for entry of judgment and interest.

Because the trial court did not set forth its reasons for denying debris-removal expenses, it is unclear whether those costs were denied because Acorn waived its claim for them by not requesting them before the appraisal panel or whether they were properly denied on other grounds, such as forfeiture.[45] Therefore, we vacate the decision of the Court of Appeals and remand the issue of debris-removal expenses to the circuit court to determine (1) whether the appraisal panel had the ability under MCL 500.2833 to determine debris-removal expenses, (2) if the appraisal panel did have the authority to determine debris-removal expenses, whether it erred in failing to award such expenses, and (3) if the appraisal panel did not have the authority to determine debris-removal expenses, whether Acorn waived or forfeited its claim to debris-removal expenses.

V. CONCLUSION

Acorn may recover its actual costs under MCR 2.403(O)(2)(c) because the motion for entry of judgment and interest caused the case to "proceed to verdict" when the circuit court ruled on the motion. Because the circuit court has the discretion to award such costs to Acorn,[46] we reverse the Court of Appeals and remand the case to the circuit court for further proceedings.

[45] Forfeiture, "the failure to assert a right," is distinguishable from waiver. *Vaughn*, 491 Mich at 663.

[46] See MCR 2.403(O)(1); MCR 2.403(O)(11).

Additionally, we remand to the circuit court for a determination whether Acorn is entitled to recover debris-removal expenses in accordance with Part IV of this opinion. We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*concurring*). I concur with the majority's decision to reverse the Court of Appeals and remand for further proceedings consistent with the majority opinion. The primary issue in this case is whether there was a "verdict" for purposes of case evaluation costs under MCR 2.403(O).

In this case, Acorn Investment Company (Acorn) filed suit after Michigan Basic Property Insurance Association (Michigan Basic) denied Acorn's claim. After both parties' motions for summary disposition were denied, the case was submitted to case evaluation, resulting in an award in Acorn's favor, which Acorn accepted but Michigan Basic rejected. Accordingly, the action proceeded. Subsequently, Acorn and Michigan Basic again moved for summary disposition. The trial court denied Michigan Basic's motion but granted Acorn's motion, effectively leaving only the issue of damages in dispute and ultimately leading to entry of a judgment in Acorn's favor.

Under the circumstances of this case, I agree with the majority that there was a "verdict" for purposes of MCR 2.403(O)(2) when a judgment entered *as a result of* a ruling on a motion after case evaluation. I also agree with the majority's determination that the Court of Appeals erred insofar as it focused its analysis on caselaw, such as *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assocs, PC*, 204 Mich

App 278; 514 NW2d 516 (1994), that is inapposite or interpreted previous versions of the court rule. Finally, I note that the possibility of actual costs in cases such as this does not necessarily run afoul of the purpose of the court rule, as Michigan Basic's arguments imply. The court rule is not intended to punish parties; instead, the court rule seeks to expedite and promote the settlement of cases by shifting the financial burden of paying actual costs to the party that imprudently rejected the proposed case evaluation award. See *McAuley v Gen Motors Corp*, 457 Mich 513, 523; 578 NW2d 282 (1998); *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002). In this case, although Michigan Basic argues that its decision not to contest the appraisal panel's determination regarding Acorn's losses frees it from potential responsibility regarding actual costs, Michigan Basic nevertheless rejected the proposed case evaluation award in Acorn's favor, contested its liability until the trial court granted Acorn's motion for summary disposition, and otherwise protracted the proceedings contrary to the aim of the rule. Accordingly, I concur with the majority's decision to reverse the Court of Appeals and remand for further proceedings, including whether it is in the interest of justice to refuse to award actual costs under MCR 2.403(O)(11).

PEOPLE v GARRISON

Docket No. 146626. Argued November 7, 2013. Decided May 29, 2014.

Chad J. Garrison pleaded guilty in the Cheboygan Circuit Court to one count of larceny of property valued at $1,000 or more but less than $20,000, MCL 750.356(1) and (3)(a), as a second-offense habitual offender. While the case was pending, the three victims of defendant's theft had traveled back and forth from their primary residences to secure their stolen property and attend a restitution hearing. At the hearing, the victims testified that they had incurred travel expenses related to those trips in the cumulative amount of $1,125. Over defense counsel's objection, the court, Scott L. Pavlich, J., included $977 of this amount in its restitution order. Defendant appealed. The Court of Appeals, FITZGERALD, P.J., and BOONSTRA, J. (METER, J., concurring in part and dissenting in part), affirmed in part but reversed with respect to that issue in an unpublished opinion per curiam, issued December 20, 2012 (Docket No. 307102), concluding that the sentencing court had abused its discretion because neither the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., nor the general restitution statute, MCL 769.1a, authorizes courts to include victims' travel expenses in a restitution award. The Court of Appeals remanded for a redetermination of restitution, and the prosecution sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 493 Mich 1015 (2013).

In an opinion by Justice VIVIANO, joined by Chief Justice YOUNG and Justices CAVANAGH, KELLY, and ZAHRA, the Supreme Court *held*:

The Court of Appeals erred by reversing in part and remanding this case for a redetermination of restitution. The CVRA and MCL 769.1a authorize courts to order a defendant to pay restitution for the reasonable travel expenses that victims incur while securing their stolen property and attending restitution hearings. MCL 780.766(1) (part of the CVRA provision that applies to felony convictions) and MCL 769.1a(1)(b) define "victim" as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. MCL 780.766(2) and MCL 769.1a(2) provide that sentencing courts

must order a defendant convicted of a crime to make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. The statutory language imposes a duty on sentencing courts to order defendants to pay restitution that is maximal and complete. While other subsections of the statutes give sentencing courts specific instructions regarding what must be included in a restitution order for certain losses, such as when a crime results in damage to or loss or destruction of property, nothing in those statutes indicates that courts may only award restitution for the types of losses described in those subsections. They do not contain an exhaustive list of all types of restitution available under Michigan law for victims who suffer particular losses. For instance, not all crime victims suffer property damage, personal injury, or death, but many of those otherwise unharmed victims must travel to reclaim property, identify perpetrators, or participate in the investigatory process in the aftermath of a crime. These travels impose a real financial burden on victims in the form of transportation expenses. Holding that the statutes exclude those losses would not give effect to the connection that the Legislature made between the financial harm a person suffers and that person's status as a victim. While another statute in the CVRA, MCL 780.766b, expressly authorizes courts to order defendants convicted of human-trafficking offenses to pay restitution for transportation costs incurred by victims of those crimes, MCL 780.766b did not expand the restitution authority of sentencing courts; rather, the Legislature was ensuring that sentencing courts did not overlook the types of losses that were likely to be common in the human-trafficking context. The victims' immediate need in this case to recover their property, inventory their losses, and explain their losses in court was a natural consequence of defendant's criminal activity. Hence, their travel expenses were a direct result of defendant's criminal course of conduct, and the sentencing court's decision to include those expenses in its restitution order was in keeping with the court's statutory duty to order defendant to pay full restitution.

Reversed with respect to restitution of travel expenses and remanded to the sentencing court for reinstatement of the original restitution order.

Justice MARKMAN, joined by Justice MCCORMACK, dissenting, would have affirmed the Court of Appeals' judgment and held that crime victims are not entitled under current law to the reimbursement of reasonable travel expenses they incurred in the course of traveling to recover property or attend a restitution hearing. Under the majority's view, courts may award restitution beyond

that explicitly set forth in the statutes if necessary to fully compensate a victim for the loss that he or she sustained. If the majority's interpretation were correct, however, there would have been no need for the Legislature to articulate in detail the nature of the restitution contemplated. The Legislature could simply have required courts to award full restitution to crime victims and left it at that, rather than setting forth highly detailed directions about what forms of costs are subject to restitution. By specifying in MCL 780.766(3) that some forms of restitution must be awarded for a crime resulting in property injury, while specifying in MCL 780.766(4) and (5) that other forms must be awarded for a crime resulting in psychological or physical injury, the Legislature indicated that a sentencing court cannot award whatever restitution it believes is necessary to fully compensate a victim, but must instead examine the relevant subsection of MCL 780.766 to award the particular restitution contained in that provision. The Legislature expressly provided for the restitution of travel expenses in MCL 780.766(8) and MCL 780.766(24)(c), but did not do the same in MCL 780.766(3), implying that such restitution is available only under those specific circumstances and is not available under other circumstances or to other persons. Moreover, MCL 780.766b specifically states that for victims of human-trafficking crimes, the court may order the costs of transportation incurred by the victim, as well as the costs and expenses relating to assisting the investigation of the offense and attendance at related court proceedings, including transportation and parking, in addition to restitution ordered under MCL 780.766, strongly suggesting that the omission of those expenses from MCL 780.766 was significant and purposeful.

CRIMINAL LAW — CRIME VICTIMS — RESTITUTION — TRAVEL EXPENSES.

MCL 780.766 (the provision of the Crime Victim's Rights Act that addresses restitution for felony convictions) and MCL 769.1a (the general restitution statute) require courts to order full restitution, i.e., restitution that is complete and maximal; the statutes authorize courts to order a defendant to pay restitution for the reasonable travel expenses that victims incur while securing their stolen property and attending restitution hearings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Daryl P. Vizina*, Prosecuting Attorney, and *Anthony M. Damiano*, Chief Assistant Prosecuting Attorney, for the people.

Ann M. Prater, Attorney & Counselor at Law, PLLC (by *Ann M. Prater*), for defendant.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the Attorney General.

VIVIANO, J. This case involves two related statutory schemes: the William Van Regenmorter Crime Victim's Rights Act (CVRA)[1] and Michigan's general restitution statute.[2] The issue is whether these statutes authorize courts to order a defendant to pay restitution for the reasonable travel expenses that victims incur while securing their stolen property and attending restitution hearings. We conclude that the statutes do authorize such payments because they require courts to order full restitution, i.e., restitution that is complete and maximal. Therefore, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals on this issue and remand this case to the Cheboygan Circuit Court for reinstatement of the original restitution order.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant, Chad James Garrison, stole four snowmobiles and two trailers from vacation homes in Cheboygan County. He pleaded guilty to one count of larceny of property valued at $1,000 or more, but less than $20,000, in violation of MCL 750.356(1) and (3)(a), as a second-offense habitual offender. While the case was pending, the three victims of defendant's theft traveled back and forth from their primary residences in order to secure their stolen property and attend a

[1] MCL 780.751 *et seq*.

[2] MCL 769.1a

restitution hearing. At the hearing, the victims testified that they had incurred travel expenses related to these trips in the cumulative amount of $1,125. The sentencing court included $977 of this amount in its restitution order over defense counsel's objection.

Defendant appealed, and the Court of Appeals reversed the lower court on this issue. Relying on the reasoning of *People v Jones*,[3] the Court determined that neither the CVRA nor MCL 769.1a authorizes courts to include victims' travel expenses in a restitution award.[4] The Court concluded that the sentencing court abused its discretion by doing so in this case.

Judge METER dissented from that portion of the majority opinion, arguing instead that, under MCL 780.766(2), sentencing courts have a statutory duty to make victims whole for the losses that criminals cause. Although the applicable restitution statutes do not include victims' travel expenses in their lists of compensable losses, Judge METER did not view those lists as exhaustive because of the overarching duty created by MCL 780.766(2).[5]

The prosecution sought leave to appeal the Court of Appeals' decision in this Court. On May 3, 2013, we ordered oral argument on the prosecution's application pursuant to MCR 7.302(H)(1).[6]

II. STANDARD OF REVIEW

This case presents a question of statutory interpretation. We review such questions de novo.[7] We review

[3] *People v Jones*, 168 Mich App 191; 423 NW2d 614 (1988).

[4] *People v Garrison*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2012 (Docket No. 307102), p 2.

[5] *Id*. at 1-2 (METER, J., dissenting).

[6] *People v Garrison*, 493 Mich 1015 (2013).

[7] *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

the sentencing court's factual findings for clear error.[8]

III. ANALYSIS

Our goal in interpreting a statute is to give effect to the intent of the Legislature as expressed in the statute's language.[9] Absent ambiguity, we assume that the Legislature intended for the words in the statute to be given their plain meaning, and we enforce the statute as written.[10]

There are two main statutes that govern restitution in Michigan: MCL 780.766 (part of the CVRA)[11] and MCL 769.1a (the general restitution statute). Both statutes begin by defining "victim" as "an individual who suffers direct or threatened physical, *financial*, or emotional harm as a result of the commission of a crime."[12] The statutes then declare that sentencing courts "shall order" a defendant convicted of a crime to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate."[13] Several following subsections in the statutes go on to provide detailed instructions

[8] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

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

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

[11] The CVRA is divided into three articles. Article 1, MCL 780.751 through MCL 780.775, addresses felony convictions and contains the provision at issue in this case. Article 2, MCL 780.781 through MCL 780.802, addresses various juvenile offenses, and Article 3, MCL 780.811 through MCL 780.834, addresses convictions for various misdemeanors. MCL 780.794(2) and MCL 780.826(2) have language regarding restitution similar to that in MCL 780.766(2).

[12] MCL 780.766(1) (emphasis added). As used in MCL 780.766, "crime" means a felony. MCL 780.752(1)(b). See note 11 of this opinion. MCL 769.1a replaces the word "crime" with the words "felony, misdemeanor, or ordinance violation." MCL 769.1a(1)(b).

[13] MCL 769.1a(2); MCL 780.766(2).

regarding how to calculate restitution for various types of injuries. Subsection (3) of each statute[14] pertains to property loss; Subsection (4) of each statute[15] pertains to a victim's physical or psychological injury, and Subsection (5) of each statute[16] also pertains to bodily injury, including death.

We begin our analysis by focusing on the statutes' requirement that sentencing courts order "full restitution."[17] The statutes do not define "full restitution," but the plain meaning of the word "full" is "complete; entire; maximum[.]"[18] Hence, both restitution statutes impose a duty on sentencing courts to order defendants to pay restitution that is maximal and complete.

The CVRA and Article 1, § 24 of Michigan's Constitution were enacted as part of a movement intended to balance the rights of crime victims and the rights of criminal defendants.[19] One aim of these laws was "to enable victims to be compensated fairly for their suffering at the hands of convicted offenders."[20] The Legislature's statutory direction to order defendants to pay complete, entire, and maximum restitution effectuates this goal of fair compensation.

We acknowledge that in both MCL 780.766(3) and MCL 769.1a(3), the Legislature gave specific instructions to sentencing courts regarding what must be

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[14] MCL 769.1a(3); MCL 780.766(3).

[15] MCL 769.1a(4); MCL 780.766(4).

[16] MCL 780.766(5) refers to a bodily injury that results in death or serious impairment of a body function, while MCL 769.1a(5) refers to only the former.

[17] MCL 769.1a(2); MCL 780.766(2).

[18] *Random House Webster's College Dictionary* (2001).

[19] See Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 Pepperdine L R 59, 77 (1989).

[20] *People v Peters*, 449 Mich 515, 526; 537 NW2d 160 (1995).

included in a restitution order when a crime "results in damage to or loss or destruction of property of a victim" and that these subsections do not mention victims' travel expenses. However, this does not alter our conclusion that sentencing courts are authorized to include such costs in restitution awards. We read Subsections (3) of MCL 780.766 and MCL 769.1a as complementary to the broad mandate for complete restitution set out in their respective prior subsections, not contradictory. Subsections (3) tell courts how to evaluate specific types of losses when they occur. But nothing in the text of the statutes indicates that courts may only award restitution for the types of losses described in those subsections.[21] On the contrary, as explained above, the Legislature unambiguously instructed courts to order restitution that is "full," which means complete and maximal. Therefore, we conclude that these subsections

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[21] The dissent disagrees, arguing, "If 'full restitution' simply means restitution that is 'maximal and complete,' without reference to the adjacent statutory language purporting to define the term, there would have been no need for the Legislature to further specify [at the end of Subsection (2) of MCL 780.766] that courts shall order the restitution required 'under this section.' "

We find this argument unpersuasive. In full, the sentence that contains the phrase on which the dissent relies reads as follows: "For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section." MCL 780.766(2). This sentence makes it clear that courts must order "full restitution" even in certain cases in which the defendant has not been convicted of a crime. It does not state that sentencing courts may order only the specific restitution described in Subsections (3), (4), and (5).

Furthermore, the subsection that follows in the statute begins with language that is permissive, not restrictive. It states that a court shall require a defendant to do "1 or more of the following, as applicable[.]" MCL 780.766(3); MCL 769.1a(3) (providing that the court "may require that the defendant do 1 or more of the following, as applicable"). It does not state that a court may include *only* those amounts.

do not contain an exhaustive list of all types of restitution available under Michigan law for victims who suffer property damage or loss.

Our conclusion that Subsections (3) to (5) are not exhaustive is also consistent with the CVRA's definition of "victim" for purposes of restitution, which includes those who suffer financial harm as the result of the commission of a crime.[22] Not all crime victims suffer property damage, personal injury, or death. But many of these otherwise unharmed victims must travel to reclaim property, identify perpetrators, or otherwise participate in the investigatory process in the aftermath of a crime. These travels impose a real financial burden on victims in the form of transportation expenses. If we treated Subsections (3) to (5) as excluding those losses, we would not give effect to the connection that the Legislature made between the financial harm that a person suffers and that person's status as a victim within the provisions of the CVRA.

The dissent argues that "[i]t would have been pointless for the Legislature to have gone through this additional effort to provide specific guidance concerning restitutable costs" if the Legislature had already given sentencing courts broad authority to award restitution for any actual losses by using the words "full restitution." We disagree. Even in view of the broad grant of authority from Subsection (2) of MCL 780.766 and MCL 769.1a, the specific instructions in Subsections (3) and following subsections prevent courts from overlooking common types of losses. They also promote consistency among different courts and cases by ensuring that judges use the same criteria when calculating the value of these key losses. Hence, our interpretation of the

[22] MCL 780.766(1).

statutes does not make Subsections (3) and following "pointless."[23]

In reaching this conclusion, we are mindful of MCL 780.766b, which expressly authorizes courts to order defendants convicted of human-trafficking offenses to pay restitution for transportation costs incurred by victims.[24] The dissent posits that because the Legislature thought it was necessary to mention transportation costs in the human-trafficking statute, it must not have thought that the other restitution statutes authorized courts to order restitution for those expenses. However, a closer reading of MCL 780.766b shows that this is not so. MCL 780.766b(c)(*i*) and (*ii*) authorize courts to order restitution for lost wages and child-care expenses in human-trafficking cases, but those same expenses were already authorized under MCL 780.766(4)(c) and (e) for *any* crime that causes physical or psychological injury.[25] Hence, the Legislature was not expanding the restitution authority of sentencing courts in MCL 780.766b. Instead, it appears the Legislature was ensuring that sentencing courts did not overlook types of losses that were likely to be common in the human-trafficking context.

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[23] The dissent takes issue with our conclusion that the statute "means that 'full restitution' must be awarded." This is curious because the CVRA itself declares that the "court shall order . . . that the defendant make full restitution . . . ." MCL 780.766(2). In holding that this statute actually means what it says, we give effect to the intent of the Legislature.

[24] MCL 780.766b(c)(*iii*).

[25] See MCL 780.766(4)(c) (authorizing courts to order the defendant to "[r]eimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime") and MCL 780.766(4)(e) (authorizing courts to order the defendant to "[p]ay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the crime").

We are likewise unpersuaded by the dissent's use of the canon *expressio unius est exclusio alterius*, which states that the express mention of one thing implies the exclusion of other similar things.[26] The statute does not entitle the parents of victims or third parties who help victims to "full restitution," so it makes sense to read the lists of possible restitution awards for those parties as exclusive in relation to *those parties*. By contrast, the Legislature did provide a broad restitution mandate for victims, declaring that courts must order defendants to pay them full restitution, i.e., restitution that is complete and maximal. To read the Legislature's lists regarding third-party expenses as a limit on the restitution to which victims are entitled would allow the canon of *expressio unius* to overcome the plain meaning of the words in MCL 780.766(2). In other words, the dissent's interpretation would mean that third parties could recover restitution for transportation expenses, but that victims, who are entitled to "full restitution," could not.

Although courts must order defendants to pay "full restitution," their authority to order restitution is not limitless. The statute authorizes restitution only for damage or loss that results from a "defendant's course of conduct that gives rise to the conviction . . . ."[27] This is in keeping with the statute's definition of "victim" as "an individual who suffers *direct* or threatened physical, financial, or emotional harm *as a result* of the commission of a crime."[28] Thus, the losses included in a restitution order must be the result of defendant's criminal course of conduct.

In this case, the Court of Appeals relied on *Jones* for the proposition that "neither MCL 769.1a nor the

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[26] *Bianchi v Auto Club of Mich*, 437 Mich 65, 72; 467 NW2d 17 (1991).

[27] MCL 780.766(2).

[28] MCL 780.766(1) (emphasis added).

CVRA, MCL 780.766, authorizes the sentencing court to order a defendant to pay restitution to reimburse the victim for traveling expenses."[29] The Court of Appeals erred by relying on *Jones* because the law has changed since 1988, when *Jones* was decided. At that time, a victim's right to restitution was not yet enshrined in our state's Constitution. In addition, the version of MCL 780.766 in effect when Jones committed his crime stated that a sentencing court "*may* order . . . that the defendant make *restitution* . . . ."[30] Likewise, the prior version of MCL 769.1a stated that sentencing courts "*may* order . . . a person convicted of any felony or misdemeanor to make *full or partial* restitution . . . ."[31] Thus, sentencing courts used to have discretion regarding whether to order restitution at all and, if so, in what amount. Now, both statutes state that sentencing courts "*shall* order . . . *full* restitution." Hence, since *Jones*, the Legislature has decided that ordering restitution is mandatory, not discretionary, and that a restitution order must reflect the total amount of loss caused by a defendant's criminal conduct, not some lesser amount that a sentencing court might feel is appropriate. The Court of Appeals erred in this case by relying on precedent that did not account for these important changes in the governing statutes.

IV. APPLICATION

In this case, the victims' immediate need to recover their property, inventory their losses, and explain their

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[29] *Garrison*, unpub op at 2.

[30] MCL 780.766(2), as enacted by 1985 PA 87 (emphasis added). "May" was changed to "shall" by 1993 PA 341.

[31] MCL 769.1a(1), as added by 1985 PA 89 (emphasis added). "May" was changed to "shall" by 1993 PA 343. The reference to "partial" restitution was deleted by 1996 PA 560.

losses in court was a natural consequence of defendant's criminal activity. Hence, their travel expenses were a direct result of defendant's criminal course of conduct. The sentencing court's decision to include these expenses in its restitution order was in keeping with its statutory duty to order defendant to pay "full restitution."

At the restitution hearing, the three victims testified that defendant's theft forced them to travel a combined distance of 2,250 miles to secure their property and attend the restitution hearing. They multiplied this number by a flat rate of 50 cents a mile, making their total travel-expenses claim $1,125. The court apparently discredited some portion of the victims' testimony, but found the rest believable, and included $977 of the claimed $1,125 in its restitution order. Defendant does not identify any evidence that shows that the sentencing court's factual finding was clearly erroneous.[32] Therefore, the Court of Appeals erred by reversing the sentencing court and remanding this case for a redetermination of restitution.

V. CONCLUSION

Consistent with its statutory duty to order "full restitution," the sentencing court in this case properly included the victims' travel expenses in its restitution order. Accordingly, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals on this issue and remand this case to the Cheboygan Circuit Court for reinstatement of the original restitution order.

YOUNG, C.J., and CAVANAGH, KELLY, and ZAHRA, JJ., concurred with VIVIANO, J.

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[32] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority opinion's decision to reverse the judgment of the Court of Appeals with respect to the issue before us and hold that a court may order a defendant to pay restitution for reasonable travel expenses incurred by the victim of the crime in the course of traveling to recover property or attend a restitution hearing. I would instead affirm the Court of Appeals' judgment and hold that crime victims are not entitled under current law to the reimbursement of those expenses, however much such restitution might be deemed entirely reasonable had it been authorized by the Legislature.

ANALYSIS

Crime victims have a statutory right to restitution, pursuant to both the Crime Victim's Rights Act (CVRA), MCL 780.751 *et. seq*., and the restitution provision of the Code of Criminal Procedure, MCL 769.1a. In particular, MCL 780.766 of the CVRA states:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section.
>
> (3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the

order of restitution shall 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.

(c) Pay the costs of the seizure or impoundment, or both.

* * *

(8) . . . The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. . . .

* * *

(24) If the victim is a minor, the order of restitution shall require the defendant to pay to a parent of the victim an amount that is determined to be reasonable for any of the following that are actually incurred or reasonably expected to be incurred by the parent as a result of the crime:

* * *

(c) Mileage.

* * *

(f) Any other cost incurred in exercising the rights of the victim or a parent under this act. [Emphasis added.]

The pertinent issue for purposes of the instant appeal—whether a sentencing court may order a defendant to pay restitution to crime victims for travel expenses incurred while traveling to recover property or attend a restitution hearing—may be resolved by a straightforward exercise in statutory interpretation, and the majority opinion does not appear to disagree. While the majority opinion cites various provisions of law in support of its conclusion that the applicable statutes permit such restitution, I believe that other provisions that compel a contrary conclusion are considerably more persuasive.[1]

First, the majority places great emphasis on the Legislature's use of the phrase "full restitution" in MCL 780.766(2), concluding that given the dictionary meaning of "full," "full restitution" must refer to restitution that is "maximal and complete." Under this view, courts may award restitution beyond that explicitly set forth in MCL 780.766 if necessary to "fully" compensate a victim for the loss that he or she has sustained. However, if this interpretation were correct, there would have been no need for the Legislature to have proceeded beyond its reference to "full restitution" in MCL 780.766(2) to articulate in detail the nature of the restitution contemplated by this statute.

[1] MCL 769.1a of the Code of Criminal Procedure is similar to MCL 780.766 of the CVRA, but is somewhat less expansive in its coverage and contains fewer mandatory provisions. Because all relevant provisions contained in MCL 769.1a are also contained in MCL 780.766, I will primarily focus upon MCL 780.766 for purposes of this opinion.

In other words, if "full restitution" refers to restitution in the limitless sense that the majority asserts, then the Legislature could simply have required courts to award "full restitution" to crime victims and left it at that, rather than setting forth highly detailed directions in the succeeding provisions of MCL 780.766 as to what forms of costs are subject to restitution. It would have been pointless for the Legislature to have gone through this additional effort to provide specific guidance concerning restitutable costs if the Legislature had simply intended for "full restitution" to mean "full restitution," as opposed to "full restitution" as subsequently delineated by the very statute in which the term appears.[2]

Second, while MCL 780.766(2) requires a defendant to make "full restitution" to any victim of the defendant's course of conduct, the very same paragraph proceeds to state that "the court shall order the restitution required *under this section*." (Emphasis added.) If "full restitution" simply means restitution that is "maximal and complete," without reference to the adjacent statutory language purporting to define the term, there would have been no need for the Legislature to further specify that courts shall order the restitution required "under this section." That is, the language "under this section" is limiting language, indicating in traditional statutory terms that a court must examine only the provisions contained in MCL 780.766 in order to ascertain the amount of restitution to which a crime victim is entitled—and indeed what constitutes for

[2] The majority's interpretation of "full restitution," based solely on the dictionary definition of "full," might be more persuasive if no better definition of "full restitution," or if no "textual clues" as to its meaning, could be found elsewhere. However, MCL 780.766 does provide such textual clues.

purposes of the statute "full restitution."[3] Had the Legislature intended to give sentencing courts the unrestricted discretion to award other forms of restitution in addition to those identified in MCL 780.766, it would more reasonably have stated in MCL 780.766(2) that a court shall order restitution "including, but not limited to," the restitution required "under this section," just as it used virtually identical language, "include, but are not limited to," elsewhere in the very same statute. See MCL 780.766(8). In short, "full restitution" once again must be understood in the context of the language surrounding the term, as all statutory language must be read within its particular context. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. 'In seeking meaning, words and clauses will not be divorced from those which precede and those which follow.' ") (citations omitted).

Third, the fact that the Legislature separated the statutorily required restitution into distinct subsections based on the specific type of injury sustained suggests that "full restitution" is given meaning in part by these applicable subsections. By specifying that some forms of restitution must be awarded for a crime

[3] The majority asserts that MCL 780.766(2) "makes it clear that courts must order 'full restitution' even in certain cases in which the defendant has not been convicted of a crime. It does not state that sentencing courts may order only the specific restitution described in Subsections (3), (4), and (5)." I agree that the Legislature has required that all such defendants must make "full restitution," not just those who have been convicted of a crime. Nonetheless, the conclusion drawn by the majority that this language authorizes travel expenses is incompatible, for all the reasons set forth in this opinion, with the succeeding sentence in the statute, stating that such defendants must pay "the restitution *required under this section*." MCL 780.766(2) (emphasis added).

resulting in property injury in MCL 780.766(3), while other forms must be awarded for a crime resulting in psychological or physical injury in MCL 780.766(4) and (5), the Legislature has indicated that a sentencing court cannot award *whatever* restitution it believes in its own discretion is necessary to "fully" compensate a victim, but must instead look to the relevant subsection to award the particular restitution contained in *that* provision.[4] If "full restitution" refers simply to restitution that is "complete" or "maximal," the Legislature would not have limited the restitution articulated in each subsection to those victims who sustained the applicable injury; instead, any victim who incurred such injury would have been entitled to restitution for a loss of the particular type. For example, MCL 780.766(4)(c) requires a defendant to reimburse a victim for income loss suffered as a result of a physical or psychological injury. A crime victim who sustains only property injury might also suffer income loss if he or she misses a day of work as a result of circumstances attending the aftermath of the crime, but would not be entitled to relief for that income loss because MCL 780.766(3) does not provide for such restitution. In short, if "full restitution" means nothing more than fully compensating a victim for his or her loss, then the Legislature need not have carved out separate subsections pertaining to different injuries and then listed specific and distinct forms of restitution in each subsection.

Fourth, the applicable law itself clearly instructs sentencing courts as to the method of calculating restitution when there is "damage to or loss or destruction of property of a victim" or the "seizure or impoundment

[4] Of course, if a crime results in both property injury and physical or psychological injury, the crime victim would seem to be entitled to the restitution articulated in both applicable subsections of MCL 780.766.

of property of a victim," as in this case. MCL 780.766(3). MCL 780.766(3) states "the order of restitution *shall* require that the defendant do 1 or more of the following [as set forth in Subdivisions (a) through (c)][.]" These forms of relief include return of the property, payment of an amount equal to the fair market value of the property, and payment of the costs of the seizure or impoundment, or both. Given that the Legislature has provided sentencing courts with specific instructions as to how to calculate the restitution award when a crime resulting in property injury is at issue, it would seem that "full restitution" for those crimes is best defined by the applicable subsection. Nowhere do these subsections provide for the restitution of travel expenses, nor does MCL 780.766 anywhere else provide for the restitution of travel expenses in addition to the restitution provided for in these subsections. The Legislature has expressly provided for the restitution of travel expenses in other provisions of MCL 780.766, but, for whatever reasons, did not do the same in MCL 780.766(3). Furthermore, if "full restitution" for a property injury was to have a more extensive meaning than the aggregation of the restitution provided for in MCL 780.766(3), there would have been little need in the first place for a statement of the measures of compensation provided for in this provision. See *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002) (stating that statutes should not be construed in a manner that renders any part of them nugatory).

The majority opinion asserts that Subsections (3)(a) through (c) do not contain an "exhaustive list of all types of restitution available under Michigan law for victims who suffer property damage or loss," but are "complementary to the broad mandate for complete restitution set out in [the prior subsection]," meaning that travel expenses may be awarded in addition to the

restitution articulated in the subsections. Although in isolation, this interpretation of Subsections (3)(a) through (c) might not be unreasonable, given the specificity with which the Legislature has set forth the restitution available for a property injury in these provisions, one might well expect the Legislature to have also identified travel expenses had it intended for those expenses to be reimbursable, particularly considering that most crimes resulting in property injury likely require that the victim travel somewhere in order to *recover* the property that was the object of the crime; the property must typically be recovered from either court or police storage in order to be returned to its location before the crime. While travel expenses concededly are slightly more indirect, and less inextricable, from a property crime than the expenses set forth in Subsections (3)(a) through (c), the Legislature nonetheless would seemingly have included those expenses in MCL 780.766(3), given its apparent intention to enumerate victims' expenses that are routinely characteristic of a property crime. In short, the specificity of Subsections (3)(a) through (c), and the absence of a provision authorizing restitution of travel expenses, is at least one more relevant textual clue that travel expenses were not meant to be recoverable.[5]

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[5] The majority asserts that its "conclusion that Subsections (3) to (5) are not exhaustive is also consistent with the CVRA's definition of 'victim' for purposes of restitution, which includes those who suffer financial harm as the result of the commission of a crime" because "[n]ot all crime victims suffer property damage, personal injury, or death," but many otherwise unharmed victims incur financial harm while traveling to "reclaim property, identify perpetrators, or otherwise participate in the investigatory process in the aftermath of a crime." According to the majority, if Subsections (3) to (5) excluded those losses, "we would not give effect to the connection that the Legislature made between the financial harm that a person suffers and that person's status as a victim within the provisions of the CVRA." However, while MCL 780.766(1) *does*

Fifth, the law itself *expressly* provides for the restitution of travel expenses in two specific situations. MCL 780.766(8) permits courts to award restitution to a *third party* who has provided transportation services to a crime victim as a result of a crime, and MCL 780.766(24)(c) permits courts to award a *parent* restitution of mileage expenses incurred as a result of a crime in which his or her minor child was a victim. The Legislature's authorization of travel expenses in these very specific situations further implies that such restitution is available *only* under those circumstances, and is not available under other circumstances or to other persons. In other words, pursuant to the maxim *expressio unius est exclusio alterius, the express mention of restitution of travel expenses for certain individuals implies the exclusion of restitution of travel expenses for other individuals. Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997) ("[T]he express mention in a statute of one thing implies the exclusion of other similar things."). The Legislature has demonstrated that it clearly knows how

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state that a person who sustains financial harm is a "victim" for purposes of the CVRA, it does not follow that such "victims" are entitled to restitution for whatever financial harm that they have incurred. Rather, MCL 780.766(1) identifies which individuals constitute "victims," and later subsections identify the restitution that is available to those "victims." Interpreting MCL 780.766(1) otherwise would seemingly entitle a victim to restitution for any financial harm incurred, whatever its nature. This could not have been the Legislature's intent, particularly considering that certain types of "financial loss," such as wage loss, are explicitly *included* in MCL 780.766(4), but *omitted* from MCL 780.766(3). Further, because those who suffer a property injury may incur financial harm without an accompanying "physical or emotional harm," the reference in MCL 780.766(1) to "financial harm" serves the purpose of ensuring that these individuals are nonetheless considered "victims" and entitled to restitution under the CVRA. Thus, our interpretation of Subsections (3) to (5) does indeed "give effect" to the Legislature's conclusion that a "victim" for purposes of the CVRA includes one who has suffered "financial harm."

to provide for the restitution of travel expenses, but has simply chosen not to do so with regard to the victims themselves, again for reasons that are not altogether clear.[6] However, the lack of a clear rationale or the uncertain wisdom of the outcome cannot require the importation of words into the statute that are not there.[7]

Sixth, while MCL 780.766 articulates the restitution available to victims of the majority of crimes, MCL 780.766b, added by 2010 PA 364 and effective April 1, 2011, expressly provides more extensive restitution to victims of a narrower group of crimes, human trafficking, described in Chapter LXVIIA of the Michigan Penal Code:

> When sentencing a defendant convicted of an offense described in chapter LXVIIA of the Michigan Penal Code, 1931 PA 328, MCL 750.462a to 750.462i, the court shall order restitution for the full amount of the loss suffered by the victim. In addition to restitution ordered under [MCL 780.766], the court may order the defendant to pay all of the following:
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> (a) Lost income, calculated by whichever of the following methods [listed in Subdivision (a)(*i*) through (*iii*)] results in the largest amount . . . .

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[6] Additionally, MCL 780.766(24)(f) permits a parent to recover "[a]ny other cost incurred in exercising the rights of the victim or a parent under this act." This reference to "any other cost" seemingly permits restitution of expenses that are not explicitly provided for in MCL 780.766. While MCL 780.766(24)(f) pertains to the restitution available to a parent, not a victim, the Legislature could also have employed this same language elsewhere in MCL 780.766 to permit a victim to recover "any other cost incurred" in exercising his or her rights, but it did not do so.

[7] Perhaps the Legislature did not wish to require sentencing courts to ascertain the amount of restitution for what will typically constitute a minor expense, but desired nonetheless to encourage third parties to assist victims even at the cost of having to ascertain those amounts. Regardless, even though this Court might have done things differently, the Legislature did not act beyond its authority in providing restitution to certain third parties, but not to other persons.

(b) The *cost of transportation*, temporary housing, and child care expenses incurred by the victim because of the offense.

(c) Attorney fees and other costs and expenses incurred by the victim because of the offense, including, but not limited to, *costs and expenses relating to assisting the investigation of the offense and for attendance at related court proceedings* as follows:

(*i*) Wages lost.

(*ii*) Child care.

(*iii*) *Transportation.*

(*iv*) *Parking.*

(d) Any other loss suffered by the victim as a proximate result of the offense. [Emphasis added.]

Thus, MCL 780.766b specifically states that for victims of a highly limited and specifically delineated group of crimes, the court may order "[*i*]*n addition to* restitution ordered under [MCL 780.766]" the "cost of transportation . . . incurred by the victim because of the offense," MCL 780.766b(b), as well as the "costs and expenses relating to assisting the investigation of the offense and for attendance at related court proceedings," including those incurred for both "transportation" and "parking," MCL 780.766b(c)(*iii*) and (*iv*). Two statutes that relate to the same subject or share a common purpose are considered *in pari materia*, or sufficiently related to one another that they should be read together as a single proposition of law, even if they were enacted at different times. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The goal of this interpretive rule is to give effect to the legislative purpose of harmonious and complementary statutes, and when such statutes lend themselves to a single construction that avoids conflict or tension, that construction should control. *Id*. MCL 780.766 and

MCL 780.766b are both contained in the CVRA, and both clearly pertain to the same subject—victim restitution—and should therefore be read together in a manner that avoids conflict or tension. Accordingly, the Legislature's *express* inclusion of certain travel expenses in MCL 780.766b strongly intimates, and constitutes a powerful textual clue, that the omission of those expenses from MCL 780.766 was significant and purposeful. This Court simply "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). This is particularly clear given the Legislature's use of the language "[i]n addition to restitution ordered under [MCL 780.766]" in enacting MCL 780.766b. If the very travel expenses that the victim seeks must be provided for "*in addition to*" the restitution ordered under MCL 780.766, then the only reasonable and logical conclusion is that such restitution is not encompassed within MCL 780.766.[8] More-

[8] The majority contends that because "MCL 780.766b(c)(*i*) and (*ii*) authorize courts to order restitution for lost wages and child-care expenses in human-trafficking cases, [and because] those same expenses were already authorized under MCL 780.766(4)(c) and (e) for *any* crime that causes physical or psychological injury," the Legislature was not "expanding the restitution authority of sentencing courts in MCL 780.766b," but was only "ensuring that sentencing courts did not overlook types of losses that were likely to be common in the human-trafficking context." In providing for the restitution of "[a]ttorney fees and other costs and expenses incurred by the victim because of the offense," MCL 780.766b(c), the majority argues, encompasses restitution also provided for in MCL 780.766(4)(c) and (e). However, MCL 780.766b(c) then proceeds to authorize restitution for lost wages and child-care expenses specifically related to "assisting the investigation of the offense" or the "attendance at related court proceedings," expenses that are *not* provided for in MCL 780.766(4)(c) and (e). By authorizing restitution for the latter expenses,

over, MCL 780.766b(d) permits restitution for "[a]ny other loss suffered by the victim as a proximate result of the offense." MCL 780.766 again does not contain a similar provision, further intimating that the Legislature has purposefully provided more extensive restitution (again for whatever reason) to a particular group of victims and that such restitution is not similarly available under the general restitution provision, MCL 780.766. This notwithstanding that *all* losses suffered by a victim "as a proximate result of the offense" could with no difficulty at all be viewed as fitting within the meaning of "full restitution," a term viewed as dispositive of this case by the majority.

These statutory provisions, or "textual clues," reasonably compel the conclusion that sentencing courts may not award restitution to crime victims for travel expenses because there is simply no apparent statutory authority allowing the result reached by the majority. It is not within this Court's authority—the exercising of the "judicial power"—to contravene this determination. The majority places great emphasis on the Legislature's use of the phrase "full restitution," but at the same time recognizes that there are limits on the types of losses that may be included in a restitution order because "the losses included in a restitution order must

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MCL 780.766b(c) does "expand[] the restitution authority," and it is understandable that the Legislature would again refer to restitution of wage loss and child-care expenses to avoid the implication that these are no longer covered under that provision. Further, even assuming that there is some overlap between the wage loss and child-care expenses set forth in MCL 780.766(4) and MCL 780.766b(c), the same cannot be said for travel expenses, as such expenses are nowhere provided for in MCL 780.766. By providing restitution additional to that provided for in the general statute, the more specific statute does not merely reiterate types of restitution in order that these not be "overlooked," but expands the realm of restitution.

be the result of defendant's criminal course of conduct".[9] While such a standard might be desirable, albeit potentially difficult of application in individual cases, this is simply not the test that the Legislature has adopted.[10] Rather, it has chosen to take the legislative course of defining with greater specificity what is encompassed by the general concept of "full restitution."[11]

Finally, the majority notes the fact that a crime victim's right to restitution is now guaranteed by Article 1, § 24 of Michigan's Constitution, whereas it was discretionary in nature before this amendment in 1988. However, the gravamen of the instant appeal has noth-

[9] The majority's interpretation of "full restitution" presumably encompasses not only travel expenses, but also any other expenses that could be understood to comprise "full restitution" as long as the relevant losses are "the result of defendant's criminal course of conduct."

[10] For example, if a victim suffers income loss due to the absence of the property that was the subject of the crime, is that income loss reimbursable as the "result" of the criminal course of conduct? If a victim feels compelled to purchase a new security system after experiencing a break-in, is that purchase reimbursable as the "result" of the criminal course of conduct?

[11] Had the Legislature desired to simply provide restitution for the losses that are "the result of defendant's criminal course of conduct," it likely would have done so in the context of *nonproperty* crimes, as it is undoubtedly a more difficult task to ascertain the amount of restitution needed to reimburse a victim for a physical or psychological injury than it is to ascertain the amount of restitution needed to reimburse a victim for the loss of his or her property. However, even for these nonproperty crimes, the Legislature explicitly provided standards in MCL 780.766(4) by which courts are to calculate the applicable restitution award. See MCL 780.766(4)(a) (stating that if a crime results in physical or psychological injury to a victim, the defendant shall "[p]ay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care"). Had the Legislature genuinely intended for "full restitution" to refer only to restitution that "fully" compensates a victim for his or her losses, it seemingly would not have made an effort to articulate the restitution available for especially difficult-to-value nonproperty crimes.

ing to do with the *mandatory character of restitution*, but addresses only what *comprises the restitution* that may properly be awarded to crime victims and others in a mandatory restitution order. Article 1, § 24 qualifies victims' constitutional right to restitution with the phrase "[t]he Legislature may provide by law for the enforcement of this section." Const 1963, art 1, § 24(2). In light of this authorization, and in light of the fact that the Legislature has "accepted" the Constitution's invitation to enact such a law, it is evident that the precise scope of the right to restitution in this case is to be found in the work product of the Legislature.

The "textual clues" provided by the CVRA compellingly indicate that a court may not order a defendant to pay restitution for the travel expenses that a crime victim incurs in the course of traveling to recover property or attend a restitution hearing.

CONCLUSION

In summary, the relevant parts of the restitution statute, MCL 780.766, state as follows:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make *full restitution* to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section.
>
> (3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the

order of restitution shall 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.

(c) Pay the costs of the seizure or impoundment, or both.

(4) If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.

(c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime.

(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of

the victim's family actually incurred and reasonably expected to be incurred as a result of the crime.

(e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the crime or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the crime for that homemaking and child care, based on the rates in the area for comparable services.

(f) Pay an amount equal to the cost of actual funeral and related services.

(g) If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent's or guardian's federal, state, or local income tax returns, pay an amount equal to the loss of the tax deduction or tax credit. The amount of reimbursement shall be estimated for each year the victim could reasonably be claimed as a dependent.

(h) Pay an amount equal to income actually lost by the spouse, parent, sibling, child, or grandparent of the victim because the family member left his or her employment, temporarily or permanently, to care for the victim because of the injury.

(5) If a crime resulting in bodily injury also results in the death of a victim or serious impairment of a body function of a victim, the court may order up to 3 times the amount of restitution otherwise allowed under this section. As used in this subsection, "serious impairment of a body function of a victim" includes, but is not limited to, 1 or more of the following:

(a) Loss of a limb or use of a limb.

(b) Loss of a hand or foot or use of a hand or foot.

(c) Loss of an eye or use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than 3 days.

(g) Measurable brain damage or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of a body organ.

* * *

(8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. . . .

* * *

(24) If the victim is a minor, the order of restitution shall require the defendant to pay to a parent of the victim an amount that is determined to be reasonable for any of the following that are actually incurred or reasonably expected to be incurred by the parent as a result of the crime:

(a) Homemaking and child care expenses.

(b) Income loss not ordered to be paid under subsection (4)(h).

(c) Mileage.

(d) Lodging or housing.

(e) Meals.

(f) Any other cost incurred in exercising the rights of the victim or a parent under this act. [Emphasis added.]

The majority opinion concludes that—all legislative detail, nuance and precision of language, and specific recitations of coverage and noncoverage notwithstanding—this statute simply means that "full restitution" must be awarded. Why in light of this conclusion the Legislature proceeded to waste its breath on an additional 1006 relevant words in this statute, I do not know. Although the majority opinion may set forth a worthy public policy, it is not one, I am quite certain, actually enacted by our Legislature. Accordingly, I would affirm the judgment of the Court of Appeals.

MCCORMACK, J., concurred with MARKMAN, J.

In re SANDERS

Docket No. 146680. Argued November 7, 2013 (Calendar No. 6). Decided June 2, 2014.

The Department of Human Services (DHS) petitioned the Jackson Circuit Court, Family Division, to assume jurisdiction over the minor children of Tammy Sanders and Lance Laird after the youngest child was born with drugs in his system. The court, Richard N. LaFlamme, J., removed the child from Sanders's custody and placed him with Laird, who at the time also had custody of the older child. The DHS subsequently filed an amended petition, alleging that Laird had tested positive for cocaine, that Sanders had admitted using drugs with Laird, and that Sanders had spent the night at Laird's home despite a court order that prohibited her from having unsupervised contact with the children. At the preliminary hearing, the court removed the children from Laird's custody and placed them with the DHS. Laird contested the allegations in the amended petition and requested an adjudication with respect to his fitness as a parent. Sanders pleaded no contest to the allegations of neglect and abuse in the amended petition, but Laird declined to enter a plea and instead repeated his demand for an adjudication and requested that the children's temporary placement be changed from their aunt to their paternal grandmother, with whom Laird resided. At a placement hearing, Laird admitted that he had allowed Sanders to spend one night at his house after the court removed the children from her custody but asserted that the children never saw her that night. Laird also testified that he was on probation for a domestic violence conviction. The court took the placement motion under advisement and maintained placement of the children with their aunt pending Laird's adjudication. A few weeks later, the DHS dismissed the remaining allegations against Laird, and his adjudication was canceled. Following a review hearing, the court ordered Laird to comply with a service plan, including parenting classes, a substance-abuse assessment, counseling, and a psychological evaluation; restricted his contact with the children to supervised parenting time; and continued placement of the children with their aunt. Laird subsequently moved for immediate placement of the children with him, arguing that the court had no

authority to condition the placement of his children on his compliance with a service plan because he had not been adjudicated as unfit. The court denied the motion, relying on the one-parent doctrine derived from *In re CR*, 250 Mich App 185 (2002), which provides that if jurisdiction has been established by the adjudication of only one parent, the court may then enter dispositional orders affecting the parental rights of both parents. The Court of Appeals denied Laird's application for interlocutory leave to appeal in an unpublished order, entered January 18, 2013 (Docket No. 313385). The Supreme Court granted Laird leave to appeal. 493 Mich 959 (2013).

In an opinion by Justice MCCORMACK, joined by Chief Justice YOUNG and Justices CAVANAGH, KELLY, and ZAHRA, the Supreme Court *held*:

Application of the one-parent doctrine impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process, and the doctrine is consequently unconstitutional under the Due Process Clause of the Fourteenth Amendment. Due process requires a specific adjudication of a parent's unfitness before the state can infringe that parent's constitutionally protected parent-child relationship.

1. MCL 712A.2(b) governs child protective proceedings generally. MCL 712A.2(b)(1) gives the family court jurisdiction over a child in cases of parental abuse or neglect. Child protective proceedings have two phases: the adjudicative phase and the dispositional phase. Generally, the court determines during the adjudicative phase whether it can take jurisdiction over the child in the first place. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. With respect to the adjudicative phase, once the court authorizes a petition containing allegations of abuse or neglect, the respondent parent can admit the allegations, plead no contest to them, or request a trial (the adjudication) and contest the merits of the petition. If there is a trial, (1) the parent is entitled to a jury, (2) the rules of evidence generally apply, and (3) the petitioner must prove by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition. When the allegations are proved by a plea or at the trial, the adjudicated parent is determined to be unfit. Under MCR 3.973(A) and MCL 712A.6, the purpose of the dispositional phase is to then determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult. Unlike the adjudicative phase, the rules of evidence do not apply and the parent is not entitled to

a jury determination of facts. The dispositional phase ultimately ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering the DHS to file a petition for the termination of parental rights.

2. The one-parent doctrine permits the family court to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine therefore eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court.

3. Included in the Fourteenth Amendment's promise of due process is a substantive component that provides heightened protection against governmental interference with fundamental rights and liberty interests, including the right of parents to make decisions concerning the care, custody, and control of their children. A parent's right to control the custody and care of his or her children is not absolute because the state has a legitimate interest in protecting the children's moral, emotional, mental, and physical welfare, and in some circumstances neglectful parents may be separated from their children. The United States Constitution, however, recognizes a presumption that fit parents act in the best interests of their children and that there will normally be no reason for the state to insert itself into the private realm of the family to further question the ability of fit parents to make the best decisions concerning the rearing of their children. Due process demands that an individual be afforded minimal procedural protections before the state can burden a fundamental right, and the three-part balancing test of *Mathews v Eldridge*, 424 US 319 (1976), is applied to determine what process is due when the state seeks to curtail or infringe an individual right. The test requires consideration of three factors: (1) the private interest that the official action will affect, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In essence, the test balances the costs of certain procedural safeguards (in this case, an adjudication) against the risks of not adopting those procedures.

4. In *CR*, the Court of Appeals interpreted MCR 3.973(A) as permitting the family court to enter dispositional orders affecting the rights of any adult, including the parental rights of unadjudicated parents, as as long as the court had established jurisdiction

over the child. According to the DHS, the requirement of a dispositional phase obviated an unadjudicated parent's right to a fitness hearing. Applying the three-part *Mathews* test, however, led to the conclusion that dispositional hearings are constitutionally insufficient and that due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights. The private interest at stake is a core liberty interest recognized by the Fourteenth Amendment. With respect to the second and third *Mathews* factors, the state has an interest in protecting the health and safety of minors, which will, in some circumstances, require temporary placement of a child with a nonparent. This interest runs parallel with the state's interest in maintaining the integrity of the family unit whenever possible, however, and the state's interest is undermined when a parent is erroneously deprived of his or her fundamental right to parent a child. The state has an equally strong interest in ensuring that a parent's fitness or lack thereof is resolved before the state interferes with the parent-child relationship. Therefore, the probable value of extending the right to an adjudication to each parent in a child protective proceeding benefits both public and private interests. While requiring adjudication of each parent will increase the burden on the state in many cases, an adjudication would significantly reduce any risk of the erroneous deprivation of the parent's right. The adjudication is the only fact-finding phase regarding parental fitness, and the procedures afforded parents are tied to the allegations of unfitness in the petition, protecting them from the risk of erroneous deprivation of their parental rights. Dispositional hearings do not serve this same function because the court is concerned at that time only with what services and requirements will be in the children's best interests. There is no presumption of fitness in favor of the unadjudicated parent. The procedures during the dispositional phase are not related to the allegations of unfitness because the question before the court at a dispositional hearing assumes a previous finding of parental unfitness. Therefore, while extending the right to an adjudication to all parents will impose additional burdens on petitioners, those burdens do not outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit, as the one-parent doctrine allows. The one-parent doctrine is therefore unconstitutional and *In re CR* is overruled.

5. Laird's current incarceration for violating federal drug-trafficking laws did not render his complaint moot. Incarcerated parents can exercise the constitutional right to direct the care of their children while incarcerated, and Laird had tried to do just that, requesting several times during the proceedings below that

the children be placed with their parental grandmother. As long as the children are provided adequate care, state interference with those decisions is not warranted.

Trial court order vacated and case remanded for further proceedings.

Justice MARKMAN, joined by Justice VIVIANO, dissenting, stated that the issue was whether the Legislature acted in an unconstitutional manner by enacting statutes that for more than 70 years have provided the underpinnings for the one-parent doctrine. Although Justice MARKMAN agreed with the majority that all parents are entitled to due process in the child protective context, with the presumption of fitness and the burden of proof to the contrary resting on the state, he saw no constitutional barriers to the long-established procedures in Michigan that guarantee that such a fitness determination is fairly made. He concluded that *CR* correctly held that the one-parent doctrine, as well as the statutes and court rules on which the doctrine was grounded, were constitutional and would have affirmed the family court. In its opinion the majority only perfunctorily referred to its threshold obligation to presume the constitutionality of statutes and court rules and did not accord any weight to the good-faith judgments of the Legislature. While Justice MARKMAN agreed with the majority that absent exigent circumstances, the state cannot remove a child from a parent's custody or otherwise interfere with a parent's parental rights unless a court first finds that the parent is unfit, he did not believe that the statutory scheme (which includes the one-parent doctrine) allows the state to do so. The statutory provisions and the court rules presume that parents are fit and require the state to prove a parent's unfitness before the state can remove a child from the parent's custody. Once the court adjudicates one parent pursuant to MCL 712A.2(b), however, the court can exercise jurisdiction over the child and, pursuant to MCL 712A.6, enter any orders affecting adults that the court determines are necessary for the physical, mental, or moral well-being of the child. If a child is being abused or neglected, it is imperative that a court have the power to intervene immediately and effectively. The issue in this case concerned the propriety of an unadjudicated parent being deprived of the adjudicative phase of a child protective proceeding. The adjudicative phase only determines whether the court has jurisdiction over the child. It is the initial phase in which the court acquires jurisdiction in order to attempt to alleviate the problems in the home so that the children and the parents can be reunited. A finding of jurisdiction does not necessarily or immediately foreclose the parent's rights to his or

her child, and not every adjudicative hearing results in removal of custody. Once a jury has determined that one parent has abused or neglected a child, however, that child should not have to wait for a secure placement until a determination, following an additional jury trial, that the other parent also abused or neglected the child. Abolishing the one-parent doctrine will cost the state in terms of time, financial resources, and social-services manpower because the state will now have to adjudicate both parents as unfit before a court can even exercise jurisdiction over abused and neglected children. Most troubling are the additional costs and burdens that will now be placed on abused and neglected children, who are in the greatest need of expedited public protection but will be given that protection considerably less quickly because both parents are for the first time constitutionally entitled to jury trials. Although the majority addressed at length the parental interests involved in the case, it mentioned in only the most peremptory way the existence of the children's interests. While the majority apparently believed the most important (if not the exclusive) constitutional interest involved was that of the parent, Justice MARKMAN believed that the most important (albeit not the exclusive) constitutional interest involved was that of the children. He disagreed that both parents are constitutionally entitled to a jury trial on their fitness before children can be placed within the protective jurisdiction of the court. The Legislature adequately protected the due process rights of an unadjudicated parent of an abused or neglected child by requiring a hearing on the parent's fitness before the state can interfere with his or her parental rights, and Laird was reasonably determined to be unfit after several such hearings in this case.

PARENT AND CHILD — ABUSE AND NEGLECT — DUE PROCESS — ADJUDICATIONS — ONE-PARENT DOCTRINE.

Due process requires a specific adjudication of a parent's unfitness before the state can infringe that parent's constitutionally protected parent-child relationship; the one-parent doctrine, which permits the family division of the circuit court to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase of a child protective proceeding with respect to both parents and thus eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before he or she is subject to the dispositional authority of the court, is unconstitutional (MCL 712A.2(b), 712A.6; MCR 3.973(A)).

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Vivek S. Sankaran and *Joshua B. Kay* for Lance Laird.

Amici Curiae:

William Ladd and *Deborah Paruch* for the Juvenile Appellate Clinic of the University of Detroit Mercy School of Law.

David S. Leyton and *Terrence E. Dean* for the Prosecuting Attorneys Association of Michigan.

Honigman Miller Schwartz and Cohn LLP (by *Robert M. Riley*) for the National Association of Counsel for Children.

Honigman Miller Schwartz and Cohn LLP (by *Beth J. Kerwin*) for the Legal Services Association of Michigan and the Michigan State Planning Body for the Delivery of Legal Services to the Poor.

Legal Services of South Central Michigan (by *Ann L. Routt*) for the Michigan Coalition to End Domestic and Sexual Violence.

Elizabeth Warner for the Children's Law Section of the State Bar of Michigan.

MCCORMACK, J. At issue in this case is the constitutionality of Michigan's one-parent doctrine. The one-parent doctrine permits a court to interfere with a parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that he or she is also unfit.

In other words, the one-parent doctrine essentially imposes joint and several liability on both parents, potentially divesting either of custody, on the basis of the unfitness of one. Merely describing the doctrine foreshadows its constitutional weakness.

In the case before us, upon petition by the Department of Human Services (DHS), the trial court adjudicated respondent-mother, Tammy Sanders, as unfit but dismissed the allegations of abuse and neglect against respondent-appellant-father, Lance Laird. Laird moved for his children to be placed with him. Although Laird was never adjudicated as unfit, the trial court denied Laird's motion, limited his contact with his children, and ordered him to comply with a service plan. In justifying its orders, the court relied on the one-parent doctrine and the Court of Appeals' decision in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), from which that doctrine derives.

Laird believes that the one-parent doctrine violates his fundamental right to direct the care, custody, and control of his children because it permits the court to enter dispositional orders affecting that right without first determining that he is an unfit parent. We agree. Because application of the one-parent doctrine impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process, we hold that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Laird is the father of two boys: P, born in 2010, and C, born in 2011. Sanders is the boys' mother. Four days after C was born drug positive, the Jackson Circuit Court, acting on a petition filed by the DHS, removed C

from Sanders's custody and placed the child with Laird. At that time, P was also in Laird's custody.

Several weeks later, the DHS filed an amended petition alleging that Laird had tested positive for cocaine, that Sanders had admitted "getting high" with Laird, and that Sanders had spent the night at Laird's home despite a court order that prohibited her from having unsupervised contact with the children. At a November 16, 2011 preliminary hearing, the court removed the children from Laird's custody and placed them in the custody of the DHS.[1] Laird contested the allegations in the amended petition and requested an adjudication with respect to his fitness as a parent.

On February 7, 2012, Sanders pleaded no contest to the allegations of neglect and abuse in the amended petition. Laird declined to enter a plea and instead repeated his demand for an adjudication. Laird also moved to change the children's temporary placement from their paternal aunt to the children's paternal grandmother, with whom Laird then resided. The court conducted a placement hearing at which several witnesses, including Laird, testified. Laird admitted that he had allowed Sanders to spend one night at his house after the court removed the children from her custody. Laird claimed, however, that the children never saw Sanders that night. Laird also testified that he was on probation stemming from a domestic violence conviction. The court took the placement motion under ad-

[1] Consistently with the court rule governing pretrial placement of children in child protective proceedings, the DHS temporarily placed the children with their aunt. See MCR 3.965(C)(2) (" If continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs.").

visement and maintained placement of the children with their aunt pending Laird's adjudication, which was scheduled for May 1, 2012.

A few weeks later, on April 18, 2012, the DHS dismissed the remaining allegations against Laird, and Laird's adjudication was cancelled. At a May 2, 2012 review hearing, the court ordered Laird to comply with services, including parenting classes, a substance-abuse assessment, counseling, and a psychological evaluation. Laird's contact with his children was restricted to supervised parenting time, and placement of the children continued with their aunt. On August 22, 2012, Laird moved for immediate placement of the children with him. Laird argued that the court had no legal authority to condition the placement of his children on his compliance with a service plan because he had not been adjudicated as unfit. The court, relying on the Court of Appeals' decision in *CR*, denied the motion.

Laird's application for interlocutory leave to appeal in the Court of Appeals was denied for lack of merit. *In re Sanders Minors*, unpublished order of the Court of Appeals, entered January 18, 2013 (Docket No. 313385). This Court granted leave to appeal to address "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders*, 493 Mich 959 (2013).[2]

II. LEGAL BACKGROUND

A. STANDARD OF REVIEW

Whether child protective proceedings complied with a parent's right to procedural due process presents a

[2] After this Court granted leave to appeal, Laird was convicted in federal court of drug-trafficking charges. See 21 USC 841(a)(1) and (b)(1)(B).

question of constitutional law, which we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). The interpretation and application of statutes and court rules are also reviewed de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). We interpret court rules using the same principles that govern statutory interpretation. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

B. CHILD PROTECTIVE PROCEEDINGS IN MICHIGAN

A brief review of the court rules and statutes governing child protective proceedings is helpful here. The juvenile code, MCL 712A.1 *et seq.*, establishes procedures by which the state can exercise its *parens patriae* authority over minors. These procedures are reflected in Subchapter 3.900 of the Michigan Court Rules. In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. See *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase. *Id*. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. *Id*.

The court's authority to conduct those proceedings is found at MCL 712A.2(b), which encompasses child protective proceedings generally. The first subsection of that statute provides the court with jurisdiction over a child in cases of parental abuse or neglect. MCL 712A.2(b)(1) (providing for jurisdiction over a juvenile

whose parent "neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals"). To initiate a child protective proceeding, the state must file in the family division of the circuit court a petition containing facts that constitute an offense against the child under the juvenile code (i.e., MCL 712A.2(b)). MCL 712A.13a(2); MCR 3.961.[3] If the court authorizes the petition, the court may release the child to a parent, MCR 3.965(B)(12)(a), or, if the court finds that returning the child to the home would be contrary to the child's welfare, order that the child be temporarily placed in foster care, MCR 3.965(B)(12)(b) and (C). The respondent parent can either admit the allegations in the petition or plead no contest to them. MCR 3.971. Alternatively, the respondent may demand a trial (i.e., an adjudication) and contest the merits of the petition. MCR 3.972. If a trial is held, the respondent is entitled to a jury, MCR 3.911(A), the rules of evidence generally apply, MCR 3.972(C), and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition, MCR 3.972(E). When the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit. While the

[3] While a petition is the ordinary route by which child protective proceedings begin, the juvenile code also recognizes that exigent circumstances can require immediate action. See MCL 712A.14a(1) (authorizing the immediate removal of a child without a court order "[i]f there is reasonable cause to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety"); see also MCL 712A.14b(1)(a) (allowing an ex parte order authorizing the DHS to immediately take a child into protective custody before any hearing if a petition alleges a similar "imminent risk of harm").

adjudicative phase is only the first step in child protective proceedings, it is of critical importance because "[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation" of their parental rights. *Brock*, 442 Mich at 111.

Once a court assumes jurisdiction over a child, the parties enter the dispositional phase. Unlike the adjudicative phase, here the rules of evidence do not apply, MCR 3.973(E), and the respondent is not entitled to a jury determination of facts, MCR 3.911(A). The purpose of the dispositional phase is to determine "what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against *any* adult . . . ." MCR 3.973(A) (emphasis added). The court's authority to enter these orders is found in MCL 712A.6.

The court has broad authority in effectuating dispositional orders once a child is within its jurisdiction. *In re Macomber*, 436 Mich 386, 393-399; 461 NW2d 671 (1990). And while the court's dispositional orders must be "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained," MCL 712A.18(1), the orders are afforded considerable deference on appellate review, see *In re Cornet*, 422 Mich 274, 278-279; 373 NW2d 536 (1985) (adopting the clear-error standard of review for dispositional orders).

If certain requirements are met, the court can terminate parental rights at the initial dispositional hearing, MCR 3.977(E);[4] otherwise, the court continues to conduct periodic review hearings and may enter orders that

[4] Among other things, the petition must contain a request for termination, there must be adequate grounds for the court's jurisdiction, and the court must find by clear and convincing legally admissible evidence that grounds exist for termination under MCL 712A.19b(3).

provide for services, direct the child's placement, and govern visitation, MCR 3.973(F); MCR 3.974; MCR 3.975. Before the court enters any order of disposition, however, the DHS must prepare a case service plan that includes a "[s]chedule of services to be provided to the parent . . . to facilitate the child's return to his or her home . . . ." MCL 712A.18f(3)(d).[5] That case service plan must also "provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's interests and special needs." MCL 712A.18f(3). The court examines the case service plan pursuant to MCL 712A.18f(4) and MCR 3.973(F)(2), and frequently adopts the DHS's case service plan and orders compliance with the services contained in the plan.

Ultimately, the dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering the DHS to file a petition for the termination of parental rights.

C. THE ONE-PARENT DOCTRINE

Because the jurisdictional inquiry is focused on the child, once there has been *an* adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit. MCL 712A.2(b). In cases in which jurisdiction has been established by adjudication of only *one* parent, the one-parent doctrine allows the court to then enter dispositional orders affecting the parental rights of *both* parents. The one-parent doctrine is the

[5] We note that the statute providing for case service plans, MCL 712A.18f, does not distinguish between adjudicated parents and unadjudicated parents.

result of the Court of Appeals' interpretation of Subchapter 3.900[6] of the Michigan Court Rules in *CR*:

> [O]nce the family court acquires jurisdiction over the children, [MCR 3.973(A)] authorizes the family court to hold a dispositional hearing "to determine [what] measures [the court will take] . . . *against any adult* . . . ." [MCR 3.973(F)(2)] then allows the family court to "order compliance with all or part of the case service plan and [. . .] *enter such orders as it considers necessary in the interest of the child*." Consequently, after the family court found that *the children* involved in this case came within its jurisdiction on the basis of [the adjudicated parent's] no-contest plea and supporting testimony at the adjudication, the family court was able to order [the unadjudicated parent] to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the [petitioner's] obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the unadjudicated parent] was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct. [*CR*, 250 Mich App at 202-203.]

In simpler terms, the one-parent doctrine permits courts to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine thus eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court.

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[6] *CR* was decided when the court rules governing child protective proceedings and other proceedings relating to minors were located in former Subchapter 5.900 of the Michigan Court Rules. References to and quotations of former Subchapter 5.900 in *CR* have been updated to reflect the rules currently found in Subchapter 3.900.

D. CONSTITUTIONAL PARENTAL RIGHTS

The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1. Included in the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. See *Meyer v Nebraska*, 262 US 390, 399-400; 43 S Ct 625; 67 L Ed 1042 (1923). In the words of this Court, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), citing *Brock*, 442 Mich at 109.

The right to parent one's children is "essential to the orderly pursuit of happiness by free men," *Meyer*, 262 US at 399, and "is perhaps the oldest of the fundamental liberty interests," *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). The right is an expression of the importance of the familial relationship and "stems from the emotional attachments that derive from the intimacy of daily association" between child and parent. *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 844; 97 S Ct 2094; 53 L Ed 2d 14 (1977).

A parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting "the moral, emotional, mental,

and physical welfare of the minor" and in some circumstances "neglectful parents may be separated from their children." *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (quotation marks and citation omitted). The United States Constitution, however, recognizes "a presumption that fit parents act in the best interest of their children" and that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children." *Troxel*, 530 US at 68-69 (opinion by O'Connor, J.). Further, the right is so deeply rooted that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

The United States Supreme Court has also recognized that due process demands that minimal procedural protections be afforded an individual before the state can burden a fundamental right. In *Mathews v Eldridge*, the Supreme Court famously articulated a three-part balancing test to determine "what process is due" when the state seeks to curtail or infringe an individual right:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute proce-

> dural requirement would entail. [*Mathews v Eldridge*, 424 US 319, 333, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).]

In essence, the *Eldridge* test balances the costs of certain procedural safeguards—here, an adjudication—against the risks of not adopting such procedures. The Supreme Court has regularly employed the *Eldridge* test to determine the nature of the process due in child protective proceedings in related contexts. See *Santosky*, 455 US at 758 ("Evaluation of the three *Eldridge* factors compels the conclusion that use of a 'fair preponderance of the evidence' standard in [parental rights termination] proceedings is inconsistent with due process."); *Smith*, 431 US at 848-852 (addressing New York City's procedures for removing a minor from a foster home).

Our due process inquiry is also informed by *Stanley v Illinois*, a pre-*Eldridge* case in which the Supreme Court held that the Fourteenth Amendment demands that a parent be entitled to a hearing to determine the parent's fitness before the state can infringe the right to direct the care, custody, and control of his or her children. *Stanley*, 405 US at 649. *Stanley* addressed an Illinois statutory scheme that declared the children of unmarried fathers, upon the death of the mother, to be dependents (i.e., wards of the state) without a fitness hearing at which neglect was proved.[7] The *Stanley* Court found this scheme to be

[7] Under then-existing Illinois law, the state could take custody of a child in a dependency proceeding or in a neglect proceeding. "In a dependency proceeding [the state] may demonstrate that the children are wards of the State because they have no surviving parent or guardian. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care." *Stanley*, 405 US at 649 (citations omitted). The statute defined "parents" as " 'the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent,' " but did not include unmarried fathers. *Id*. at 650. Thus, the statute did not recognize Stanley as a parent, and it

constitutionally infirm because it allowed the state to deprive Stanley of custody without first determining that he was unfit at a hearing:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.
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> . . . The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. [It] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family. [*Id*. at 656-658.]

The rule from *Stanley* is plain: all parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id*. at 658.

III. ANALYSIS

At the onset, we note that the Court of Appeals' interpretation in *CR* of MCL 712A.6 and MCR 3.973(A) would seemingly grant trial courts unfettered authority to enter dispositional orders, as long as the court finds them to be in the child's best interests.[8] This Court,

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did not require the state to prove that Stanley was unfit in a neglect proceeding in order to deprive him of custody of his children.

[8] The dissent also emphasizes that MCL 712A.2(b)(1) refers singularly to "parent." This reference is consistent with the unremarkable idea that courts may assume jurisdiction over a child on the basis of the adjudication of one parent. Laird's challenge to the one-parent doctrine does not challenge this proposition because the one-parent doctrine is not con-

however, has a duty to interpret statutes as being constitutional whenever possible. *Taylor*, 468 Mich at 6. Thus, if the Court of Appeals' interpretation permits trial courts to exercise their jurisdiction in a manner that impermissibly interferes with a parent's constitutional right to direct the care and custody of his or her child, as Laird argues, we are duty-bound to reject it.

A. THE ONE-PARENT PROBLEM

Laird's primary argument is that the one-parent doctrine is unconstitutional because it allows courts to infringe the rights of unadjudicated parents to direct the care, custody, and control of their children without an adjudication that those parents are unfit. According to Laird, the facts of this case well illustrate the flaws inherent in the one-parent doctrine in practice. After the DHS filed the neglect petition, Sanders entered a no-contest plea to the allegations against her. This allowed the court to assume jurisdiction over Laird's children. The DHS did not pursue any allegations against Laird, despite his demand for a trial. His fitness was never the subject of any hearing, and he was never adjudicated as unfit. Nevertheless, the court refused to grant Laird custody of his children and instead ordered him to comply with services ordered as part of the dispositional plan.[9] Laird

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cerned with the *assumption* of jurisdiction. In this case, for example, the trial court properly assumed jurisdiction over the children on the basis of Sanders's plea. See MCR 3.971. Rather than challenge the assumption of jurisdiction, Laird argues that the court's *exercise* of jurisdiction affecting *his* constitutional parental rights—that is, the one-parent doctrine at work—is an unconstitutional interference with those rights.

[9] To be clear, Laird's parental rights were not and have not been terminated. Nevertheless, temporary deprivation of custody is an "intrusion into the family sphere," *Hunter v Hunter*, 484 Mich 247, 269; 771 NW2d 694 (2009), and plainly infringes on Laird's constitutional rights

contends that this process—the one-parent doctrine at work—is forbidden by *Stanley*.

The DHS responds that Laird was afforded all the process that he was due by virtue of the dispositional proceedings. According to the DHS, the dispositional phase obviates an unadjudicated parent's right to a fitness hearing.

As the Court of Appeals explained in *CR*, its interpretation of MCR 3.973(A) permits the trial court to enter dispositional orders affecting the rights of "any adult," including the parental rights of unadjudicated parents, as long as the court has established jurisdiction over the child. *CR*, 250 Mich App at 202-203. Because we have a duty to interpret statutes and court rules as being constitutional whenever possible, we reject any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of "any adult."[10]

Stanley is plain that Laird's right to direct the care, custody, and control of his children is a fundamental

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as a parent, see *Troxel*, 530 US at 68 (opinion by O'Connor, J.) (recognizing that parental rights are implicated in grandparent-visitation cases).

[10] MCR 3.973(A) states that, at a dispositional hearing, the court determines what measures it will take regarding the child "and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true." While the parties have focused on the constitutional implications of interpreting the phrase "any adult" as the Court of Appeals did in *CR*, 250 Mich App at 202-203, we note that the phrase "when applicable" can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of "any adult" is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition.

right that cannot be infringed without *some* type of fitness hearing. We therefore begin our analysis by testing the DHS's contention that a dispositional hearing is a constitutionally sufficient process in light of the *Eldridge* factors. We conclude that under *Eldridge*, dispositional hearings are constitutionally inadequate; due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights.

First, the importance of the private interest at stake here—a parent's fundamental right to direct the care, custody, and control of his or her child free from governmental interference—cannot be overstated.[11] It is a core liberty interest recognized by the Fourteenth Amendment. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, 455 US at 753.

With respect to the second and third *Eldridge* factors, it is undisputed that the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that the interest will require temporarily placing a child with a nonparent. *Stanley*, 405 US at 652. It is this interest that lies at the heart of the state's *parens*

[11] We agree with the dissent that there is, of course, a second private interest that is always relevant in child protective proceedings—the child's interest in his or her own welfare. If a parent is unfit, the child's interest aligns with the state's *parens patriae* interest. On the other hand, the child *also* has an interest in remaining in his or her natural family environment. In which direction the child's interest preponderates cannot be known without first a specific adjudication of a parent's unfitness, as "the State cannot presume that a child and his parents are adversaries." *Santosky*, 455 US at 760. Rather, only "[a]fter the State has established parental unfitness . . . [may] the court . . . assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." *Id*.

patriae power. But this interest runs parallel with the state's interest in maintaining the integrity of the family unit whenever possible. MCL 712A.1(3) ("This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, *preferably in his or her own home*, conducive to the juvenile's welfare and the best interest of the state.") (emphasis added); *Stanley*, 405 US at 652-653 ("[I]f Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."); *Troxel*, 530 US at 68-69 (opinion by O'Connor, J.) ("[S]o long as a parent adequately cares for . . . [his or her] children, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of [his or her] children."); *Santosky*, 455 US at 766-767 ("[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds."). When a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest. But when a father or mother is erroneously deprived of his or her fundamental right to parent a child, the state's interest is undermined as well: "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley*, 405 US at 652. In other words, the state ordinarily[12] has an equally strong interest in ensuring

[12] Of course, when a minor faces an *imminent* threat of harm, the state's interest in the welfare of the child is paramount. In the case of an imminent threat of harm, the state may take the child into custody without prior court authorization or parental consent. See, e.g., *Tenenbaum v Williams*, 193 F3d 581, 593-594 (CA 2, 1999). And as noted in

that a parent's fitness, or lack thereof, is resolved before the state interferes with the parent-child relationship. Thus, the probable value of extending the right to an adjudication to each parent in a child protective proceeding benefits both public and private interests alike.

There is no doubt that requiring adjudication of each parent will increase the burden on the state in many cases. But there is also little doubt that an adjudication would significantly reduce any risk of a parent's erroneous deprivation of the parent's right to parent his or her children. The trial is the only fact-finding phase regarding parental fitness, and the procedures afforded respondent parents are tied to the allegations of unfitness contained in the petition. As this Court has stated, "The procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation" of their parental rights. *Brock*, 442 Mich at 111.[13]

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footnote 3 of this opinion, Michigan law allows exactly that process. See MCL 712A.14a(1); MCL 712A.14b(1)(a). Requiring an imminent threat of harm for removal is constitutionally sound: as the Second Circuit recognized in *Tenenbaum*, " '[T]he mere "possibility" of danger is not enough.' " *Tenenbaum*, 193 F3d at 594 (citation omitted; alteration in original). Similarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child. MCR 3.965(B)(12)(b) and (C). Because our holding only reaches the court's exercise of its postadjudication dispositional authority, it should not be interpreted as preventing courts from ordering temporary foster-care placement pursuant to MCR 3.965(B)(12)(b) and (C).

[13] The risk of error is not limited to the erroneous interference with a parent's right to parent. Oftentimes, pursuant to the one-parent doctrine, services will be ordered for the unadjudicated parent. Absent some fact-finding regarding that parent's alleged neglectful or abusive conduct, however, the DHS cannot reasonably be expected to formulate an individualized plan, resulting in unadjudicated parents being ordered to comply with potentially unnecessary and costly service plans.

Dispositional hearings simply do not serve this same function. At the dispositional phase, the court is concerned only with what services and requirements will be in the best interests of the children. There is no presumption of fitness in favor of the unadjudicated parent.[14] See MCL 712A.18f. The procedures afforded parents during the dispositional phase are *not* related to the allegations of unfitness because the question a court is answering at a dispositional hearing assumes a previous finding of parental unfitness.

While extending the right to an adjudication[15] to all parents before depriving them of the right to direct the care, custody, and control of their children will impose additional burdens on the DHS, those burdens do not

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[14] Ideally, the removal of the child at the dispositional hearing would always involve a finding that the child's parents are unfit, as the dissent suggests. The statutes and court rules governing the dispositional phase, however, simply do not demand any fitness determination. And because the "[t]he court may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child," MCR 3.973(F)(2), the one-parent doctrine results in the unadjudicated parent's rights being subordinated to the court's best-interest determination.

[15] The dissent suggests that we have found a constitutional right to a jury trial in child protective proceedings. This misunderstands our opinion, as we have found no such constitutional right. Rather, we simply hold that due process requires a specific adjudication of a parent's unfitness and that the one-parent doctrine is unconstitutional because it deprives unadjudicated parents of this right. The right to a jury is granted by statute. MCL 712A.17(2) ("Except as otherwise provided in this subsection, in a hearing other than a criminal trial under this chapter, a person interested in the hearing may demand a jury of 6 individuals, or the court, on its own motion, may order a jury of 6 individuals to try the case."). Because Laird is *constitutionally* entitled to a fitness hearing, MCL 712A.17(2) affords him the *statutory* right to demand a jury because a parental-fitness hearing qualifies as a noncriminal hearing under the juvenile code.

We express no opinion about whether the jury guarantee in MCL 712A.17(2) is constitutionally required.

outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit, as the one-parent doctrine allows. Thus, consideration of the procedures afforded parents at the dispositional phase in light of the *Eldridge* factors requires us to reject the DHS's primary argument.

We also find unpersuasive the DHS's position that adjudication of one parent offers sufficient process to the other parent. An unadjudicated parent is not entitled to contest any allegations made against him or her at the other parent's adjudication hearing because the unadjudicated parent is not a party to that proceeding. While an unadjudicated parent can hope that the respondent parent is willing to vigorously contest the allegations made in the petition, as the facts here demonstrate, the unadjudicated parent will often be disappointed. The respondent parent may enter a plea, as is his or her right, or may choose not to defend the allegations as vigorously as the unadjudicated parent would prefer. Moreover, as a nonparty to those proceedings, it is difficult to see how an unadjudicated parent could have standing to appeal any unfavorable ruling.

We find similarly unconvincing the argument that the state is relieved of its initial adjudication burden because unadjudicated parents *may* have the opportunity to have their parental rights restored during the dispositional phase, *if* the unadjudicated parents have complied with the case services plan or court orders, or both, during the dispositional phase.[16] The DHS's argu-

[16] For example, the trial court must order the child returned home at the permanency planning hearing unless the court determines that he or she is likely to be harmed if placed with the parent. MCL 712A.19a(1); MCR 3.976(E)(2). According to the dissent, a decision not to return the child to the parent's home necessarily entails a determination that the unadjudicated parent is unfit, thus ensuring that fit parents are not deprived of custody. What the dissent fails to recog-

ment puts the plow before the mule. The possibility of a fix at the back end is not sufficient to justify a lack of process at the front end. Rather, the state must adjudicate a parent's fitness *before* interfering with his or her parental rights. *Stanley*, 405 US at 658. The arguments made by the DHS echo an argument the state of Illinois made in *Stanley*: because Stanley might have been able to regain custody of his children as a guardian or through adoption proceedings, no harm was done. *Id*. at 647. The Court disagreed:

> This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone. Surely, in the case before us, if there is a delay between the doing and the undoing [Stanley] suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation. [*Id*. (citation omitted).]

The same is true here. The state cannot deprive an unadjudicated parent of his or her constitutional parental rights simply because those rights may be restored at some future date. The Constitution demands more.[17]

B. MOOTNESS

Finally, we decline the DHS's invitation to dismiss this case as moot because Laird is currently incarcerated for violating federal drug-trafficking laws. An incarcerated parent *can* exercise the constitutional right to direct the care of his or her children while

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nize, however, is that there is no similar requirement during the earlier dispositional hearings, see MCR 3.975, and that the unadjudicated parent will have to wait up to a year after the child's removal before the permanency planning hearing takes place, see MCL 712A.19a(1); MCR 3.976(E)(2).

[17] Because we hold that the one-parent doctrine violates the due process rights of unadjudicated parents, we need not consider Laird's argument that the doctrine also violates the Equal Protection Clause.

incarcerated, and Laird has tried to do just that.[18] For example, an incarcerated parent can choose who will care for his children while he is imprisoned. *In re Mason*, 486 Mich at 161 n 11 ("Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative."). At several times during the proceedings below, Laird requested that the children be placed with his mother, the children's parental grandmother. As long as the children are provided adequate care, state interference with such decisions is not warranted. As a result, Laird's complaint is not moot.

IV. CONCLUSION

We recognize that the state has a legitimate—and crucial—interest in protecting the health and safety of minor children. That interest must be balanced, however, against the fundamental rights of parents to parent their children. Often, these considerations are not in conflict because "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 US at 68 (opinion by O'Connor, J.). When the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking

[18] See, e.g., *In re Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) ("Some parents, however, because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for.") (opinion by LEVIN, J.), overruled in part on other grounds by *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992); *In re Curry*, 113 Mich App 821, 826-827; 318 NW2d 567 (1982) ("Until there is a demonstration that the person entrusted with the care of the child by that child's parent is either unwilling or incapable of providing for the health, maintenance, and well being of the child, the state should be unwilling to interfere.").

an adjudication against *both* parents. In contrast, when the state seeks only to deprive *one* parent of the right to care, custody and control, the state is only required to adjudicate *that* parent. In this case, for example, there was no constitutional or jurisdictional impediment to disrupting the parental rights of Sanders, who was afforded the right to a determination of fitness.

Adjudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children. Admittedly, in some cases this process may impose a greater burden on the state than would application of the one-parent doctrine because "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley*, 405 US at 656-657. But as the United States Supreme Court made clear in *Eldridge*, constitutional rights do not always come cheap. The Constitution does not permit the state to presume rather than prove a parent's unfitness "solely because it is more convenient to presume than to prove." *Stanley*, 405 US at 658.

We accordingly hold that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship. In doing so, we announce no new constitutional right. Rather, we affirm that an old constitutional right—a parent's right to control the care, custody, and control of his or her children—applies to *everyone*, which is the very nature of constitutional rights. Because the one-parent doctrine allows the court to deprive a parent of this fundamental right without any finding that he or she is unfit, it is an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment. We therefore overrule *In re CR*,

vacate the order of the trial court, and remand this case to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and CAVANAGH, KELLY, and ZAHRA, JJ., concurred with MCCORMACK, J.

MARKMAN, J. (*dissenting*). The issue here, as it generally is in constitutional cases, is whether the Legislature has acted in an unconstitutional manner by enacting statutes that for many years have provided the underpinnings for the so-called one-parent doctrine.[1] I do not believe that it has. For that reason, I respectfully dissent from the majority opinion's decision to vacate the order of the trial court, overrule *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), and hold that the one-parent doctrine, which has been a part of our statutory scheme for more than 70 years, is now unconstitutional under the Due Process Clause of the Fourteenth Amendment. Instead, I would affirm the trial court and conclude that *CR* correctly held that the one-parent doctrine, as well as the statutes and court rules on which the doctrine is grounded, remain constitutional. The Legislature has adequately protected the due process rights of a parent of an abused or neglected child (a child whose other parent has already been adjudicated unfit) by requiring a hearing on the parent's fitness before the state can interfere with this parent's parental rights, and appellant here has been reasonably determined to be unfit after several such hearings.

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[1] Even this threshold statement of the constitutional issue in this case separates the majority opinion and this opinion. The majority opinion concentrates almost exclusively on the Court of Appeals' decision in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), and gives little attention to connecting this analysis to the statutes and court rules that underlie *CR*.

I. FACTS AND HISTORY

Appellant Lance Laird and Tammy Sanders were never married, but are the parents of two young boys—P (born in 2010) and C (born in 2011). Soon after the youngest boy was born with drugs in his system, the DHS removed the child from Sanders's custody and placed him with Laird, where the other child was already living.[2] However, a few weeks later when Laird himself tested positive for cocaine, the DHS removed the children from his custody and placed them with their paternal aunt. Sanders entered a no-contest plea to allegations of abuse and neglect. The trial court applied the one-parent doctrine to continue the children's placement with their aunt and order Laird to comply with a service plan, including psychological evaluation, parenting classes, substance abuse assessment, random drug screens, maintenance of housing and employment, and terms of probation stemming from a previous domestic violence conviction.

Laird filed a motion seeking immediate placement of his children with him and challenging the one-parent doctrine. Following a hearing at which several witnesses, including Laird himself, testified, the trial court, relying on *CR*, denied this motion, and the Court of Appeals denied leave to appeal for lack of merit. *In re Sanders Minors*, unpublished order of the Court of Appeals, entered January 18, 2013 (Docket No. 313385). This Court granted leave to appeal and directed the parties to address "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders*, 493 Mich 959 (2013).

[2] Laird and the children lived with Laird's mother.

II. STANDARD OF REVIEW

Questions involving the interpretation of statutes and court rules are reviewed de novo. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). Questions of constitutional law are also reviewed de novo. *Id*. It is well established that

> "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). " 'Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.' " *Id*. at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it," *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) . . . . "[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor*, 468 Mich at 6. [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011) (second alteration in original).]

"[W]e interpret court rules using the 'same principles that govern the interpretation of statutes,' " *Buie*, 491 Mich at 304, and therefore court rules, like statutes, are presumed to be constitutional.[3] (Citation omitted.)

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[3] The majority opinion makes only the most perfunctory reference to its threshold obligation to presume the constitutionality of statutes and

III. ANALYSIS

A. THE ONE-PARENT DOCTRINE

Child-protective proceedings typically begin with the state filing a petition in the trial court alleging that a parent has abused or neglected a child. MCL 712A.13a(2); MCR 3.961. Then comes the adjudicative phase, in which it is determined whether the parent abused or neglected the child as alleged in the petition and thus whether the court has jurisdiction over the child. During this adjudicative phase, a parent can admit the allegations, plead no contest to the allegations, or demand a trial. MCR 3.971; MCR 3.972. Once a parent has admitted the allegations or pleaded no contest, or the fact-finder has found "evidence of abuse [or] neglect proved by a preponderance of the legally admissible evidence presented at the adjudication, [the court has jurisdiction over the child, and] it then proceeds to the dispositional phase of the protective proceedings." *CR*, 250 Mich App at 200-201. During the dispositional phase, the court will "determine what measures [it] will take with respect to a child," MCR 3.973(A), and in doing so, the court "may make orders affecting adults as in the opinion of the court are

court rules. Rather, it begins its analysis by presuming that the one-parent doctrine— a doctrine derived from both our statutes and court rules—is unconstitutional, as suggested by its initial observation that "[m]erely describing the doctrine foreshadows its constitutional weakness." The opinion treats the one-parent doctrine as if it had been created by the Court of Appeals out of whole cloth. *Ante* at 401("[T]he [trial] court relied on the one-parent doctrine and the Court of Appeals' decision in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), from which that doctrine derives."). Nowhere, including in its ultimate holding, does the majority opinion give serious recognition to the fact that the one-parent doctrine is derived from statutes and court rules of this state, which explains in turn why it also gives little recognition to the fact that these must be presumed constitutional. The positive law of this state is largely a bystander in the majority opinion.

necessary for the physical, mental, or moral well-being of [the child] under its jurisdiction," MCL 712A.6. As this Court explained in *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993):

> Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional. The adjudicative phase determines whether the . . . court may exercise jurisdiction over the child. If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child.

The so-called one-parent doctrine allows a trial court to exercise jurisdiction over a child on the basis of the adjudication of only one parent. In other words, after one parent has been adjudicated, the court does not have to adjudicate the other parent, but instead can proceed to the dispositional phase. It is undisputed that the Legislature incorporated the one-parent doctrine into its statutory scheme and that this Court similarly incorporated the doctrine into its court rules. Most notably, MCL 712A.2 provides, in pertinent part:

> The court has the following authority and jurisdiction:
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> * * *
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> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (1) Whose *parent* or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> * * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of *a parent*, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. [Emphasis added.][4]

MCL 712A.2(b) employs the singular form of "parent" and thus does not require that both parents be adjudicated in order for the court to exercise jurisdiction over the child.[5] In addition, MCL 712A.6 provides:

The court has jurisdiction *over adults* as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders *affecting adults* as in the opinion of the court are necessary for the physical, mental,

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[4] Indeed, the Legislature incorporated the one-parent doctrine into its statutory scheme as early as 1944 when it added Chapter XIIA to the Probate Code, now codified at MCL 712A.1 *et seq*. See 1944 (Ex Sess) PA 54, § 2(a)(6) (granting jurisdiction to the court over any child under 17 years of age "[w]hose *parent* or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses, to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian, or other custodian, or who is otherwise without proper custody or guardianship") (emphasis added).

[5] The majority opinion agrees that the fact that "MCL 712A.2(b)(1) refers singularly to 'parent' . . . is consistent with the *unremarkable* idea that courts may assume jurisdiction over a child on the basis of the adjudication of one parent." *Ante* at 412 n 8 (emphasis added); see also *ante* at 407 ("[O]nce there has been *an* adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit."). However, this assumption of jurisdiction over the child is not quite as "unremarkable" as the majority opinion seems to believe, at least for purposes of the instant case, since MCL 712A.6 provides that once the court has jurisdiction over the child, it *also* "has jurisdiction over adults . . . and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." "Adults" presumably includes the *parents* of the child over whom jurisdiction has been assumed.

> or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles. [Emphasis added.]

Accordingly, once the court adjudicates one *parent*, pursuant to MCL 712A.2(b) the court can exercise jurisdiction over the *child* and, pursuant to MCL 712A.6, in exercising that jurisdiction, the court can "make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being" of the child. This makes sense because if a child is being abused or neglected, it is imperative that a court have the power to immediately intervene and to intervene effectively. "[A] juvenile court must be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent. This authority is essential to ensuring that the court has the ability to issue orders to remedy the abuse or neglect by the offending parent." Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp L Rev 55, 84 (2009).

The one-parent doctrine has similarly been incorporated into the Michigan Court Rules. For example, MCR 3.973(A) provides:

> A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable,[6]

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[6] The majority opinion contends that

> the phrase "when applicable" [in MCR 3.973(A)] can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of "any adult" is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition.

against any adult,[7] once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true. [Emphasis added.]

In addition, MCR 3.973(F)(2) provides:

> The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.

Accordingly, as the Court of Appeals explained in *CR*, 250 Mich App at 202-203, 205:

> [O]nce the family court acquires jurisdiction over the children, MCR [3.973(A)] authorizes the family court to hold a dispositional hearing "to determine [what] measures [the court will] take[] . . . *against any adult* . . . ." MCR [3.973(F)(2)] then allows the family court to "order compliance with all or part of the case service plan and *may enter such orders as it considers necessary in the interest of the child*." Consequently, after the family court found that the children involved in this case came within its jurisdiction on the basis of [the adjudicated parent's] no-contest

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While I agree that the state must certainly overcome the presumption of parental fitness, I do not believe that the state must do this by "proving the allegations in the petition." Instead, as discussed more fully later, the state can overcome the presumption by proving that the parent abused or neglected the child regardless of whether such allegations were contained in the petition. I do not believe that the language "when applicable" suggests anything to the contrary. However, even if it did, the pertinent statute, MCL 712A.6, indisputably cannot be interpreted in this way because it does not contain the phrase "when applicable" and it very clearly states that "[t]he court has jurisdiction over adults . . . and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction."

[7] We do not have to decide in this case the breadth of the language "any adult" because no one disputes that it applies to Laird.

> plea and supporting testimony at the adjudication, the family court was able to order [the unadjudicated parent] to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the [petitioner's] obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the unadjudicated parent] was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct. . . .
>
> * * *
>
> As we have explained, the court rules simply do not place a burden on a petitioner . . . to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding. [Some emphasis omitted.][8]

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[8] The majority opinion "reject[s]" the Court of Appeals' interpretation of MCL 712A.6 because its interpretation "would seemingly grant trial courts unfettered authority to enter dispositional orders . . . ." *Ante* at 412. I do not believe that MCL 712A.6, or the Court of Appeals' interpretation of it, grants courts any such authority. Rather, it grants courts the far more limited power to "make orders affecting adults as in the opinion of the court are *necessary* for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." MCL 712A.6 (emphasis added). Contrary to the majority opinion's contention, such an order can in no way be said to "impermissibly interfere[] with a parent's constitutional right to direct the care and custody of his or her child," *ante* at 413 as a parent's constitutional rights with respect to his or her child have never been regarded as absolute, in particular not with regard to abusive and neglectful parents, *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) ("Neglectful parents may be separated from their children."). As discussed in more detail later, it would never be "necessary" to enter an

Laird concedes and the majority opinion agrees that the court can exercise jurisdiction over a child on the basis of the adjudication of only one parent. Accordingly, Laird concedes and the majority opinion again agrees that the trial court had jurisdiction over the children at issue here because their mother had entered a no-contest plea to the allegations in the amended petition. See *ante* at 413 n 8. ("[T]he trial court properly assumed jurisdiction over the children based on Sanders's plea."). However, Laird argues and the majority opinion agrees that the court violated his due process rights by relying on the one-parent doctrine to enter an order taking away his children and directing him to comply with a service plan without first adjudicating him as unfit. Although the Court of Appeals has addressed this issue many times and has consistently held that the one-parent doctrine does not violate due process, this Court has not yet addressed the issue. See, e.g., *In re Slater/Weimer*, unpublished opinion of the Court of Appeals, issued March 25, 2014 (Docket No. 317132), p 2 (opinion by MARKEY, J.); *In re Farris*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket Nos. 311967, 312193, and 312194), pp 5-6;[9] *In re Mays*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2012 (Docket No. 309577), p 4 (*Mays II*);[10] *In re Rohmer*,

order that infringes on a parent's "rights" *unless* that parent has been determined to be unfit. Thus, in enacting MCL 712A.6, which only allows the court to enter orders that infringe on an unfit parent's "rights," the Legislature manifestly did not grant courts any "unfettered authority" to "impermissibly interfere[] with a parent's constitutional right[s] . . . ." *Ante* at 412-413.

[9] This Court is currently holding an application for leave to appeal in *Farris* in abeyance pending the decision in this case. *In re Farris*, 838 NW2d 147 (Mich, 2013).

[10] In *In re Mays*, 493 Mich 945 (2013) (*Mays II*), this Court denied leave to appeal on the basis of mootness because the parents had reached a consent agreement regarding joint custody of the children.

unpublished opinion per curiam of the Court of Appeals, issued August 14, 2012 (Docket No. 308745), p 3; *In re Camp*, unpublished memorandum opinion of the Court of Appeals, issued May 9, 2006 (Docket No. 265301), lv den 476 Mich 853 (2006); *In re Church*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket Nos. 263541 and 265112), lv den 475 Mich 899 (2006).[11] This Court expressed an interest in addressing the constitutionality of the one-parent doctrine in *In re Mays*, 490 Mich 993, 994 n 1 (2012) (*Mays I*), stating:

> The constitutionality of the "one parent doctrine" is obviously a jurisprudentially significant issue and one which this Court will undoubtedly soon be required to address given the widespread application of this doctrine.

However, this Court did not address the issue in *Mays I* because the appellant-father had failed to preserve the issue in the trial court or the Court of Appeals. *Id*.

B. DUE PROCESS

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. "It is well established that parents have a significant interest in the companionship, care, custody, and management of their children," and "[t]his interest has been characterized as an element of 'liberty' to be protected by due process." *Brock*, 442 Mich at 109. Indeed, "[t]he liberty interest at issue in this case—the

[11] "Nearly every state" has adopted the one-parent doctrine, Sankaran, 82 Temp L Rev at 57, and this "near-universal approach," *id*., has been upheld against similar constitutional challenges in other states. See, for example, *In re AR*, 330 SW3d 858 (Mo App, 2011); *In re CR*, 108 Ohio St 3d 369; 843 NE2d 1188 (2006); *In re Amber G*, 250 Neb 973; 554 NW2d 142 (1996).

interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.).[12] And this interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

"Where procedural due process must be afforded because a 'liberty' or 'property' interest is within the Fourteenth Amendment's protection, there must be determined 'what process is due' in the particular context." *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 847; 97 S Ct 2094; 53 L Ed 2d 14 (1977). " ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Mathews v Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Cafeteria & Restaurant Workers Union v McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961). Instead, " '[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Smith*, 431 US at 848, quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972). " '[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' . . . ." *Stanley v Illinois*, 405 US 645, 650; 92 S Ct 1208; 31 L Ed 2d 551 (1972), quoting *Cafeteria Workers*, 367 US at 895. "It is true that '[b]efore a person is deprived of a protected

[12] In *Troxel*, 530 US at 72-73 (opinion by O'Connor, J.), the Court held that Washington's nonparental visitation statute was unconstitutional because it "infringe[d] on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." ' " *Smith*, 431 US at 848, quoting *Bd of Regents of State Colleges v Roth*, 408 US 564, 570 n 7; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (citation omitted). "But the hearing required is only one 'appropriate to the nature of the case.' " *Smith*, 431 US at 848, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). The following factors should generally be considered when determining "what process is due":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

C. THE ONE-PARENT DOCTRINE AND DUE PROCESS

1. PRIVATE INTEREST

The first factor to be considered is "the private interest that will be affected by the official action[.]" *Id*. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 US at 651. "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " *Id*., quoting *Kovacs*

v Cooper, 336 US 77, 95; 69 S Ct 448; 93 L Ed 513 (1949) (Frankfurter, J., concurring) (alteration in original). "[T]here is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 US at 68 (opinion by O'Connor, J.). "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69.

2. THE RISK OF ERRONEOUS DEPRIVATION OF AN INTEREST

The next factor to be considered is "the risk of an erroneous deprivation of such interest through the procedures used . . . ." *Mathews*, 424 US at 335. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Santosky*, 455 US at 758 (citations and quotation marks omitted).[13] "[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews*, 424 US at 341. " '[T]he possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests.' " *Id.* (citation omitted) (alteration in original).

With regard to this factor, it is important to remember that the issue we address in the instant case concerns the propriety of a parent of an abused or

[13] In *Santosky*, 455 US at 768-769, the Court held that while applying a "fair preponderance of the evidence" standard in a parental-rights termination proceeding does not satisfy due process, applying a "clear and convincing evidence" standard does.

neglected child (a child whose other parent has already been adjudicated as unfit) being deprived of the adjudicative phase of a child-protective proceeding. We are not addressing a criminal proceeding, and we are not addressing a termination-of-parental-rights proceeding. "Child protective proceedings are not criminal proceedings." *Brock*, 442 Mich at 107. "The purpose of child protective proceedings is the protection of the child . . . ." *Id*. "The juvenile code is intended to protect children from unfit homes rather than to punish their parents." *Id*. at 108. The adjudicative phase only determines whether the trial court has jurisdiction over the child. In *Brock*, 442 Mich at 115, this Court described the adjudicative phase as the "initial phase wherein the court acquires jurisdiction in order to attempt to alleviate the problems in the home so that the children and the parents can be reunited . . . ."

The degree of interference with the parent's rights over the child after a finding that jurisdiction exists is largely dependent on the circumstances. As this Court has recognized, "[u]pon a finding of jurisdiction, the [family] court has several options, one of which is to return the children to their parents. Not every adjudicative hearing results in removal of custody." *Id*. at 111.[14] Simply put, a finding of jurisdiction does not necessarily, or immediately, foreclose the parent's rights to his or her child. "Moreover, in order to permanently terminate respondents' parental rights, further hearings would be required, and the statutory elements for termination must be proven by clear and convincing evidence." *Id*. at 111-112.

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[14] In *Brock*, 442 Mich at 110, this Court held that due process does not require that a parent be given the opportunity to cross-examine the child during the adjudicative phase.

"[T]he fairness and reliability of the existing . . . procedures" must also be considered. *Mathews*, 424 US at 343. As the Court of Appeals explained in *Mays II*, unpub op at 3-5:

> The procedures outlined by the Juvenile Code and the court rules protect a parent's due process rights. They permit the court to issue an order to take a child into custody when a judge or referee finds from the evidence "reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child." MCR 3.963(B)(1). Once the child is taken into custody, the parent must be notified and advised "of the date, time, and place of the preliminary hearing," which is to be held within 24 hours after the child has been taken into custody, and a petition is to be prepared and submitted to the court. MCR 3.921(B)(1); MCR 3.963(C); MCR 3.965(A)(1). If the child is in protective custody when the petition is filed, the procedures afforded at the preliminary hearing provide due process to the respondent-parents. They are informed of the charges against them and the court may either release the child to the respondent-parents or order alternative placement. MCR 3.965(B)(4) and (12)(b). Before ordering alternative placement, "the court shall receive evidence, unless waived, to establish that the criteria for placement . . . are present. The respondent shall be given an opportunity to cross-examine witnesses, subpoena witnesses, and to offer proof to counter the admitted evidence." MCR 3.965(C)(1). Thus, the respondent-parents are given notice of the proceedings and an opportunity to be heard before the child can remain in protective custody.
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> For the court to continue the child in alternative placement and "exercise its full jurisdiction authority," it must hold an adjudicatory hearing at which the factfinder determines whether the child comes within the provisions of [MCL 712A.2(b)]. . . . Once jurisdiction is obtained, the case proceeds to disposition "to determine what measures

the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . ." MCR 3.973(A).

* * *

The essence of respondent's argument on appeal is that the one parent doctrine violates the nonadjudicated parent's due process rights by depriving him of custody of his children without a determination that he is an unfit custodian, as would be established at the adjudicatory hearing. Respondent's argument conflates the adjudicatory and dispositional phases of the proceedings. The adjudicatory phase determines whether a child requires the protection of the court because he or she comes within the parameters of [MCL 712A.2(b)]. If the child comes within the scope of [MCL 712A.2(b)], the trial court acquires jurisdiction and "can act in its dispositional capacity." It is at the dispositional hearing that the court determines "what measures [it] will take with respect to a child properly within its jurisdiction[.]" MCR 3.973(A). It can issue a warning to the parents and dismiss the petition, MCL 712A.18(1)(a), place the child in the home of a parent or a relative under court supervision, MCL 712A.18(1)(b), or commit the child to the DHS for placement, MCL 712A.18(1)(d) and (e). Before the court determines what action to take, the DHS must prepare a case service plan, MCL 712A.18f(2), and the court must "consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition." MCL 712A.18f(4). See, also, MCR 3.973(E)(2) and (F)(2). If the DHS recommends against placing the child with a parent, it must "report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home," MCR 3.973(E)(2), and identify the likely harm to the child if separated from or

returned to the parent. MCL 712A.18f(1)(c) and (d). The parent is entitled to notice of the dispositional hearing, MCR 3.921(B)(1)(d), and the parties are entitled to an opportunity "to examine and controvert" any reports offered to the court and to "cross-examine individuals making the reports when those individuals are reasonably available." MCR 3.973(E)(3).

If the child is removed from the home and remains in alternative placement, the court must hold periodic review hearings to assess the parents' progress with services and the extent to which the child would be harmed if he or she remains separated from, or is returned to, the parents. MCL 712A.19(3) and (6); MCR 3.975(A) and (C). The court must "determine the continuing necessity and appropriateness of the child's placement" and may continue that placement, change the child's placement, or return the child to the parents. MCL 712A.19(8); MCR 3.975(G). Before making a decision, the court must "consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.975(E). If the child remains out of the home and parental rights have not been terminated, the court must hold a permanency planning hearing within 12 months from the time the child was removed from the home and at regular intervals thereafter. MCL 712A.19a(1); MCR 3.976(B)(2) and (3). The purpose of the hearing is to assess the child's status "and the progress being made toward the child's return home[.]" MCL 712A.19a(3). At the conclusion of the hearing, the court "must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See, also, MCL 712A.19a(5). In making its determination, "[t]he court must consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant

and material evidence at the hearing." MCR 3.976(D)(2). Further, "[t]he parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." *Id*. As with the initial dispositional hearing, each parent is entitled to notice of the dispositional review and permanency planning hearings and an opportunity to participate therein. MCR 3.920(B)(2)(c); MCR 3.975(B); MCR 3.976(C).[15]

These provisions, taken together, satisfy the requirements of due process. The parent is entitled to notice of the dispositional hearing and an opportunity to be heard before the court makes its dispositional ruling. When it is recommended that the child not be placed with a parent, the court must consider whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Once the court determines that the child should not be placed with the parents, it may continue the child in alternative placement or return the child to the parents depending on the circumstances of the parents and the child, again considering whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Respondent does not contend that these procedures were not followed here. [Emphasis added; alterations in original except those inserting citations.][16]

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[15] As explained in *Camp*, unpub op at 2 n 1:

> Respondent is additionally protected by the different standards of proof applicable at a dispositional hearing. "The parent who has been subject to an adjudication . . . can have [his or] her parental rights terminated on the basis of all the relevant and material evidence on the record, including evidence that is not legally admissible. In contrast, the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication." [Citation omitted; alteration in original.]

[16] See also *Slater/Weimer*, unpub op at 3 (opinion by MARKEY, J.), which explained:

Given the protections afforded to parents by the provisions discussed above, "the risk of an erroneous deprivation" of a parent's interest, if any, is minimal.

As discussed more later, I believe that I reach a different result than the majority opinion partly because while the majority opinion only fleetingly acknowledges the interests of the children, I believe this to be the most important interest at issue here. The other reason we reach different results, in my opinion, is attributable to the majority opinion's erroneous as-

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> [R]espondent cannot establish an erroneous deprivation of her liberty interest in caring for her children because before the trial court is authorized to take further action after adjudication, a respondent is entitled to receive additional procedural safeguards during the dispositional phase of the proceedings. For instance, and contrary to respondent's claims, the adjudication phase of the proceedings does not require the trial court to remove a child from the parent's home. See MCL 712A.18(1)(a), (b). And, during the dispositional phase of the proceedings, if petitioner recommends against placing the child with her parent, petitioner "shall report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the children from the home." MCR 3.973(E)(2). *Hence, the subsequent removal of a child from her parent's home during the dispositional phase involves a finding that the parent is unfit.* Further, before respondent's parental rights can be terminated, she is entitled to a number of additional procedural protections during the dispositional phase of the proceedings, such as dispositional review hearings, the implementation of a case services plan, parental visitation, and findings as to whether continued placement outside of the home is necessary to protect the children. *In re CR*, 250 Mich App at 201-202. See also MCR 3.973(F). And, a respondent is entitled to notice of all dispositional hearings, MCR 3.921(B)(1)(d), as well as an opportunity "to examine and controvert written reports" submitted to the trial court by petitioner and to "cross-examine individuals making the reports when those individuals are reasonably available," MCR 3.973(E)(3). *Further still, the trial court is not to presume during this time that the parent is unfit.* See *In re Mason*, 486 Mich 142, 168; 782 NW2d 747 (2010). Therefore, because respondents are given notice and an opportunity to be heard before the children are placed outside of the home or parental rights are terminated, we find that the one-parent doctrine does not violate a respondent's right to procedural due process. [Emphasis added.]

sumptions that "[t]he [adjudication] trial is the only fact-finding phase regarding parental fitness," "[t]he statutes and court rules governing the dispositional phase . . . simply do not demand any fitness determination," and "[t]here is no presumption of fitness in favor of the unadjudicated parent." This is not accurate. As addressed earlier, the statutory provisions and court rules, as they should, presume that parents are fit and require the state to prove a parent's unfitness before the state can remove a child from a parent's custody. See, for example, MCL 712A.18f(1)(c) and (d) and (4) and MCR 3.973(F)(2), which only allow the court to remove a child from a parent's custody if doing so would be "necessary in the interest of the child," after considering the "[l]ikely harm to the child if the child were to be separated from his or her parent" and the "[l]ikely harm to the child if the child were to be returned to his or her parent," and even then requires the court to specify in the order what "reasonable efforts have been made to prevent the child's removal from his or her home . . . ."[17] In addition, the state must prove that a

[17] Laird's counsel has authored a thoughtful article in which he proposes a "policy solution that balances the constitutional rights of the nonoffending parent with the interests of the child and the other parent." Sankaran, 82 Temp L Rev at 70. The following is his proposed solution:

> My proposed solution consists of two guiding principles. First, a juvenile court must be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent. This authority is essential to ensuring that the court has the ability to issue orders to remedy the abuse or neglect by the offending parent. Second, in order to respect the constitutional rights of the nonoffending parent, the court's power should be limited. While the case is ongoing, absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent. [*Id*. at 84.]

In my opinion, this proposed solution is fully consistent with existing Michigan law because under that law, as discussed earlier, the court is "afforded the flexibility to assume jurisdiction over a child based on

parent *remains* unfit in order for the state to continue depriving a parent of his or her right to the custody of his or her child. See, for example, MCL 712A.19(6)(d) and (e) and (8), which requires the court to "determine the continuing necessity and appropriateness of the child's placement" after considering the "[l]ikely harm to the child if the child continues to be separated from the child's parent" and the "[l]ikely harm to the child if the child is returned to the child's parent." See also MCL 3.975. Finally, "[a] permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return home . . . ." MCL 712A.19a(3). If "the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent." MCL 712A.19a(5); see also MCR 3.976(E)(2).[18]

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findings of maltreatment against one parent," but "absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent." *Id*. However, Sankaran then proceeds to argue that a finding of unfitness would first require "the filing of a petition against the nonoffending parent, which would then trigger all the procedural protections available under state law." *Id*. at 85. In other words, he argues that a finding of unfitness must occur during the adjudicative phase of the proceedings, rather than during the dispositional phase. However, neither Sankaran nor the majority opinion nor anyone else of whom I am aware has identified any support for this proposition—that is, the proposition that the Constitution demands that a finding of unfitness occur during the adjudicative phase. Once again, it is important to remember that the issue before this Court is not whether requiring a finding of unfitness to be made during the adjudicative phase would be a *wise* policy decision, only whether the *Constitution* requires that this finding be made during that phase.

[18] The majority opinion, although it apparently recognizes that the permanency planning hearing statute, MCL 712A.19a(5), requires a finding of unfitness, proceeds to state "that there is no similar require-

While I agree with the majority opinion that the state, absent exigent circumstances,[19] cannot remove a child from a parent's custody or otherwise interfere with a parent's parental rights without first finding that the parent is unfit, I do not believe that our current statutory scheme, encompassing as it does the one-parent doctrine, allows the state to do so.[20] As discussed earlier, " '[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Advisory Opinion*, 490 Mich at 307 (citation omitted). Accordingly, if it is possible to reasonably

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ment during the earlier dispositional hearings . . . ." Thus, in this regard, it fails to recognize that the statutes cited previously, MCL 712A.18f and MCL 712A.19, include "similar requirement[s] during the earlier dispositional hearings."

[19] See MCL 712A.14a(1), which allows the state to immediately take a child into protective custody "[i]f there is reasonable cause to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's removal from those surroundings is necessary to protect the child's health and safety . . . ." See also MCL 712A.14b(1)(a).

[20] The majority opinion also argues that "[a]bsent some fact-finding regarding that parent's alleged neglectful or abusive conduct, . . . the DHS cannot reasonably be expected to formulate an individualized plan, resulting in unadjudicated parents being ordered to comply with potentially unnecessary and costly service plans." The majority opinion's concern is premised on its erroneous assumption that the court can order a parent to comply with a service plan without first considering what services are necessary. However, MCL 712A.6 expressly states that the court "may make orders affecting adults as in the opinion of the court are *necessary* for the physical, mental, or moral well-being of [the child] under its jurisdiction." (Emphasis added.) In addition, MCL 712A.18f(4) states that "[t]he court may order compliance with all or any part of the case service plan as the court considers *necessary*." (Emphasis added.) Therefore, contrary to the majority opinion's suggestion, the trial court cannot order a parent to comply with "unnecessary" or arbitrary service plans. Instead, the service plan must be determined to be *necessary* to serve the best interests of the child, over whom jurisdiction has already been obtained by the court. Indeed, even Laird himself does not argue that he was ordered to comply with an "unnecessary" service plan.

construe statutes to avoid unconstitutionality, it is this Court's duty to do so. *Evans Prods Co v State Bd of Escheats*, 307 Mich 506, 548; 12 NW2d 448 (1943) ("We are compelled to construe Act No. 170, in accordance with well-defined rules of statutory construction, in such manner as to avoid constitutional pitfalls, if this can be reasonably done within the legislative intent."). Because I believe it is possible to reasonably construe the statutes (as well as the court rules) at issue here to avoid unconstitutionality, it is our obligation to do this. See *Hooper v California*, 155 US 648, 657; 15 S Ct 207; 39 L Ed 297 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). It is entirely reasonable to construe the pertinent statutes and court rules as requiring a finding of unfitness before the state can interfere with parental rights.[21] Although these

[21] While the majority opinion relies on its "duty to interpret [the law] as being constitutional whenever possible" to reject the Court of Appeals' interpretation of the law in *CR*, which the majority opinion views as "grant[ing] trial courts unfettered authority to enter dispositional orders," it fails to give any consideration to this same "duty to interpret [the law] as being constitutional whenever possible" when it rejects the Court of Appeals' interpretation of the law in *Mays II*, which requires a finding of unfitness before the state can interfere with parental rights. See *ante* at 418 n 14 ("The [law] governing the dispositional phase . . . simply do[es] not demand any fitness determination."). If the majority opinion believes that it has such a "duty," is it truly not even reasonably *possible* to interpret the law as requiring a finding of unfitness when several Court of Appeals panels have been readily capable of doing so? If the majority opinion would apply its "duty" with consistent force, it would be far more likely to reach the same conclusion as the Court of Appeals that the law does not grant an "unfettered authority" to enter dispositional orders because those orders must be "*necessary* for the physical, mental, or moral well-being of [the child] under [the court's] jurisdiction," MCL 712A.6, and there must be a finding of unfitness before the state can intervene because MCL 712A.18f(1)(c) and (d) and (4) and MCR 3.973(F)(2) only allow the removal of a child from a parent's custody where doing so is "necessary in the interest of the child," after consid-

statutes and court rules do not require this finding of unfitness to be made during the adjudicative phase of the proceedings, I see nothing in the Constitution that would require such a finding to be made during that particular phase. Therefore, unlike the majority opinion, I do not find it necessary to strike down as unconstitutional any of the pertinent statutes and court rules. "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged" by "we the people" to adopt fair procedures—the Legislature—"that the procedures they have provided assure fair consideration . . . ." *Mathews*, 424 US at 349. The majority opinion, as far as I can see, does not accord any weight to the good-faith judgments of the Legislature, and instead of presuming that the statutes and court rules at issue are constitutional, it presumes from the very beginning the opposite, which is yet another reason why I reach a different result.

The fairness of the procedures adopted by the Legislature is well demonstrated by the particular facts of this case. As Laird concedes, the court properly exercised jurisdiction over the children given the mother's no-contest plea. At this point, the children were placed with Laird and it was only after he tested positive for cocaine that the children were removed from his care. In other words, Laird was not presumed unfit. Instead, he was clearly presumed fit; otherwise the children would never have been placed with him to begin with.[22]

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ering the "[l]ikely harm to the child if the child were to be separated from his or her parent" and the "[l]ikely harm to the child if the child were to be returned to his or her parent," and further require the court to specify what "reasonable efforts have been made to prevent the child's removal from his or her home . . . ."

[22] Indeed, at oral arguments, Laird's counsel conceded that "[t]he state did presume that he was fit."

However, Laird then *proved* himself to the DHS and the trial court as being unfit by testing positive for cocaine. See *Farris*, unpub op at 7 ("Though a trial court may not presume that a parent is unfit, Farris's conduct throughout the course of this case demonstrated that he was *not* a fit parent.") (citation omitted). It was only at this point that the decision to place the children with Laird was reevaluated—at the point at which the court became aware that Laird had tested positive for cocaine, had been arrested for distributing cocaine,[23] had stopped participating in random drug screens, had been getting high with the children's mother, and had allowed the children's mother to have contact with the children even though the DHS had told him not to allow her to have such contact.[24] Laird lived with his mother and there were concerns about her as well, including significant mental health issues, as well as a history of interaction with the DHS. There was also no available bedroom for the children at Laird's mother's house, the court was aware that Laird remained on probation for domestic violence, and the court knew that the psychologist who had conducted an evaluation of Laird had concluded that

> [i]t does not appear that Mr. Laird is a candidate for reunification with his young children based on his violent history, the fact that he denies his entire history of violence and takes absolutely no responsibility for it, his substance abuse issues and his severe psychopathology. He has no

[23] More recently, Laird was convicted in federal court of conspiracy to distribute more than 500 grams of cocaine and thus is currently imprisoned and unable to take custody of the children. However, I agree with Laird and the majority opinion that this fact does not render this case moot because incarcerated parents still have a constitutionally protected interest in the "management of their children."

[24] According to the mother, she was spending every night with Laird and the children.

> insight into his own functioning, and sees no need to change anything about himself as he believes he is good the way he is and that other people simply need to realize what he believes.

The court considered all this information, including Laird's own testimony, and decided that Laird was, at least temporarily, an unfit parent. Because this determination was made (a determination that Laird does not even contest), the trial court had the requisite authority to place the children with someone other than Laird and to order him to comply with a service plan in order to regain custody of his children.

Laird argues that the trial court had to "adjudicate" him in order to find him unfit, and the majority opinion agrees with him in this regard. Laird and the majority opinion rely heavily on *Stanley*, 405 US at 649, which held that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him . . . ." Stanley was an unwed father who cared for his children until the children's mother died, at which point the state took his children away from him on the basis of an Illinois law that provided that the children of unwed fathers become wards of the state upon the death of the mother. The United States Supreme Court held that this law violated Stanley's right to due process because parents are entitled to a hearing on their fitness before their children can be taken away. The state cannot simply presume that all unwed fathers are unfit parents. However, *Stanley* never specified what *type* of hearing must be convened. Therefore, Laird's reliance on *Stanley* for the proposition that he is constitutionally entitled to a jury trial during the adjudication phase of a child-protective proceeding is misplaced. *Stanley* merely held that a hearing is required, and in the instant case *multiple* hearings were held regarding the

placement of Laird's children.[25] The children were initially placed with him because he was presumed to be a fit parent (unlike Stanley), but when his drug problems resurfaced, the children were removed from his care.[26] This removal, and whether this removal should continue, i.e., Laird's fitness as a parent, was the subject of multiple hearings—the November 16, 2011 preliminary hearing, the January 11, 2012 pretrial hearing, the February 7, 2012 adjudication hearing, the February 22, 2012 dispositional hearing, the May 2, 2012 dispositional review hearing, the August 22, 2012 dispositional review hearing, and the September 5, 2012

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[25] Contrary to the suggestion of the majority opinion, *Stanley* did not hold that a parent is entitled to a jury trial on the issue of his or her fitness as a parent. Indeed, the United States Supreme Court has explicitly held that "trial by jury in the juvenile court's adjudicative stage is *not* a constitutional requirement." *McKeiver v Pennsylvania*, 403 US 528, 545; 91 S Ct 1976; 29 L Ed 2d 647 (1971) (emphasis added). Furthermore, as explained earlier, although Laird did not have a right to a jury trial, he *did* have a right to a hearing in which he was allowed to introduce "[a]ll relevant and material evidence," including "any written or oral information concerning the child from the child's parents," MCR 3.973(E)(2), to "examine and controvert written reports" offered to the court, MCR 3.973(E)(3), and to "cross-examine individuals making the reports when those individuals [were] reasonably available," *id*.

[26] As explained by the Court of Appeals in *Slater/Weimer*, unpub op at 3-4:

> The case at bar is distinguishable because unlike in *Stanley*, the one-parent doctrine does not presume that parents are unfit. Rather, the doctrine permits the trial court to exercise jurisdiction over children because petitioner established that the children were abused or neglected. Furthermore, before parents are declared unfit under the one-parent doctrine, they are . . . afforded certain procedural protections during the dispositional phase of the proceedings. Thus, *Stanley* is inapposite.

Stanley merely held that a parent must be presumed to be a fit parent and that a parent is entitled to a hearing before being deemed unfit, and that is exactly what happened in the instant case.

hearing on the motion for immediate placement. As explained by the trial court:

> Here, just as in *In re CR*, the father has been involved in all court proceedings since the inception of the petition. He has been provided with appointed counsel, he has been informed of the conditions that necessitated removal (including domestic violence and drug abuse) and he has been offered services to address these conditions. No action has been taken to terminate his parental rights, which would necessarily require that a supplemental or amended petition be filed. He most certainly would be entitled to a trial before his parental rights could be terminated. At that trial his parental rights could be terminated only upon clear and convincing evidence that a statutory basis exists for termination.

3. THE BURDENS OF ADDITIONAL PROCEDURAL SAFEGUARDS

"[T]he final factor to be considered is the public interest." *Mathews*, 424 US at 347. "[T]he interest of the state as *parens patriae* is for the welfare of the child." *Brock*, 442 Mich at 112-113. "[T]he State has an urgent interest in the welfare of the child . . . ." *Lassiter v Dep't of Social Servs of Durham Co*, 452 US 18, 27; 101 S Ct 2153; 68 L Ed 2d 640 (1981).[27] "The state's interest in protecting the child is aligned with the child's interest to be free from an abusive environment." *Brock*, 442 Mich at 113 n 19. That is, the child's interest and the state's interest overlap and are both relevant considerations in the due process analysis. Given this overlap, it is difficult, if not impossible, to consider the state's interest without at the same time considering the child's interest. Therefore, both the

[27] In *Lassiter*, 452 US at 31, the United States Supreme Court held that the Constitution does not require the appointment of counsel in every proceeding to terminate parental rights.

state's interest and the child's interest must be taken into account when considering this final factor. See *Santosky*, 455 US at 766 ("Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.").

" 'The child has an interest in the outcome of the fact-finding hearing independent of that of the parent.' " *Brock*, 442 Mich at 113 n 19 (citation omitted).[28] Children have an interest in being protected from abusive and neglectful parents. And "the state has a legitimate interest in protecting children who are neglected or abused by their parents." *Mays II*, unpub op at 2. "[I]n child abuse proceedings, 'the rights of parents are a most essential consideration, but we further recognize that the best interests and welfare of the child outweigh all other considerations.' " *Brock*, 442 Mich at 114 (citation omitted). Parents "have an important liberty interest in the management of their children that is protected by due process. However, the child's

[28] Although the majority opinion addresses at length the *parental* interests involved in this case, it mentions in only the most peremptory way, in a footnote, that there is also the *child*'s interest, which is an indispensable part of the constitutional due process analysis in this case. These differing approaches go to the heart of our differing constitutional conclusions. That is, while the majority opinion believes the most important (if not the exclusive) constitutional interest involved is that of the parent, I respectfully believe the most important (albeit not the exclusive) constitutional interest involved is that of the child. In a perfect world, these interests would invariably be aligned. However, in the highly imperfect world from which child-protective cases tend to come—arising out of often highly dysfunctional households—this is not necessarily true, and in such cases, I believe the child's interests must be viewed as paramount, specifically the child's interest in the due process analysis required by *Mathews*, in which the child's interests are given consideration in *conjunction* with the interests of the parent.

welfare is primary in child protective proceedings." *Id*. at 114-115. "[T]he paramount purpose of the juvenile section of the Probate Code is to provide for the well-being of children." *In re Macomber*, 436 Mich 386, 390; 461 NW2d 671 (1990). "One significant feature common to all child custody cases, regardless of the procedural label, is this Court's insistence upon the child's best interest prevailing as the predominant, if not sole, judicial concern." *In re Ernst*, 373 Mich 337, 361; 129 NW2d 430 (1964). " 'We recognize the long-established rule that the best interest of the child is of paramount importance and that it is our judicial duty to safeguard his welfare and care.' " *Id*. at 369 (citations omitted). "The paramount question under the law in all cases of this character is the welfare of the child. All other considerations must yield to this one." *Id*. at 370 (citations and quotation marks omitted).

Because "the risk of an erroneous deprivation" of a parent's interest is already minimal with the current procedures in place, the added or marginal value, if any, that would be served by requiring both parents to be adjudicated before the court could proceed to the dispositional phase is considerably outweighed by the added burdens that would be imposed on the state and children. As even the majority opinion recognizes, "[t]here is no doubt that requiring adjudication of each parent will increase the burden on the state . . . ." See *Mathews*, 424 US at 335 (stating that "the probable value, if any, of additional or substitute procedural safeguards" as well as the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail" should be considered when determining what process is due). This is far less important, however, than the fact that any added or marginal value of the new safeguards would be considerably outweighed by the additional burdens on the

children involved. See *id.* at 347 (stating that "the administrative burden and other *societal costs* that would be associated with requiring [the additional or substitute procedural requirement], as a matter of constitutional right," should also be considered) (emphasis added). Once it has been determined following a jury trial that a child has been abused or neglected by one parent, that child should not have to wait for a secure placement until it has been determined, following an additional jury trial, that the other parent—most particularly one who has actually resided in the same household as the abusing or neglecting parent—is implicated in the same abuse or neglect.

Abolishing the one-parent doctrine, as the majority opinion does today, will cost the state in terms of time, financial resources, and social-services manpower because it will now have to adjudicate both parents as unfit before it can even *exercise jurisdiction* over abused and neglected children.[29] However, this is the least of the burdens imposed by judicial abolition of the doctrine. Rather, it is the additional costs and burdens that will now be placed on abused and neglected children themselves that is most troubling. These children, who are in the greatest need of expedited public protection, may eventually be afforded that protection, but considerably less quickly because a parent (again, most particularly a parent who has resided in the same household as the adjudicated and unfit parent) will for the first time

[29] Once again, this jurisdictional determination is altogether *distinct* from any actual termination of parental rights or even from any determination that a parent is not entitled to custody pending further proceedings.

become constitutionally entitled to a jury trial.[30] Because I do not believe the latter is required by our Constitution, and because it is obvious that this will ensure that a child will remain for a longer time with the unadjudicated parent who may have resided in close proximity with the adjudicated and unfit parent, I respectfully dissent.[31] Although I agree with the majority opinion that *all* parents are entitled to due process in the child-protective context, with the presumption of fitness and the burden of proof to the contrary resting on the state, I see no constitutional barriers to the long-established procedures in this state in guaranteeing that such a fitness determination is fairly made.[32]

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[30] The majority opinion disputes that it has "found a constitutional right to a jury trial in child protective proceedings." Instead, it "simply hold[s] that due process requires a specific adjudication of a parent's unfitness . . . ." Never mind that the majority's "specific adjudication of a parent's unfitness" is necessarily and always a jury trial. Although the majority is correct that "[t]he right to a jury is granted by statute," *this* specific right only applies to the adjudication of the first parent, in the course of which the state may obtain jurisdiction over the abused or neglected child. By holding that the Due Process Clause of the Constitution requires that the *second* parent of the abused or neglected child is also entitled to a jury trial, rather than to any other form of due process, the majority has not only expanded a statutory "right," but transformed it into a constitutional right.

[31] I am cognizant that the instant case does not involve two parents living in the same household with the children, but the majority's abolition of the one-parent doctrine will apply in that situation just as much as it applies to the instant situation. That reality is precisely what is signified by the regular inquiries of justices at oral argument about the legal rules and principles that attorneys would offer for the resolution of their cases that are equally appropriate in the next "one hundred" cases of the same kind.

[32] I am cognizant that the state can immediately take a child into protective custody "[i]f there is reasonable cause to believe that a child is at *substantial* risk of harm or is in surroundings that present an *imminent* risk of harm and the child's removal from those surroundings is *necessary* to protect the child's health and safety . . . ."

While the majority opinion recognizes that "requiring adjudication of each parent will increase the burden on the state," it does not acknowledge the greater risk that the formal adjudication it requires of each parent will increase the burdens on the abused or neglected child, who may remain in an unsecure position for a prolonged period. Just as the majority opinion's failure to recognize that the current procedural requirements adequately protect parents' rights has caused it to conclude that the risks of erroneously depriving parents of their rights are great, its failure to recognize that requiring adjudication of each parent will increase the burden on abused and neglected children has caused it to conclude that the additional burdens that will be imposed as a result of requiring adjudication of each parent are minimal. This in turn has caused the majority opinion to conclude that "those burdens do not outweigh the risks associated with depriving a parent of [his or her] right[s] . . . ." When the risks and the burdens are calculated more realistically, I believe it is clear that the latter considerably outweigh the former. As explained earlier, the risks are low because the Legislature has already adequately afforded a range of protections for parental rights, while the burdens are high because abused and neglected children in many cases will be left for significantly longer periods of time than are necessary in the care of a parent who may ultimately be proved unfit. While I agree with the majority opinion that "constitutional rights do not always come cheap," I do not agree that there is any constitutional right to a jury trial in the instant context;

MCL 712A.14a(1) (emphasis added). See also MCL 712A.14b(1)(a). However, not all children who are in need of protection will be readily able to qualify for protection under these demanding standards, and it is *these* children about whom I am most concerned.

while the parent of an abused or neglected child has an undeniable right to due process, this can take many reasonable forms.

4. SUMMARY

Given (a) the interest of children in being protected from abusive and neglectful parents, (b) the public's legitimate interest in protecting children from abusive and neglectful parents, (c) the fact that Laird was only deprived of a trial during the initial phase of the child-protective proceedings, which simply determines whether the trial court possesses jurisdiction over the children, (d) the fact that Laird's rights to his children were adequately protected during the child-protective proceedings, and (e) the significant costs that would be inflicted on abused and neglected children of this state by entitling both parents to a trial on their unfitness before allowing the state to intervene to protect these children, I do not believe that Laird's constitutional rights to due process were violated by depriving him of a trial at the adjudicative phase of the process.[33]

In summary, I *agree* with the majority opinion that (a) pursuant to MCL 712A.2(b), "once there has been *an* adjudication, either by trial or by plea, the court has jurisdiction over the child regardless of whether one or both parents have been adjudicated unfit"; (b) "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due

[33] Laird also argues that his equal protection rights were violated. However, he failed to raise this issue at the trial court, and thus this issue is not properly before this Court. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("[A] litigant must preserve an issue for appellate review by raising it in the trial court. . . . [G]enerally a failure to timely raise an issue waives review of that issue on appeal.") (citation omitted).

process"; (c) "there is a presumption that fit parents act in the best interests of their children"; (d) "all parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," except that "[i]n the case of an imminent threat of harm, the state may take the child into custody without prior court authorization or parental consent"; (e) "the state has a legitimate and important interest in protecting the health and safety of minors"; (f) "requiring adjudication of each parent will increase the burden on the state"; (g) "constitutional rights do not always come cheap"; and (h) "Laird's complaint is not moot." (Citations and quotation marks omitted.) However, for the reasons set forth in this opinion, I respectfully *disagree* with the majority opinion's conclusion that both parents are constitutionally entitled to a jury trial on their fitness before children can be removed from their custody and placed within the protective jurisdiction of the court.

5. THE CRUX OF THE PROBLEM

Concerning due process, it is always possible to extend additional procedural rights and entitlements to persons who come into contact with the government, as criminal defendants, public employees, consumers of public services, regulated parties, recipients of social-services benefits, or parents of abused and neglected children. Additional hearings and additional appeals can always be convened, more protective rules of evidence can always be prescribed, and broader compliance with ever finer details of process can always be required. There is simply no end to the argument that "fairness" requires something more, and there is little specificity in the Due Process Clause that either sustains or refutes most such arguments.

It is for this reason that the principle of deference to the constitutional judgments of the legislative and executive branches is of critical importance here. The threshold "presumption of constitutionality" of laws and rules enacted by the accountable branches of government is not a principle of jurisprudence deserving of mere passing reference, but, particularly in realms such as that of due process in which the constitutional text is so relatively open-ended and arguably compatible with alternative understandings of "fairness," it is a presumption necessary to ensuring that the judgments of the people and their elected representatives are not casually replaced by the contrary judgments of the judiciary.

What lies at the heart of the "presumption of constitutionality" is that the burden of persuasion rests heavily with the party seeking to upend the legal status quo to compellingly demonstrate that the people's elected representatives have erred in their understanding of the Constitution, and thus that the extraordinary power of judicial review should be exercised to strike down what has been enacted in the course of republican governance. As the breadth and open-endedness of a constitutional provision becomes increasingly pronounced, this does not become a warrant for the exercise of judicial discretion and intervention, but instead a warrant for the exercise of judicial deference—a respect for a broad range of judgments on the part of the legislative and executive branches. For when it is uncertain whether the people's representatives have acted within the purview of the Constitution, when people can reasonably disagree about whether a particular procedure is or is not required by due process, it is *then* that the "presumption of constitutionality" becomes most important. Otherwise, the presumption is little more than cant, mere formalism, as opposed to

a genuine limitation on the exercise of judicial power within our constitutional architecture of separated powers.

The "presumption of constitutionality," if it means anything, signifies that the burden rests upon the *judiciary*, as a precondition to the invalidation of a law enacted through the representative process, to affirmatively demonstrate incompatibility of that law with the Constitution. It is not the people's obligation to demonstrate constitutionality, but the judiciary's obligation to demonstrate the contrary. It is simply not enough that a tribunal believes that it would be "better" to do things differently than the people have chosen. Rather, it is the court's obligation to establish that under no reasonable understanding of the Constitution could it countenance what the people have understood it to countenance.

What is further implicit in the "presumption of constitutionality" is that the legislative and executive branches must be viewed as no less committed than the judicial branch to upholding the Constitution, the principles of which include that citizens who interact with the government must be treated fairly and in accordance with the requirements of due process. Legislators, governors, and members of the cabinet each take an oath to support the Constitution, just as do judges. And it must be presumed that because the former are reasonably capable of *reading* the Constitution—a document never intended to be the exclusive province of lawyers and judges, but intended to be accessible to all citizens—legislators, governors, and members of the cabinet are also reasonably capable of *comprehending* their obligations under the Constitution, and reasonably capable of *acting* in accordance with these obligations. All of this is implied by the "presumption of constitutionality," and it is a presumption, if the sepa-

ration of powers is to be maintained, that must be taken seriously when the representatives of the people act on behalf of those in whose name the Constitution was ratified.

And for at least 70 years, not only have the legislative and executive branches of this state acted to protect the interests of abused and neglected children through the enactment of laws that have *allowed* for the one-parent doctrine, but the judicial branch itself during this time has understood the laws underlying this doctrine to be fully constitutional, regularly reviewing and applying their provisions in countless numbers of cases involving abused and neglected children and their parents. No court of this state has previously understood these laws to run afoul of the supreme law of the land or of our state. At least not until today, when the people and their representatives have been newly informed that "fairness" now requires something considerably more.

What is it today that accounts for the nullification of the one-parent doctrine and (although it does not expressly say so) the laws that form this doctrine? What is it today that accounts for the conclusion that the accountable branches, as well as the judiciary, have for all these years erred by believing that the protections and guarantees conferred by our laws on the parents of abused and neglected children were sufficient under the Constitution? Is there some newly minted decision of the United States Supreme Court that has now compelled these conclusions? None that the majority opinion identifies. Are there new statutes or amendments that have been enacted by our Legislature that now warrant these results? Again, none that are cited. Are there new executive-branch policies or child-protective measures that have been introduced that now require these changes? None that are referred to. And is there

any suggestion whatsoever that there has been some miscarriage of justice in the present case, or more generally that there have been injustices regarding our state's treatment of parents of abused and neglected children, or indeed even a *single* case indicative of serious shortcomings in this process? The majority opinion apprises us of none.

The majority opinion likely presages that this will be the first of many decisions of this Court elaborating ever more finely on what "fairness" requires in the context of the parents of abused and neglected children. There is no principled stopping point articulated that raises any barrier to future case-by-case-by-case expansions of due process. And as invariably tends to occur when matters that were once the subject of representative decision-making become "constitutionalized," there will be a long line of future decisions in which additional procedures, details, and hearings are successively layered on the child-protective process by the judiciary, ever more closely perhaps tracking the procedures, details, and hearings of the criminal justice process. As a result, the final disposition and placement of abused and neglected children will become increasingly delayed by trials and legal procedures, requiring, despite every justice's obvious solicitude for their interests, that abused and neglected children remain for extended periods in what child-protective workers might understandably view as a less-than-secure environment. And also as a result, the judgments of legislatures and governors, reached after committee and administrative hearings, the testimonies of witnesses of a wide variety of viewpoints, public debates inside and outside the chambers of government, and even occasionally after elections, will be replaced by the determinations of appellate judges, in which each new procedure, detail, and hearing becomes an issue of

"constitutional right" and "entitlement." And thus once again, the realm of the lawyer and the judge expands, and the realm of ordinary citizens and those elected to represent them diminishes.

Our legislative and executive branches have adopted a broad array of procedures in support of the due process rights of the parents of the abused or neglected child. In the present case, Laird was afforded notice of multiple proceedings, an attorney to represent his interests at these proceedings, and an opportunity to be heard at these proceedings. Yes, more procedures, more details, more hearings, and more "constitutional" guarantees could doubtlessly be constructed by this Court, but again it is always possible to fill in the blanks of the Due Process Clause with more "rights" and "guarantees," albeit at some point only at a cost to other legitimate rights and interests, in this case those of the abused or neglected child. The majority opinion is quite correct in recognizing that constitutional rights "do not always come cheap." However, it is for precisely that reason—that there are, in fact, *costs* to the devising of new constitutional rights—that a Court should take the utmost care, and exercise the utmost judicial humility, in deferring to the judgments and expertise of those public actors best equipped to reasonably balance the interests of abused and neglected children and their parents coming from seriously dysfunctional homes. And it is for the same reason that this Court should exercise the utmost care, and exercise the utmost judicial humility, in ensuring that any new expression of "constitutional rights" is genuinely grounded in the text and history of the Constitution and that the contrary judgments of the Legislature and the Governor are equally genuinely incompatible with that Constitution. Precisely because constitutional rights "do not always come cheap," this Court should seek to

ensure that the "presumption of constitutionality" is faithfully honored to the point at which it can be genuinely said that the costs incurred by a new "constitutional right" must be incurred because that is what the Constitution *compels*, and the Constitution compels nothing *less*.

IV. CONCLUSION

For these reasons, I would affirm the trial court and hold that *In re CR* correctly held that the one-parent doctrine, which has been a part of our statutory scheme for more than 70 years, is not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Legislature has adequately protected the due process rights of a parent of an abused or neglected child (a child whose other parent has already been adjudicated unfit) by requiring a hearing on the parent's fitness before the state can interfere with his or her parental rights.

VIVIANO, J., concurred with MARKMAN, J.

MAKOWSKI v GOVERNOR

Docket No. 146867. Argued December 11, 2013 (Calendar No. 4). Decided June 3, 2014.

Matthew Makowski filed an action in the Court of Claims against the Governor and the Secretary of State, seeking a declaratory judgment and injunctive relief to reverse then Governor Jennifer Granholm's decision to revoke her commutation of plaintiff's nonparolable life sentence that had been imposed for his first-degree murder and armed robbery convictions. The Governor had signed the commutation on December 22, 2010, after which it was signed by the Secretary of State and affixed with the Great Seal; however, four days later, the Governor decided to revoke the commutation order, and all copies of the commutation certificate were destroyed. Plaintiff alleged that the commutation was final when it was signed, sealed, and delivered to the Department of Corrections, and argued that the Governor lacked the authority to revoke a completed commutation. The court, Richard D. Ball, J., granted defendants' motion for summary disposition, concluding that it lacked jurisdiction to review the governor's exercise of discretion over commutation decisions. Plaintiff appealed. The Court of Appeals, O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ., affirmed, holding that the Governor's exercise of the commutation power presented a nonjusticiable political question. 299 Mich App 166 (2012). The Supreme Court granted plaintiff's application for leave to appeal. 494 Mich 876 (2013).

In an opinion by Justice CAVANAGH, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, AND VIVIANO, the Supreme Court *held*:

The interpretation and exercise of the Governor's powers under Const 1963, art 5, § 14 were justiciable questions properly before this Court. The Constitution did not give the Governor the power to revoke a validly granted commutation. A commutation is complete when it is signed by the Governor and the Secretary of State and affixed with the Great Seal. Because the Governor signed plaintiff's commutation and delivered it to the Secretary of State, where it was signed and affixed with the Great Seal, plaintiff was granted an irrevocable commutation of his sentence.

1. The case did not present a nonjusticiable political question. First, while the Constitution grants the Governor absolute discretion regarding whether to grant or deny a commutation, the Constitution also restricts the procedure of a commutation to that which is provided by law. Accordingly, the procedure of a commutation, including its finality, is not wholly committed by the text of the Constitution to the Governor. Second, resolution of the question presented did not demand that the Court move beyond areas of judicial expertise because the case rested on legal questions of constitutional interpretation and the vesting of rights, which are judicial in nature and did not involve determining whether the Governor had exercised sound judgment. Third, there were no prudential considerations that prevented the Court from resolving the issue, given that determining the extent of the Governor's powers was a matter of constitutional law rather than political discretion.

2. Reviewing the Governor's exercise of the commutation power to determine its constitutionality did not violate separation-of-powers principles because determining the extent of the Governor's powers was not an exercise of the whole power of commutation.

3. Plaintiff's sentence was commuted after the commutation had been signed by the Governor, signed by the Secretary of State, and affixed with the Great Seal because the Governor clearly intended to commute the sentence and the last act required of the executive had been completed.

4. The Constitution did not grant the Governor the power to revoke a commutation. The fact that Const 1963, art 5, § 14 specifically provides that the Governor may grant a commutation implies that the Governor's power is limited only to that ability, and to interpret this power as implicitly providing the power to revoke would not give the Constitution the sense most obvious to the common understanding because to revoke is the opposite of to grant. Further, the existence of the power to grant a conditional commutation implies that a commutation that is not expressly subject to conditions may not be revoked. Moreover, the Governor's attempt to revoke plaintiff's commutation impermissibly impinged on the powers of the parole board because once plaintiff's sentence was commuted, he was under the parole board's jurisdiction. Also, should the Governor have the power to revoke a commutation, it is not clear at what point that power would cease. The purpose sought to be accomplished by the pardon power did not counsel a different result.

Court of Appeals judgment reversed; Department of Corrections ordered to reinstate plaintiff's sentence as a parolable life sentence; plaintiff remanded to the jurisdiction of the parole board.

Justice ZAHRA, concurring, wrote separately because he would have adhered to the analysis in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), which stated that a power has been exercised when the last act required from the person possessing the power has been performed, to conclude that the commutation became final when the Governor signed it rather than when the ministerial duty of affixing the Great Seal was completed by the Secretary of State.

Justice MCCORMACK took no part in the decision because of her prior involvement in the case.

1. CONSTITUTIONAL LAW — POLITICAL QUESTIONS — JUSTICIABILITY — GUBERNATORIAL POWERS — COMMUTATION DECISIONS.

Determining the extent of the governor's power to grant or revoke a commutation after a criminal conviction does not present a nonjusticiable political question (Const 1963, art 5, § 14).

2. CONSTITUTIONAL LAW — SEPARATION OF POWERS — GUBERNATORIAL POWERS — COMMUTATION DECISIONS — REVIEW BY COURTS.

Judicial review of the constitutionality of the governor's exercise of the commutation power does not violate separation-of-powers principles (Const 1963, art 5, § 14).

3. CONSTITUTIONAL LAW — GUBERNATORIAL POWERS — COMMUTATION DECISIONS — FINALITY — REVOCABILITY.

The commutation of a criminal sentence becomes complete after it has been signed by the governor, signed by the secretary of state, and affixed with the Great Seal; the governor does not have the power to revoke a validly completed commutation (Const 1963, art 5, § 14).

Paul D. Reingold and *Charles L. Levin* for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *A. Peter Govorchin*, Assistant Attorney General, for defendants.

CAVANAGH, J. his case requires us to consider the extent to which the Governor's exercise of the pardon

powers conferred by Const 1963, art 5, § 14 is justiciable; whether our review of the pardon powers offends the separation-of-powers doctrine; whether the commutation of plaintiff's sentence was complete; and whether Const 1963, art 5, § 14 grants the Governor the power to revoke a commutation. We hold that the extent of the Governor's pardon powers is a justiciable question and our review does not violate the separation-of-powers doctrine. We also hold that the Michigan Constitution does not grant the Governor the power to revoke a valid commutation, and that plaintiff's commutation was valid and irrevocable when it was signed by the Governor and the Secretary of State and affixed with the Great Seal. Accordingly, we reverse the judgment of the Court of Appeals, order the Department of Corrections to reinstate plaintiff's sentence to a parolable life sentence, and remand plaintiff to the jurisdiction of the parole board.

I. FACTS AND PROCEDURAL HISTORY

In 1988, plaintiff was a manager at a Dearborn health club. Plaintiff gave cash to one of his employees to act as a courier and sent the courier to a bank to obtain a money order. Plaintiff then conspired with a second employee and that employee's roommate to have the roommate rob the courier en route to the bank. During the attempted robbery, the courier fought back and the roommate stabbed the courier, resulting in the courier's death. Plaintiff was charged with and convicted of first-degree felony murder and armed robbery and sentenced to life in prison without the possibility of parole.

Plaintiff was a model prisoner, receiving only two minor misconduct tickets while in prison. In January 2010, plaintiff filed an application for commutation. Plaintiff's application was considered by the parole board, which

recommended that the case proceed to a public hearing. The parole board sent notice of the hearing to the Wayne County Prosecutor and to the successor Wayne County Circuit Judge. Notice was not sent to the victim's family because the family members failed to register as victims as required for notice under the Crime Victim's Rights Act. See MCL 780.769. A hearing was scheduled for October 21, 2010, and the Michigan Department of Corrections posted public notice of the hearing on its website in early October. At the hearing, neither the prosecutor nor the victim's family appeared or opposed commutation. Following the hearing, the parole board sent the commutation application to then Governor Jennifer Granholm with a favorable recommendation.

On December 22, 2010, the Governor signed the commutation. The Governor's office sent the signed commutation to the Secretary of State, who affixed the Great Seal and autopenned the Secretary of State's signature to the commutation. At 1:52 p.m., the Governor's deputy legal counsel sent an e-mail to several state officials announcing that "[t]he Governor has approved the commutation request of [plaintiff]." Early December 23, 2010, the Governor's legal counsel received a call from a lawyer representing the victim's family, who expressed the family's opposition to the commutation and the family's unhappiness with the lack of notice.

On December 27, 2010, the Governor's deputy legal counsel delivered a letter from the Governor to the parole board chair officially directing the chair to halt all commutation proceedings and indicating that the Governor intended to revoke the commutation. The Governor's deputy legal counsel obtained and destroyed all copies of the certificate of commutation. On December 31, 2010, Governor Granholm left office and on

January 1, 2011, newly elected Governor Rick Snyder assumed office. On March 25, 2011, the parole board reconsidered plaintiff's commutation, voted against recommending plaintiff for commutation, and notified the newly elected Governor of its negative recommendation. On April 15, 2011, the Governor denied plaintiff's commutation.

Plaintiff brought suit on May 19, 2011, alleging that the commutation of his sentence was final on December 22, 2010, when it was signed, sealed, and delivered to the Department of Corrections. Plaintiff also alleged that the Governor lacked authority to revoke a completed commutation and that the revocation increased plaintiff's sentence in violation of the Double Jeopardy Clauses and plaintiff's due process rights. The parties filed cross-motions for summary disposition, and on November 15, 2011, the trial court granted the state's motion for summary disposition, ruling that the court lacked jurisdiction to consider the issue. Plaintiff appealed, and the Court of Appeals affirmed. *Makowski v Governor*, 299 Mich App 166, 168; 829 NW2d 291 (2012). We granted leave to appeal.

II. STANDARD OF REVIEW

Questions of constitutional and statutory interpretation are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

III. ANALYSIS

A. POLITICAL QUESTION DOCTRINE

We must first consider whether this case presents a nonjusticiable political question. The concept of a nonjusticiable political question was introduced in the

seminal United States Supreme Court case *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803). When considering whether the United States Supreme Court had the power to review the questions posed in *Marbury*, the Court explained that "[b]y the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion" and "[i]n such cases, . . . whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." *Id*. at 165-166. Accordingly, courts may not inquire into how the executive or his officers perform their duties in which they have discretion. *Id*. at 170. The Court held that questions that by their nature are political or that are submitted only to the executive by the Constitution cannot be reviewed by courts. *Id*. However, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Id*. at 177. The Court held that whether the executive act of granting a commission vested a legal right in the appointee was a legal question, properly determinable by the courts. *Id*. at 171.[1]

In *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993), we addressed the political-question doctrine and considered whether under Const 1963, art 5, § 2 the Governor had the power to transfer all powers and duties from a legislatively created department of the executive branch responsible for environmental protection to a gubernatorially created department that had the same purpose. *House Speaker*, 443 Mich at 564.

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[1] Ultimately, *Marbury* was dismissed for lack of jurisdiction because the case was brought in the United States Supreme Court, which did not have original jurisdiction to hear a writ-of-mandamus case. *Marbury*, 5 US at 175-176.

One of the arguments in *House Speaker*, as in this case, was that the Governor's exercise of power was not properly reviewable by this Court. *Id*. We applied a three-part test to determine whether the question presented was a nonjusticiable political question:

> [1] [d]oes the issue involve resolution of questions committed by the text of the Constitution to a coördinate branch of Government? [2] Would resolution of the question demand that a court move beyond areas of judicial expertise? [3] Do prudential considerations for maintaining respect between the three branches counsel against judicial intervention? [*Id*. at 574, citing *Goldwater v Carter*, 444 US 996, 998; 100 S Ct 553; 62 L Ed 2d 428 (1979) (brackets and quotation marks omitted).]

First, we consider whether the issue involves the resolution of questions that the text of the Constitution commits to a coordinate branch of government. *Id*. In addressing this question, the United States Supreme Court has stated that "the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed." *Nixon v United States*, 506 US 224, 228; 113 S Ct 732; 122 L Ed 2d 1 (1993). Therefore, we must begin by interpreting the text of the constitutional provision in question.

"In interpreting the constitution, this Court has developed two rules of construction." *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982). First, the interpretation should be "the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Id*. (citations and quotation marks omitted). Second, in previous cases we have considered "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished[.]" *Id*. (citations and

quotation marks omitted). The Constitution provides that the Governor may grant commutations "subject to procedures and regulations prescribed *by law*." Const 1963, art 5, § 14 (emphasis added).[2] Thus, the sense most obvious to the common understanding of article 5, § 14 is that it clearly places a limit on the Governor's pardon power by allowing the Legislature to enact laws that determine the necessary procedures and regulations surrounding commutations. Therefore, while the Michigan Constitution provides the Governor the power to *grant* commutations, the Governor is not given sole control of the pardon power.

Next, we consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished[.]" *House Speaker*, 443 Mich at 580. We conclude that the adoption of article 5, § 14 also indicates that the Governor's power to grant commutations is limited. The debates in the Constitutional Convention record, while not determinative, clearly support our interpretation of article 5, § 14.[3] See *House Speaker*, 443 Mich at 580-581. The debate surrounding the pardon power at the 1961 Michigan Constitutional Convention considered two main questions: whether the Governor should be granted the ability to delegate the power, and whether the Legislature should be granted the power to limit the

[2] Const 1963, art 5, § 14 provides:

> The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor.

[3] As this Court has previously noted, the constitutional convention debates, while not controlling, "are sometimes illuminating, affording a sense of direction . . . ." *House Speaker*, 443 Mich at 581.

pardon process. See 1 Official Record, Constitutional Convention 1961, 579-585. The Executive Branch Committee originally proposed that the Governor's overall duties were too strenuous to require the Governor to personally handle each individual pardon and commutation. *Id*. at 579. Thus, the Committee favored a constitutional provision that allowed the Governor to delegate the pardon duties. *Id*. However, the delegates expressed discomfort with allowing the Governor to delegate the pardon power, *id*. at 579-580, and the Hutchinson Amendment removed the Governor's ability to do so by inserting the word "exercise" instead of the word "delegate" when referring to the Governor's pardon powers, *id*. at 583.[4] The debate makes it clear that the convention delegates were uncomfortable with anyone other than the chief executive exercising the pardon power. *Id*. at 579-580.

The later debate surrounding the Hutchinson Amendment considered whether the Legislature should have the power to regulate the Governor's pardon power. *Id*. at 585-587. There was support for the concept that the Legislature could control the procedures for a pardon, but there was concern that the Legislature could make the process so difficult that the Governor's power to grant a pardon could be nearly eliminated. *Id*. at 586-587. Nevertheless, the limitations on the pardon power were ultimately incorporated, and the provision was referred to the Committee on Style and Drafting reading that the pardon power was "subject to regulations provided by law relative to the manner of applying

[4] The Hutchinson Amendment was not ultimately adopted, and, instead, the provision was returned to committee in order to better craft the language. 1 Official Record, Constitutional Convention 1961, pp 586-587. However, a later amendment, the Faxon Amendment, was adopted that placed the pardon power solely with the Governor. *Id*. at 587-588.

for pardon." *Id*. at 588. After returning to committee, the text of the pardon power provision was edited to insert the phrase "and procedures" after "regulations" and to strike "relative to the manner of applying for pardon." 2 Official Record, Constitutional Convention 1961, p 2740. The comments concerning the introduction of the revised text clarify that the intent of the alteration was to reflect the convention's view that the Legislature could control the procedure, as consistent with the previous debate. *Id*. at 2740-2741. Indeed, the vesting of the Legislature with the power to control the procedures of commutations and pardons is not surprising because we have long recognized this as a legislative power. See *Rich v Chamberlain*, 104 Mich 436, 441; 62 NW 584 (1895) (explaining that "the Constitution, in express terms, lodges the pardoning power with the governor, and with it the co-ordinate branches of government have nothing to do, except as the legislature may by law provide how applications may be made . . . ."). Thus, our interpretation of Const 1963, art 5, § 14 leads us to the conclusion that the Governor's power to commute a sentence is limited by those procedures and regulations that the Legislature enacts.

Accordingly, the distribution of power between the Legislature and the Governor regarding commutations creates a legal question that this Court must answer. In *Nixon*, the United States Supreme Court held that the process by which the Senate impeaches a judge is nonjusticiable. However, a key consideration in *Nixon*'s holding was that the United States Constitution gives the Senate the "*sole*" power to try all impeachments. *Nixon* held that the use of the word "sole" indicated that the authority resided with the Senate and nowhere else. *Nixon*, 506 US at 229. Alternatively, *House Speaker* relied on the fact that the Constitution did not place the responsibility for effectuating legislation pro-

tecting natural resources within the "*sole* control" of the Legislature. *House Speaker*, 443 Mich at 580 (quotation marks omitted). Whether the Governor had the constitutional power to create his own department and transfer powers to that department from the existing legislatively created department did not present a nonjusticiable question and, instead, only required that the Court apply the rules of constitutional interpretation. *Id*. at 575-576.

In this case, the fact that the Constitution provides the Legislature the power to regulate the process by which commutations are granted means that the Governor does not have "sole control" over the pardon power. The Court of Appeals held that the Governor's absolute discretion was not limited by the statutory provisions that set forth the procedural requirements of commutations. *Makowski*, 299 Mich App at 175. However, the Court of Appeals' analysis misses the mark because the Governor's *power* to grant commutations is limited by the statutory provisions. Therefore, as in *House Speaker*, we only need to apply the rules of constitutional interpretation and interpret the relevant statutes to determine at what point the commutation was complete. *House Speaker*, 443 Mich at 574. We do not examine the exercise of the Governor's discretion, as the Court of Appeals held; instead, we interpret the extent of the Governor's power. The Constitution indeed grants the Governor absolute discretion regarding whether to grant or deny a commutation; however, the Constitution restricts the *procedure* of a commutation to that which is provided by law. Thus, the Constitution does not grant "absolute power" to the Governor, *Makowski*, 299 Mich App at 175, and we therefore conclude that the procedure of a commutation, including its finality, is not wholly committed by the text of the Constitution to the Governor.

Considering the second *House Speaker* question, resolution of the question presented in this case does not demand that the Court move beyond areas of judicial expertise, *House Speaker*, 443 Mich at 574, because "there is no 'lack of judicially discoverable and manageable standards for resolving' this case; nor is a decision impossible 'without an initial policy determination of a kind clearly for nonjudicial discretion.' " *Goldwater*, 444 US at 999 (Powell, J., concurring), quoting *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). The Court of Appeals held that resolution of this case "would constitute mere guess and speculation" and that there were no judicially discoverable and manageable standards that would have allowed a court to determine "how and precisely when a commutation application is considered 'granted . . . .' " *Makowski*, 299 Mich App at 176. However, as previously stated, this case ultimately rests upon the interpretation of our Constitution—a legal question—and it is this Court's duty to say "what the law is." *Marbury*, 5 US at 177. " '[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court . . . .' " *House Speaker*, 443 Mich at 575, quoting *Baker*, 369 US at 211. And to the extent that we must consider whether the Governor's actions granted plaintiff a commutation, "[t]he question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." *Marbury*, 5 US at 167.

Through MCL 791.234(1), our Legislature has provided that a prisoner serving a sentence with a minimum term of years "is subject to the jurisdiction of the

parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted . . . ." The assumed language of plaintiff's commutation provided that his sentence was commuted "to [time served in years, months, and days as calculated by the Department of Corrections] minimum to life maximum, thereby making him eligible for parole on [a date some months earlier than the date of the commutation]."[5] Therefore, a validly executed commutation brought plaintiff within the jurisdiction of the parole board pursuant to MCL 791.234(1), making him eligible for parole, and, thus, granted him the right to parole consideration. A person eligible for parole is not entitled to parole as a matter of right. See MCL 791.234(11) (stating that "a prisoner's release on parole is discretionary with the parole board"); *Adams v Russell*, 169 Mich 606, 608; 135 NW 658 (1912) (holding similarly when considering a previous version of the parole statute); *Greenholtz v Inmates of the Nebraska Penal & Corr Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979) (holding that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). However, under MCL 791.234(1), a person who is eligible for parole is nonetheless differently situated from a person serving a nonparolable life sentence. This change in status allegedly conferred by the commutation granted plaintiff the right to parole consideration. Cf. *Ex Parte Garland*, 71 US (4 Wall) 333, 380-381; 18 L Ed 366 (1866) ("[I]f granted after conviction, [a pardon]

[5] Plaintiff's commutation certificate was destroyed pursuant to the Governor's command after the decision to revoke the commutation. However, all commutations issued by the Governor contained the same standard language and components, and the state does not contest the assumed language of plaintiff's commutation.

removes the penalties and disabilities and restores him to all his civil rights; it . . . gives him a new credit and capacity.").

Therefore, in this case, as in *Marbury*, a legal document was signed by an executive granting a person a right. The executive then attempted to revoke the right granted by the document. Thus, as in *Marbury*, at issue is the Court's ability to determine whether the document granting plaintiff's commutation was effective despite the lack of a codified procedure, and whether the commutation, if validly granted, may be revoked. The similarities between this case and *Marbury* are notable, and the fact that the United States Supreme Court reached the merits in *Marbury* is persuasive. In *Marbury*, President Adams commissioned multiple justices of the peace for Washington, D.C. *Marbury*, 5 US at 155. However, the commissions were not delivered to the newly commissioned justices of the peace before the change of presidential administrations. After the new administration took office, James Madison, the new Secretary of State, refused to deliver the commissions. The commissioned justices of the peace brought suit in the United States Supreme Court seeking a writ of mandamus requiring Madison to deliver the commissions. *Id*. at 153-154.

Similar to the situation in *Marbury*, the Michigan Constitution grants the Governor a power without providing explicit procedural requirements for its exercise. The lack of procedural requirements for commutations does not foreclose this Court's ability to consider the validity and finality of commutations. Indeed, this Court has in the past considered whether a gubernatorial pardon was valid, holding that a pardon bearing the Great Seal and the signatures of the Governor and Secretary of State was sufficient despite defects on the

face of the document. *Spafford v Benzie Circuit Judge*, 136 Mich 25, 27; 98 NW 741 (1904). In *Spafford*, the requirements for a pardon were not legislatively prescribed; nevertheless, this Court reached the merits.[6] *Id*.

Turning to the controlling statutes in this case, under MCL 791.243 and MCL 791.244, applications for commutation must first be presented to the parole board for a recommendation. Further, under MCL 2.44(d), "[a]n impression of the great seal shall be placed on" commutations. The Legislature has not provided express guidance as to what is required for a completed commutation beyond the Great Seal requirement found within MCL 2.44. However, our review is not foreclosed merely because the Legislature has been largely silent on the proper procedures surrounding commutations. Contrary to the Court of Appeals' holding, we are not "legislat[ing] how and when a commutation decision becomes final and irrevocable." *Makowski*, 299 Mich App at 176. "Some point of time must be taken, when the power of the executive . . . must cease," *Marbury*, 5 US at 157, and, therefore, we simply must determine when that time is. Thus, whether the Governor's actions granted plaintiff a right to commu-

[6] The constitutional provision considered in *Spafford* provided that the Governor "may grant . . . commutations . . . for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner applying for pardons." Const 1908, art 6, § 9. Arguably, the previous commutation provision of the Constitution provided the Governor greater discretion regarding the powers of commutation than the current Constitution, because the Legislature's power in governing the commutation process was limited to the application. Therefore, although *Spafford* did not expressly consider justiciability, because the Court reached the merits in that case, it is logical that the Court may also reach the merits in this case. See *Spafford*, 136 Mich at 27.

tation of his sentence and, if so, whether the Governor may revoke a commutation under the Michigan Constitution are questions that are not only well within this Court's expertise, they are questions that this Court has the duty to answer. This Court need not determine whether the Governor exercised sound judgment in granting and revoking plaintiff's commutation; we merely must determine whether the Governor completed all the steps legally required to grant plaintiff a commuted sentence and whether the Constitution affords the Governor the power to revoke a valid commutation. Therefore, we need not move beyond the areas of judicial expertise in deciding this case.

Addressing the third *House Speaker* question, there are no prudential considerations that prevent this Court from resolving the issue. *House Speaker*, 443 Mich at 574. The Court of Appeals erroneously examined whether "Michigan's Constitution empowers the Governor, solely, to exercise *judgment* in commutation matters." *Makowski*, 299 Mich App at 178-179 (emphasis added). But, once again, we do not review the merits underlying the Governor's discretionary exercise of judgment but rather the *extent* of the Governor's powers. "The issue of decisionmaking *authority* must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts." *Goldwater*, 444 US at 1007 (Brennan, J., dissenting) (emphasis added). Nor are we "coerc[ing] an outcome that is contrary to the . . . Governor's clear intention . . . ." *Makowski*, 299 Mich App at 179. "Interpreting the constitution does not imply a lack of respect for another branch of government, even when that interpretation differs from that of the other branch." *House Speaker*, 443 Mich at 575. And while this case certainly presents a politically charged issue, the mere fact that a question involves political issues

does not make it a "political question." *Id*. at 574. " 'The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.' " *Id*., quoting *Baker*, 369 US at 217. Indeed, "the mere fact that [a] suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.' " *Baker*, 369 US at 209, quoting *Nixon v Herndon*, 273 US 536, 540; 47 S Ct 446; 71 L Ed 759 (1927). In sum, there is nothing that precludes us from reaching the merits in this case.

B. SEPARATION OF POWERS

Our review of the Governor's exercise of the powers of commutation is not an impermissible violation of the separation of powers. While the Constitution provides for three separate branches of government, Const 1963, art 3, § 2, the boundaries between these branches need not be "airtight," *Kent Co Prosecutor v Kent Co Sheriff (On Rehearing)*, 428 Mich 314, 322; 409 NW2d 202 (1987), quoting *Nixon v Administrator of Gen Servs*, 433 US 425, 443; 97 S Ct 2777; 53 L Ed 2d 867 (1977). In fact, "[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Kent Co Prosecutor*, 428 Mich at 322, quoting *United States v Nixon*, 418 US 683, 707; 94 S Ct 3090; 41 L Ed 2d 1039 (1974). "The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." *Local*

321, State, Co & Muni Workers of America v City of Dearborn, 311 Mich 674, 677; 19 NW2d 140 (1945) (citation and quotation marks omitted).

While the Constitution reserves the pardon power for the Governor, this Court may review the Governor's exercise of that power to ensure that it is constitutional. Cf. *Buback v Governor*, 380 Mich 209, 217-219; 156 NW2d 549 (1968) (opinion by ADAMS, J.) (stating that the Court may review the Governor's removal power to ensure that it is exercised within the confines of the Due Process Clause). It is true that the courts may not commute a sentence. *People v Freleigh*, 334 Mich 306, 310; 54 NW2d 599 (1952). However, we are not commuting plaintiff's sentence, as the state argues; rather, we are determining the extent of the Governor's power under Const 1963, art 5, § 14. The Governor ordered the commutation of plaintiff's sentence and the revocation of the commutation. We do not judge the Governor's discretion, nor do we usurp the Governor's power and direct plaintiff's commutation. We merely determine what rights, if any, the Governor granted plaintiff upon the delivery of the certificate of plaintiff's commutation to the Department of Corrections, and whether it was within the Governor's power to revoke any rights granted. As previously explained, our review of whether the Governor granted and may revoke a commutation in this case is not an exercise of the "whole power" of commutation. Instead, it is a determination of the extent of the Governor's powers under the Constitution. Therefore, our review of this case does not offend separation-of-powers principles.

C. FINALITY OF THE COMMUTATION

The Governor's power to grant commutations under Const 1963, art 5, § 14 is limited "to those procedures

and regulations prescribed by law." Const 1963, art 5, § 14. As stated earlier, the similarities between the facts and the questions presented in this case and *Marbury* are striking. Thus, the United States Supreme Court's analysis in *Marbury* is helpful in this case where we otherwise have little guidance. In *Marbury*, the commissions were confirmed by the Senate, signed by the President, and affixed with the seal of the United States by the Secretary of State. *Marbury*, 5 US at 155. However, the commissions were not delivered to the newly commissioned justices of the peace, and James Madison sought to block their appointment. *Id*. Specifically, *Marbury*'s analysis regarding whether the justices of the peace were entitled to the commissions necessarily considered whether the appointments were effective, *id*., and is particularly relevant to our analysis here.

When considering whether the justices of the peace were entitled to the commissions, *Marbury* determined that once the President signed the commission, the commission was complete, as that was the last act required of the person making it. Importantly, *Marbury* stated that "[s]ome point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised." *Id*. at 157. *Marbury* held that the power has been exercised "when the last act, required from the person possessing the power, has been performed," which was the signing of the commission. *Id*.

Spafford is also instructive. In *Spafford*, the defendant was convicted of manslaughter, but was pardoned before he was sentenced. The defendant filed a motion for his discharge, but the county judge denied the motion, claiming that the pardon was not effective because of multiple defects on the face of the document.

Spafford, 136 Mich at 26-27. This Court determined that none of the defects rendered the pardon invalid because the pardon's "substance left no doubt of the intention of the Governor to extend executive clemency." *Id*. at 27. Further, the Court stated that it had "no doubt of the validity of the instrument when signed by the Governor . . . and attested by the signature of the secretary of state and the great seal of the State, if otherwise regular in form and substance." *Id*.

The text of the commutation makes it clear that the commutation was final: "Now Therefore, I, Jennifer M. Granholm, Governor of the State of Michigan, do *hereby* commute the sentence of [plaintiff] . . . ." (Emphasis added). See *Soap & Detergent Ass'n*, 415 Mich at 757 (discussing the rules for interpretation of executive acts and explaining that "[t]he executive intends the meaning that is clearly expressed"). "Hereby" is defined as "[b]y this document; by these very words[.]" *Black's Law Dictionary* (8th ed). Thus, we conclude that the commutation's substance "left no doubt of the intention of the governor to extend executive clemency." *Spafford*, 136 Mich at 27. Indeed, it is clear that the Governor herself considered the commutation completed. The letter signed by the Governor ordering the parole board to refrain from effectuating the commutation stated, "[I]t is my intention . . . to *revoke* the commutation of [plaintiff's] sentence before fully effectuated." (Emphasis added.) The Governor's use of the word "revoke" indicates that the Governor herself believed that the commutation had been granted. Moreover, e-mails among executive officers explicitly stated that the commutation was "[g]ranted and certificates [were] delivered" in response to an inquiry whether the Governor had already granted the commutation, suggesting that the executive branch believed that the commutation had been granted.

Additionally, as *Marbury* explained, at some point the executive power to commute a sentence must have been exercised. *Marbury* held that executive power had been exercised "when the last act, required from the person possessing the power, has been performed," which, in that case, was the signature of the commission. *Marbury*, 5 US at 157. While the discretion to grant a commutation lies solely with the Governor, our Legislature has provided that a commutation must be affixed with the Great Seal. Indeed, *Marbury*, in considering a similar congressional statute that required that the commissions be sealed, stated that "when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; *no other act is to be performed on the part of government*." *Marbury*, 5 US at 158-159 (emphasis added). After being signed, the commutation was delivered to the Secretary of State for affixation of the Great Seal, as required by MCL 2.44. Therefore, when the commutation was signed by the Governor, signed by the Secretary of State, and affixed with the Great Seal, the last act required of the executive branch had been performed and the Governor's power of commutation had been exercised. Because it was both the clear intent of the Governor to commute plaintiff's sentence and the last act required of the executive for a commutation had been completed, we hold that once the commutation was affixed with the Great Seal by the Secretary of State, plaintiff's sentence had been commuted.

D. THE GOVERNOR'S POWER TO REVOKE A COMMUTATION

Because we hold that the Governor granted plaintiff a commutation, we must next determine whether Const 1963, art 5, § 14 grants the Governor the power to revoke a commutation. As previously stated, we con-

sider two questions when interpreting the Constitution: the interpretation must be "the sense most obvious to the common understanding" and "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished[.]" *House Speaker*, 443 Mich at 577, 580 (citations and quotation marks omitted).

The language of the Constitution confers only the power to *grant* commutations. The fact that the Constitution specifically provides that the Governor may grant a commutation implies that the Governor's power is limited only to that ability. To interpret the expressly provided power to "grant" to implicitly provide the power to "revoke" would not give the Constitution "the sense most obvious to the common understanding" because the meaning of the word "revoke" is the exact opposite of the word "grant." See *Merriam-Webster's Collegiate Dictionary* (2011) (defining "grant" as "to bestow or transfer formally" and "revoke" as "to annul by recalling or taking back").

Notably, the Constitution permits the Governor to grant *conditional* pardons and commutations.[7] When a Governor has granted a conditional commutation, if the conditions are not fulfilled, the Governor may revoke the commutation. See *People v Marsh*, 125 Mich 410; 84 NW 472 (1900). Given that the power to grant a conditional commutation exists, it logically follows that a commutation that is not expressly subject to conditions and limitations may not be revoked.

Moreover, it is well established that a trial judge does not have the power to change a valid sentence because the judge's authority over the prisoners has passed once

[7] Const 1963, art 5, § 14 states that the Governor may grant pardons and commutations "upon such *conditions and limitations* as he may direct." Emphasis added.

the sentence is imposed, see *People v Fox*, 312 Mich 577; 20 NW2d 732 (1945), and that increasing a validly imposed sentence is impermissible, *Ex Parte Lange*, 85 US (18 Wall) 163, 173; 21 L Ed 872 (1873). Similarly, the Governor's attempt to revoke a valid commutation was impermissible because her authority over the prisoner's commutation had passed. Once plaintiff's sentence was commuted, he was transferred to the jurisdiction of the parole board and his sentence was no longer one of life without the possibility of parole. See MCL 791.234(7). Therefore, the Governor's attempt to revoke plaintiff's commutation impermissibly impinged upon the parole board's powers by wresting plaintiff away from its jurisdiction.

Further, should the power to revoke a commutation exist, it is not clear at what point that power would cease. Because the Governor's pardon powers under article 5, § 14 include the power to grant reprieves, commutations, and pardons, our interpretation of the Governor's power to grant commutations is similarly applicable to the Governor's power to grant pardons and reprieves. Thus, it is important to consider that if article 5, § 14 grants the Governor the power to revoke commutations, it would also grant the Governor the power to revoke pardons and reprieves, raising serious concerns regarding the Governor's ability to direct the reincarceration of a free person. Under the state's argument, a Governor would be able to revoke a commutation granted by that Governor so long as that Governor remains in office, thereby returning a prisoner to a nonparolable life sentence potentially years after a commutation. We do not agree that the drafters intended to give the Governor such broad powers:

> When a person has been set at liberty under the pardon or the commutation of his sentence by the executive, he

> becomes once more a full citizen, clothed with all the rights, privileges, and prerogatives that belong to any other freeman. He cannot be sent out half free and half slave. He is not to be let out with a rope around his body, as it were, with one end in the hands of the warden, to be hauled back at the caprice of that officer. He must go out a free man, and remain a free man until he breaks the condition of his pardon. He must enjoy the blessings and benefits that belong to an American citizen until he has violated the law of his release. His character may be tarnished and his reputation soiled by his imprisonment, but his rights as a citizen are unimpaired. [*People v Moore*, 62 Mich 496, 500; 29 NW 80 (1886).]

On the basis of the foregoing considerations, it is the sense most obvious to the common understanding that the Constitution does not provide the Governor the power to revoke an unconditional commutation.

Moreover, the purpose sought to be accomplished by the pardon power does not counsel a different result. See *House Speaker*, 443 Mich at 580. We have explained that "[c]ommutations are acts of individualized clemency, typically motivated by the prisoner's personal characteristics and behavior in jail or prison" and are "aimed at benefiting the released prisoner." *Kent Co Prosecutor*, 428 Mich at 323, 324. Similarly, *Chamberlain* explained that a pardon " 'is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.' " *Chamberlain*, 104 Mich at 441, quoting *United States v Wilson*, 32 US (7 Pet) 150, 150; 8 L Ed 640 (1883). These purposes provide no indication that the pardon power was intended to grant the Governor such wide discretion that a commutation could be revoked at any time upon the Governor's whim. Accordingly, neither "the sense most obvious to the common understanding" nor "the purpose sought

to be accomplished," *House Speaker*, 443 Mich at 577, 580, indicates that Const 1963, art 5, § 14 grants the Governor the power to revoke a commutation. Therefore, we hold that the Governor may not revoke a completed commutation.[8]

IV. CONCLUSION

We conclude that the interpretation and exercise of the Governor's powers under Const 1963, art 5, § 14 are justiciable questions properly before this Court. The Governor is given the power to grant commutations under article 5, § 14; however, the Constitution does not give the Governor the power to revoke a validly granted commutation. Additionally, a commutation is complete when it is signed by the Governor, signed by the Secretary of State, and affixed with the Great Seal. Therefore, because the Governor signed plaintiff's commutation and delivered it to the Secretary of State, where it was signed and affixed with the Great Seal, plaintiff was granted an irrevocable commutation of his sentence. Accordingly, we reverse the judgment of the Court of Appeals, order the Department of Corrections to reinstate plaintiff's sentence to a parolable life sentence, and remand plaintiff to the jurisdiction of the parole board.

YOUNG, C.J., MARKMAN, KELLY, and VIVIANO JJ., concurred with CAVANAGH, J.

MCCORMACK, J., took no part in the decision because of her prior involvement in the case.

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[8] Because we hold that the Governor does not have the power to revoke a completed commutation, we need not address plaintiff's argument that the revocation of his commutation was a violation of the double jeopardy clauses, US Const, Am V and Const 1963, art 1, § 15, and plaintiff's due process rights, US Const, Am XIV and Const 1963, art 1, § 17.

ZAHRA, J. (*concurring*). The majority opinion concludes correctly that this case presents a justiciable issue, and I agree that our endeavoring to interpret the bounds of the commutation power does not offend the separation-of-powers doctrine. I also agree with the majority that Governor Granholm irrevocably commuted the plaintiff's sentence before trying to undo her decision. I write separately, however, because I disagree with the majority regarding the moment at which a commutation becomes final. While the majority concludes that a commutation may be revoked until it is affixed with the Great Seal of the State of Michigan, I conclude that a commutation becomes final when the governor signs it.

Every law student in the country reads the seminal United States Supreme Court case of *Marbury v Madison*.[1] As the majority opinion ably explains, *Marbury* concerned the validity of nine commissions issued to justices of the peace by President John Adams as he was leaving office that were not delivered to their intended recipients. While professors typically use *Marbury* to expound on the judiciary's role in government, this case presents the rare situation in which *Marbury* is relevant for its holding regarding the finality of an executive act. According to Chief Justice John Marshall in *Marbury*, a "power has been exercised, when the last act, required from the person possessing the power, has been performed[.]"[2] It cannot be gainsaid that the Governor alone possesses the commutation power,[3] and, as in *Marbury*, "[t]his last act is the signature . . . ."[4]

[1] *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

[2] *Id*. at 157.

[3] Const 1963, art 5, § 14.

[4] *Marbury*, 5 US at 157.

Thus, Governor Granholm had exercised the commutation power as soon as she placed her signature on plaintiff's commutation.

The majority holds that a commutation becomes irrevocable once the secretary of state affixes the Great Seal. It reaches this conclusion because it attaches particular weight to the Legislature's command in MCL 2.44 that the Great Seal be applied to commutations and a number of other documents. But the majority fails to consider the *Marbury* Court's discussion of the United States Seal, which had to be applied to the commissions for the justices of the peace. Chief Justice Marshall wrote, "[t]he signature is a warrant for affixing the great seal to the commission; and *the great seal is only to be affixed to an instrument which is complete*."[5] In other words, Chief Justice Marshall opined that the United States Seal authenticates a document that has become final upon receiving the president's signature. I attach the same significance to Michigan's Great Seal, but no more.

In reaching his conclusion in *Marbury*, Chief Justice Marshall attached particular significance to the mandate imposed on the secretary of state: "The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president."[6] The United States Secretary of State's duty was ministerial; he had no discretion to do anything other than seal the commission and deliver it. Likewise, MCL 2.44 orders Michigan's secretary of state to affix the Great Seal to a commutation;[7] it

[5] *Id*. at 158 (emphasis added).

[6] *Id*.

[7] MCL 2.44(d) ("An impression of the great seal *shall be placed on* the following documents but no others: . . . Commutations of sentences.") (emphasis added).

provides no further discretion to the secretary of state or the governor. This bears emphasis: once a commutation has been signed, MCL 2.44 requires the secretary of state to affix the Great Seal, and the statute does not empower the governor to stop it. Chief Justice Marshall called the act of affixing the seal "a ministerial act, which the law enjoins on a particular officer for a particular purpose."[8] In Michigan, the law imposes this ministerial duty on the secretary of state, and he or she must complete the task once the governor exercises his or her discretion.[9]

The *Marbury* Court drew an important distinction between an executive act's finality and the document's completion. Chief Justice Marshall said, "It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state."[10] Once again, our case is on all fours: the commutation became effective and irrevocable as soon as Governor Granholm's pen left the page—the commutation was made. The docu-

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[8] *Marbury*, 5 US at 158.

[9] After concluding that an executive act is final upon the discretion-holder's exercise of that discretion, Chief Justice Marshall proceeded to discuss the possibility of the seal's being necessary to complete a document. He said that even if the seal was a necessity, the commissions were still final under the facts before him: "If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government." *Marbury*, 5 US at 158-159. We are presented with the same situation. The outcome of this case does not turn on whether a commutation is final upon receiving the governor's signature or when the Great Seal is affixed because both were accomplished before Governor Granholm attempted to revoke the commutation.

[10] *Marbury*, 5 US at 162.

ment evidencing the commutation requires the Great Seal for completion, but the executive's discretion has already been exercised.

The majority's reliance on MCL 2.44, rather than *Marbury*'s "last act" analysis, can be traced to differences between the state and federal constitutions. Specifically, the Michigan Constitution makes the governor's clemency power "subject to procedures and regulations prescribed by law."[11] The majority suggests that the requirement in MCL 2.44 that the Great Seal be applied to commutations constitutes a procedure or regulation prescribed by law and that a commutation is incomplete and ineffective without the seal. I conclude, however, that MCL 2.44 is not the type of procedure or regulation contemplated by that constitutional provision.

Drawing from the Constitutional Convention debates, the majority opinion explains at length how the "practice and procedure" language came to exist in article 5, § 14 of the Michigan Constitution. The "practice and procedure" language reflects the delegates' concern that the governor could not deal with an unfiltered influx of clemency applications. As a solution, the delegates proposed ways that the Legislature could regulate the application process. In fact, an earlier draft of the language stated that the pardon power was "subject to regulations provided by law *relative to the manner of applying for pardon*."[12] Thus, the "practice and procedure" language refers to the Legislature's control of the application process, not to the Legislature's ability to create a point of finality different from the "last act" analysis that had stood for 160 years.

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[11] Const 1963, art 5, § 14.

[12] 1 Official Record, Constitutional Convention 1961, p 588.

Significantly, the Legislature has taken up the constitutional provision's invitation by enacting several procedures that a candidate must complete before becoming eligible for any type of clemency. MCL 791.243 and MCL 791.244 require all applications for pardons, reprieves, and commutations to be filed with the parole board and prescribe a lengthy interview and hearing procedure for any applicant. The provisions then instruct the parole board to transmit a recommendation to the governor for a final decision. Thus, the Legislature has provided a practice and procedure through which all clemency applicants must pass, which is consistent with the Constitutional Convention delegates' concern that clemency applications should not reach the governor unfiltered.

Finally, I am concerned that the majority's holding leaves our jurisprudence with the very problem that the majority opinion identifies as a flaw in the defendants' argument. Namely, if a governor commutes a sentence but the seal is not affixed to the commutation before that governor leaves office, then nothing stops the incoming governor from revoking the commutation as soon as he or she takes office. The same would be true for any of the acts requiring the Great Seal under MCL 2.44, including appointments, commissions, and extraditions. On the other hand, remaining faithful to *Marbury*'s principled holding prevents a new governor from reversing or revoking a prior governor's unsealed executive actions.

In sum, I would adhere to *Marbury*'s "last act" analysis and conclude that the commutation power has been exercised "when the last act, required from the person possessing the power, has been performed[.]"[13] The last act required from the Governor—the holder of

[13] *Marbury*, 5 US at 157.

the commutation power—was signing the commutation. At that point, the power was exercised and the plaintiff's sentence was commuted to parolable life.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Leave to Appeal Denied August 23, 2013:

In re STRINGER/DEBOSE, No. 147452; Court of Appeals No. 313622.

Summary Disposition September 3, 2013:

PEOPLE v JESSE HOLT, No. 145201; Court of Appeals No. 302017. On order of the Court, the motion for reconsideration of this Court's June 7, 2013 order is considered, and it is granted. We vacate our order dated June 7, 2013. On reconsideration, the application for leave to appeal the April 10, 2012 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Florida v Jardines*, 569 US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013), and *Davis v United States*, 564 US ___; 131 S Ct 2419; 180 L Ed 2d 285 (2011).

CAVANAGH, J., would deny reconsideration.

Leave to Appeal Denied September 3, 2013:

PEOPLE v WOODLEY, No. 145913; Court of Appeals No. 311920.

In re WILCZYNKSKI ESTATE, No. 146266; Court of Appeals No. 303150.

PEOPLE v WILLIAM, No. 146456; Court of Appeals No. 310569.

PEOPLE v KNOWLES, No. 146468; Court of Appeals No. 306558.

PEOPLE v CARLOS COLLINS, No. 146584; Court of Appeals No. 310815.

PEOPLE v THOMAS REESE, No. 146585; Court of Appeals No. 309437.

PEOPLE v QUONSHAY MASON, No. 146586; Court of Appeals No. 310392.

PEOPLE v JAMES HARDY, No. 146615; Court of Appeals No. 312942.

PEOPLE v WILBERT SMITH, No. 146635; Court of Appeals No. 311056.

PEOPLE v BLOCKSOM, No. 146641; Court of Appeals No. 312347.

PEOPLE v SHANAN HARRIS, No. 146645; Court of Appeals No. 311003.

PEOPLE v AIELLO, No. 146647; Court of Appeals No. 311457.

PEOPLE v BARRETT, No. 146648; Court of Appeals No. 310982.

PEOPLE v CHARLIE FLOYD, No. 146656; Court of Appeals No. 311719.

PEOPLE v GEOFFREY THOMAS, No. 146670; Court of Appeals No. 309631.

PEOPLE v GLEEN, No. 146708; Court of Appeals No. 309142.

VASILAKIS v TROTT & TROTT, PC, No. 146751; Court of Appeals No. 306122.

FOLTZ v CZERNIESKI, Nos. 146815 and 146816; Court of Appeals Nos. 313528 and 313532.

PEOPLE v DANIEL MCCULLOUGH, No. 146845; Court of Appeals No. 311083.

BROWNLOW v MCCALL ENTERPRISES, INC, Nos. 146883 and 146884; Court of Appeals Nos. 306190 and 307883.

PEOPLE v KNOX, No. 146887; Court of Appeals No. 314045.

PEOPLE v TONY GREEN, No. 146910; Court of Appeals No. 306710.

LEAR CORPORATION v DEPARTMENT OF TREASURY, No. 146930; reported below: 299 Mich App 533.

RESIDENTIAL CREDIT SOLUTIONS, INC v MARCH, No. 146961; Court of Appeals No. 310702.

PEOPLE v DAVID MCLEAN, No. 146964; Court of Appeals No. 308268.

PEOPLE v JAMES TILLMAN, No. 146969; Court of Appeals No. 307901.

PEOPLE v JEFFREY ADAMS, No. 146970; Court of Appeals No. 305440.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v CLAXTON, No. 146974; Court of Appeals No. 312337.

PEOPLE v ABRAITIS, No. 146984; Court of Appeals No. 309955.

PEOPLE v CRATTY, No. 146992; Court of Appeals No. 309492.

PEOPLE v BIGELOW, No. 146996; Court of Appeals No. 306435.

PEOPLE v BOBBY MILLER, No. 147001; Court of Appeals No. 307190.

US BANK, NA v HILLS, No. 147003; Court of Appeals No. 310318.

PEOPLE v CAMERON, No. 147004; Court of Appeals No. 306391.

PEOPLE v WILLIAM WELCH, No. 147005; Court of Appeals No. 313380.

PEOPLE v SCHWARTZ, No. 147007; Court of Appeals No. 307485.

PEOPLE v BOUIE, No. 147011; Court of Appeals No. 308100.

PEOPLE v LEWIS HENDERSON, No. 147017; Court of Appeals No. 306658.

ABE v MICHIGAN STATE UNIVERSITY, No. 147020; Court of Appeals No. 310585.

PEOPLE v DERRICK ALLEN MYERS, No. 147041; Court of Appeals No. 310676.

PEOPLE v DARRYL JORDAN, No. 147042; Court of Appeals No. 312014.

PEOPLE v HENRETTA LITTLE, No. 147044; Court of Appeals No. 308962.

BENEDICT v WARCHOCK, No. 147047; Court of Appeals No. 311405.

PEOPLE v CARL BENNETT, No. 147051; Court of Appeals No. 307452.

PITTSFIELD INVESTORS, LLC v PITTSFIELD CHARTER TOWNSHIP, No. 147057; Court of Appeals No. 304087.

HOV SERVICES, INC v DEPARTMENT OF TREASURY, No. 147058; Court of Appeals No. 309575.

PEOPLE v MYKOLAITIS, No. 147063; Court of Appeals No. 311224.

PEOPLE v KEITH HENDERSON, No. 147064; Court of Appeals No. 309460.

PEOPLE v SPARKS-ROSS, No. 147067; Court of Appeals No. 307498.

CIT TECHNOLOGY FINANCIAL SERVICES v DETROIT BOARD OF EDUCATION, No. 147068; Court of Appeals No. 305127.

PEOPLE v DOZIER, No. 147069; Court of Appeals No. 311678.

DEPUTY SHERIFFS ASSOCIATION OF MICHIGAN v STATE OF MICHIGAN, Nos. 147072 and 147073; Court of Appeals Nos. 300936 and 304547.

HOWARD v SPECTRUM HEALTH-BLODGETT CAMPUS, No. 147074; Court of Appeals No. 310351.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v MAIER, No. 147076; Court of Appeals No. 307744.

PEOPLE v EDDIE HAWKINS, No. 147081; Court of Appeals No. 311476.

PEOPLE v POYNTZ, No. 147082; Court of Appeals No. 308166.

PEOPLE v TIMOTHY COLLINS, No. 147086; Court of Appeals No. 307739.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v FALCONER, No. 147088; Court of Appeals No. 310037.

PEOPLE v SIMON, No. 147089; Court of Appeals No. 305939.

WILLIAMS v LEDUFF, No. 147090; Court of Appeals No. 307706.

PEOPLE v JERMAR ROSS, No. 147094; Court of Appeals No. 308198.

PEOPLE v THOMAS HARRIS, No. 147095; Court of Appeals No. 308183.

PEOPLE v WESTBROOK, No. 147096; Court of Appeals No. 308410.

PEOPLE v JIMMIE MORRIS, No. 147100; Court of Appeals No. 311297.

PEOPLE v GAGNON, No. 147101; Court of Appeals No. 310728.

PEOPLE v MASALMANI, Nos. 147102, 147103, and 147104; Court of Appeals Nos. 301376, 301377, and 301378.

PEOPLE v LORENZO ANTHONY, No. 147105; Court of Appeals No. 314898.

PEOPLE v GRIFFIN, No. 147106; Court of Appeals No. 310682.

PEOPLE v CHARLES DAWSON, No. 147107; Court of Appeals No. 315087.

PEOPLE v RIDDLE, Nos. 147112 and 147113; Court of Appeals Nos. 307859 and 307860.

MCCORMACK, J., not participating because of her prior involvement in this case.

PEOPLE v BURTON, No. 147115; Court of Appeals No. 305052.

PEOPLE v STRICKLAND, No. 147116; Court of Appeals No. 311150.

BAIRD v AKA TRUCKING, INC, No. 147125; Court of Appeals No. 299975.

PEOPLE v REVERS, No. 147126; Court of Appeals No. 308989.

PEOPLE v MOODY, No. 147127; Court of Appeals No. 307645.

CAVANAGH, J., would grant leave to appeal.

CALIFORNIA CHARLEY'S CORPORATION v CITY OF ALLEN PARK, Nos. 147128 and 147129; Court of Appeals Nos. 295575 and 295579.

PEOPLE v MICHAEL PHILLIPS, No. 147136; Court of Appeals No. 301366.

PEOPLE v ROLANDO FLORES, No. 147139; Court of Appeals No. 309262.

PEOPLE v SIVERTSEN, No. 147149; Court of Appeals No. 309565.

RAY v LOWEN REAL ESTATE, LLC, Nos. 147160 and 147161; Court of Appeals Nos. 305403 and 309436.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v DUPREE, No. 147173; Court of Appeals No. 308411.

PEOPLE v LEITZ, No. 147190; Court of Appeals No. 308902.

PEOPLE v CHAD MOORE, No. 147191; Court of Appeals No. 306039.

LANG v GREENPOINT MORTGAGE FUNDING, No. 147198; Court of Appeals No. 307141.

PEOPLE v MORRISON, No. 147199; Court of Appeals No. 301320.

PEOPLE v PATRICK SMITH, No. 147205; Court of Appeals No. 308610.

PEOPLE v RODERIC ROOKS, No. 147208; Court of Appeals No. 307810.

PEOPLE v CARL WATKINS, No. 147222; Court of Appeals No. 310875.

CITY OF RIVERVIEW v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 147224 and 147225; Court of Appeals Nos. 301549 and 302903.

WAGGONER v CIVIL SERVICE COMMISSION, No. 147229; Court of Appeals No. 311853.

HISSONG v BRYCE, No. 147252; Court of Appeals No. 311418.

In re BROWN, No. 147399; Court of Appeals No. 315325.

Superintending Control Denied September 3, 2013:

TOLAS v ATTORNEY GRIEVANCE COMMISSION, No. 147186.

Reconsideration Denied September 3, 2013:

PEOPLE v RICHARDS, No. 144989; Court of Appeals No. 306209. Leave to appeal denied at 494 Mich 866.

RUGIERO v DINARDO, Nos. 145577, 145578, 145579, 145580, 145581, 145582, 145583, and 145584; Court of Appeals Nos. 301829, 302192, 302228, 302936, 302963, 303259, 303707, and 307630. Summary disposition at 493 Mich 957.

PEOPLE v POUNCY, No. 145994; Court of Appeals No. 306257. Leave to appeal denied at 494 Mich 854.

VAN TOL, MAGENNIS & LANG, INC v WOODWARD, No. 146174; Court of Appeals No. 305313. Leave to appeal denied at 493 Mich 952.

PEOPLE v BRZEZINSKI, No. 146204; Court of Appeals No. 311687. Leave to appeal denied at 494 Mich 854.

PEOPLE v JOEL GOMEZ, No. 146235; Court of Appeals No. 301706. Leave to appeal denied at 494 Mich 851.

JAVORSKY v HURON VALLEY SCHOOLS, No. 146248; Court of Appeals No. 308443. Leave to appeal denied at 493 Mich 953.

PEOPLE v MARK JONES, No. 146288; Court of Appeals No. 308482. Leave to appeal denied at 494 Mich 852.

In re APPLICATION OF INTERNATIONAL TRANSMISSION COMPANY FOR EXPEDITED SITING CERTIFICATE , Nos. 146383, 146384, 146386, and 146387; Court of Appeals Nos. 303009 and 303040. Summary disposition at 493 Mich 947.

PEOPLE v MATTHEW MOORE, No. 146393; Court of Appeals No. 310823. Leave to appeal denied at 493 Mich 955.

AUTO-OWNERS INSURANCE COMPANY v TAX CONNECTION WORLDWIDE, LLC, No. 146458; Court of Appeals No. 306860. Leave to appeal denied at 494 Mich 864.

In re NOWAK REVOCABLE LIVING TRUST , No. 146538; Court of Appeals No. 298212. Leave to appeal denied at 494 Mich 855.

BENTON v ATTORNEY GRIEVANCE COMMISSION, No. 146658. Superintending control denied at 494 Mich 858.

PEOPLE v BICKHAM, No. 146666; Court of Appeals No. 300952. Leave to appeal denied at 494 Mich 860.

BURGESS v PEOPLES TRUST CREDIT UNION, No. 146847; Court of Appeals No. 310852. Leave to appeal denied at 494 Mich 870.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 146864. Superintending control denied at 494 Mich 858.

Leave to Appeal Denied September 6, 2013:

EDEN FOODS, INC v AMERICAN SOY PRODUCTS, INC, No. 147262; Court of Appeals No. 314730.

In re MOSS, No. 147519; reported below: 301 Mich App 76.

In re TORREZ, No. 147579; Court of Appeals No. 312975.

In re JORDAN, No. 147588; Court of Appeals No. 313789.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 12, 2013:

PEOPLE v SITERLET, No. 146713; reported below: 299 Mich App 180. The parties shall submit supplemental briefs within 28 days of the date of this order addressing: (1) whether the defendant is entitled to any relief on his claim that the trial court lacked authority to sentence him as a fourth habitual offender, MCL 769.12, due to an invalid post-trial amendment of the notice of intent to seek sentence enhancement, MCL 769.13(1), and where the defendant failed to timely object to the amendment or to his sentencing as a fourth habitual offender; and (2) whether the Court of Appeals correctly analyzed the unpreserved error in this case under "plain error" standards. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied September 13, 2013:

GILBERT ESTATE v KENT RADIOLOGY, PC, No. 147656; Court of Appeals No. 316980.

Summary Disposition September 18, 2013:

PEOPLE v DEWEESE, No. 146675; Court of Appeals No. 312171. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for the appointment of substitute appellate counsel. The defendant is entitled to appointed appellate counsel in his application to the Court of Appeals. *Halbert v Michigan*, 545 US 605, 610 (2005). The record shows that initially appointed appellate counsel moved to withdraw because of a breakdown of the attorney-client relationship. The record does not show that counsel determined or advised the court that there was no non-frivolous issue to raise on appeal, and counsel's motion did not comply with *Halbert*, 545

US 605, 623 (2005), citing *Anders v California*, 386 US 738, 744 (1967); MCR 7.211(C)(5); or AO 2004-6, Standard 5. Under the circumstances of this case, the circuit court erred in granting the motion to withdraw without appointing substitute appellate counsel. On remand, newly appointed appellate counsel may file an application for leave to appeal to the Court of Appeals within 6 months of the date of the circuit court's order appointing counsel, as, at the time the defendant was sentenced, he was entitled to file an application within 6 months of sentencing. See MCR 7.205(F)(3).

PEOPLE v LUTZ, No. 146699; Court of Appeals No. 310127. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Hillsdale Circuit Court, and we remand this case to the trial court for resentencing. The trial court articulated substantial and compelling reasons to support a departure from the presumed applicable sentencing guidelines range; however, zero points should have been scored for Offense Variables 1 and 2 because the methamphetamine in this case was not used or possessed as a weapon. See MCL 777.31(1), MCL 777.32(1), and *People v Ball*, 297 Mich App 121 (2012). The resulting change in the defendant's total OV score produces a lower guidelines range, and he is therefore entitled to resentencing. See *People v Francisco*, 474 Mich 82 (2006). On remand, should the trial court decide to again depart from the corrected sentencing guidelines range, it shall articulate a rationale justifying the extent of the particular departure. See *People v Smith*, 482 Mich 292 (2008).

PEOPLE v TEAMER (PEOPLE v BUSH), Nos. 147052 and 147053; Court of Appeals Nos. 315220 and 315228. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand these cases to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted September 18, 2013:

HUNT v DRIELICK, Nos. 146433 and 146434, and 146435; reported below: 298 Mich App 548. The parties shall address: (1) whether a lease agreement is legally implied between Roger Drielick Trucking and Great Lakes Carriers Corporation under the facts of the case and under applicable federal regulation of the motor carrier industry; and (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail) policy issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for " '[b]odily injury' or 'property damage' . . . while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented."

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MICHIGAN v CVS CAREMARK CORPORATION, Nos. 146791, 146792, and 146793; Court of Appeals Nos. 299997, 299998, and 299999. The application for leave to appeal is granted. The application for leave to appeal

as cross-appellants is granted, limited to the issue of whether there is a private cause of action under MCL 333.17755(2). The parties shall include among the issues to be briefed: (1) whether MCL 333.17755(2) provides an implied private cause of action; (2) what is meant by the requirement that a pharmacist shall "pass on the savings in cost" when the pharmacist dispenses a generically equivalent drug product and what constitutes a violation of that requirement; (3) whether this requirement is limited to transactions involving a substitution of a generic drug for a name brand drug, and in this regard, whether § 17755(2) must be read in conjunction with the other subsections of MCL 333.17755; (4) whether submission of a charge for the dispensing of a generic drug that is in violation of this requirement constitutes the making of a false claim under the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq*. or the Health Care False Claim Act (HCFCA), MCL 752.1001 *et seq*.; (5) whether use of the remedies provided by the MFCA and the HCFCA is available when Part 177 of the Michigan Public Health Code, MCL 333.17701 *et seq*. provides administrative remedies for violations of MCL 333.17755; (6) whether the plaintiffs satisfied the heightened pleading requirement applicable to these actions under MCR 2.112(B)(1); and (7) whether plaintiff Marcia Gurganus is qualified to bring a qui tam action in light of the limitations found at MCL 400.610a(13).

The motions for leave to file briefs amicus curiae are granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v RYAN SMITH, No. 147187; Court of Appeals No. 312242. The parties shall address: (1) whether a trial court loses jurisdiction, for purposes of sentencing or otherwise, by failure to sentence a defendant within one year after delaying sentence under MCL 771.1; (2) whether a defendant waives a claim of error related to a delay in sentencing where he requests a delayed sentence under the statute; and (3) what remedy should apply to a failure to sentence a defendant within a year of conviction.

The Criminal Defense Attorneys of Michigan and Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 18, 2013:

PEOPLE v VINCENT HUDSON, No. 146577; Court of Appeals No. 303437.

PEOPLE v EVERETT, No. 146689; Court of Appeals No. 312854.

JOHNSON v DRIGGETT, No. 146837; Court of Appeals No. 306560.

STATE TREASURER v PONTIUS, No. 146906; Court of Appeals No. 309693.

PEOPLE v NEILL, No. 146916; Court of Appeals No. 310561.
CAVANAGH and MCCORMACK, JJ., would grant leave to appeal.

PEOPLE v ABERNATHY, No. 146997; Court of Appeals No. 309961.

Leave to Appeal Granted September 20, 2013:

PEOPLE v JASON SHAVER, No. 146521; Court of Appeals No. 300959. The parties shall address: (1) whether evidence of a child's prior sexual abuse is barred by the rape-shield statute, MCL 750.520j; (2) if so, whether evidence of prior sexual abuse was nevertheless admissible in this instance to preserve the defendant's right of confrontation and to present a defense (see *People v Hackett*, 421 Mich 338 (1984)); and (3) whether any error in excluding evidence of prior sexual abuse in this case was harmless.

The Criminal Law Section of the State Bar of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 20, 2013:

YONO v DEPARTMENT OF TRANSPORTATION, No. 146603; reported below: 299 Mich App 102. The parties shall submit supplemental briefs within 35 days of the date of this order addressing whether the parallel parking area where the plaintiff fell is in the improved portion of the highway designed for vehicular travel within the meaning of MCL 691.1402(1). They should not submit mere restatements of their application papers.

Leave to Appeal Denied September 20, 2013:

FISHER v SULIEMAN, No. 147467; Court of Appeals No. 299212.

Rehearing Denied September 20, 2013:

HARRIS v AUTO CLUB INSURANCE ASSOCIATION, No. 144579; reported at 494 Mich 462.

Summary Disposition September 25, 2013:

OMIAN v CHRYSLER GROUP LLC, No. 146908; Court of Appeals No. 310743. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

TONDREAU v HANS, No. 147024; Court of Appeals No. 300026. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The plaintiff's experts Wayne Flye, M.D., and Donald C. Austin, M.D., are of the opinion that the chronic subdural hematoma suffered by Sandra Peetz was caused by the carotid endarterectomy performed by the defendants. While peer-reviewed, published literature is not always necessary to meet the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for these opinions render the opinions unreliable and inadmissible under MRE 702. *Edry v Adelman*, 486 Mich 634, 641 (2010). We remand this case to the Macomb Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

PEOPLE v HEMINGWAY, No. 147033; Court of Appeals No. 308775. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436 (1973), as to the defendant's new claim of ineffective assistance of counsel, which is premised on his first trial counsel's alleged conflict of interest. The circuit court shall, in accordance with Administrative Order 2003-03, determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant at the evidentiary hearing. As this Court explained in its order denying leave to appeal in *People v Davenport*, 483 Mich 906 (2009), a presumption of prejudice exists when a defendant's former defense counsel joins the prosecutor's office that is pursuing the case against the defendant. MRPC 1.9(b), 1.10(b). Such a presumption may be overcome, however, if the prosecutor shows that the attorney who had a conflict of interest was properly "screened from any participation in the matter . . . ." MRPC 1.10(b)(1). The circuit court on remand shall determine when the defendant's former counsel's employment with the Tuscola County Prosecutor's office began and whether the prosecution rebutted the presumption of prejudice by showing that the former defense counsel was properly screened from any participation in the matter. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

In re GRANITZ ESTATE, No. 147134; Court of Appeals No. 309192. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we vacate the February 29, 2012 order of the Macomb Probate Court to the extent that it disallows the payment of $18,471.55 to the appellant Pavol Tkac and surcharges the appellant for that amount. We remand this case to the probate court for further proceedings consistent with this order. The lower courts erroneously applied MCR 5.307(D) and had no justification for disregarding the October 6, 2010 order allowing the conservator's first and final account in Macomb Probate Court No. 2010-199942-CA. The payment by the appellant, when acting as personal representative of the decedent's estate, constituted a payment to the conservator, and did not constitute a payment of a claim by the personal representative that would be governed by MCR 5.307(D). In all other

respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted September 25, 2013:

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY, No. 146962; Court of Appeals No. 306820. The parties shall include among the issues to be briefed: (1) whether the plaintiff taxpayer's response to the defendant Department of Treasury's August 3, 2005 audit determination letter—in light of events and communications that preceded that response, including information provided to the defendant by the plaintiff and the contents of the defendant's Audit Report of Findings—was a "petition . . . for refund" or "claim for refund" for purposes of the calculation of overpayment interest under MCL 205.30, and (2) alternatively, whether the plaintiff's November 17, 2005 request for an informal conference with the defendant, in spite of its later withdrawal of that request, was such a petition or claim. The motion for peremptory reversal is denied.

The Taxation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 25, 2013:

PEOPLE v CHRISTOPHER WILLIAMS, No. 146493; Court of Appeals No. 311165.

PEOPLE v DAY, No. 146685; Court of Appeals No. 306104.

PEOPLE v MYRON BANKS, No. 146764; Court of Appeals No. 314588.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

THEODORE v LIVINGSTON, No. 146806; Court of Appeals No. 306555.

PEOPLE v JERE CLARK, No. 146830; Court of Appeals No. 307694.

WESTFIELD INSURANCE COMPANY v D & G DOLLAR ZONE, No. 146967; Court of Appeals No. 306408.

PEOPLE v MIAH, No. 146977; Court of Appeals No. 307373.

PEOPLE v LEMONS, No. 146979; reported below: 299 Mich App 541.

PEOPLE v KEY, No. 146981; Court of Appeals No. 314879.

Summary Disposition September 27, 2013:

PEOPLE v ARTHUR, No. 145702; Court of Appeals No. 301762. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the

judgment of the Court of Appeals, and reinstate the defendant's convictions and sentences.

The trial court did not unconstitutionally "nullify" the defendant's right to self-representation by declining to remove the defendant's leg shackles. That the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation. See, e.g., *Lefevre v Cain*, 586 F3d 349 (CA 5, 2009) (shackling does not violate a defendant's right to self-representation), *cert den* 559 US 1016 (2010).

Moreover, the trial court did not violate the defendant's due process rights by ordering the defendant to wear leg shackles in the first place because the court was justified in imposing those limited restraints to avoid the risk of flight and to ensure the safety of those present in light of the defendant's reported escape attempt and the fact that the defendant required extra police security when he was transported to court.

While a defendant's right to self-representation encompasses certain specific core rights, including the right to be heard, to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at times, the right to self-representation is not unfettered. *McKaskle v Wiggins*, 465 US 168, 174, 176-178 (1984). The defendant, who undeniably possesses physical prowess, posed a physical danger because of his history of violent acts: he was a convicted double murderer before the instant case began, serving life without parole for shooting two victims in the head during a carjacking. The judge had presided over both the previous trial in this case and the other murder trial, and understandably formed an impression that the defendant was not only violent, but cunning, improvisational, and bent on the execution and concealment of his criminal acts. The court addressed these concerns by placing the defendant in the most reasonable restrictive restraints available.

The court's decision does not violate *Deck v Missouri*, 544 US 622 (2005), where the defendant was shackled with not only leg irons, but also handcuffs and a belly chain, all of which were visible to the jury. The core rule of *Deck* is that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck*, 544 US at 629 (emphasis added). That is not the case here as the court sought to shield the defendant's leg restraints from the jury's view. Further, the record on remand makes clear that no juror actually saw the defendant in shackles.

VISSER v VISSER, Nos. 146944 and 146945; reported below: 299 Mich App 12. The application for leave to appeal the December 18, 2012 judgment of the Court of Appeals is considered. We agree with the Court of Appeals that issues relating to the extensions of the personal protection order (PPO) are moot because there is no relief that can be granted, *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359 (1998), and the respondent has failed to identify any collateral consequences arising

solely out of the length of time that the PPO was in effect. However, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the remainder of the Court of Appeals opinion in this case because the issues relating to the initial granting of the PPO were not properly before the Court of Appeals where the respondent failed to seek appellate review of the original PPO. According to the Court of Appeals records, only the orders extending the PPO were appealed to that court. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Granted September 27, 2013:

HANNAY v DEPARTMENT OF TRANSPORTATION, No. 146763; reported below: 299 Mich App 261. The application for leave to appeal the January 17, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether economic loss in the form of wage loss may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008)); and (2) whether the evidence in this case establishes that the plaintiff incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Insurance Institute of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 27, 2013:

In re HARVEY, No. 147691; Court of Appeals No. 313746.

Summary Disposition September 30, 2013:

WINGET v DEPARTMENT OF TREASURY, No. 146218; Court of Appeals No. 302190. By order of April 1, 2013, the application for leave to appeal the October 16, 2012 judgment of the Court of Appeals was held in abeyance pending the decisions in *Malpass v Dep't of Treasury* (Docket Nos. 144430-2) and *Wheeler Estate v Dep't of Treasury* (Docket Nos. 145367-70). On order of the Court, the cases having been decided on June 24, 2013, 494 Mich 237 (2013), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Malpass* and *Wheeler*. The motion for entry of an order reversing the Court of Appeals decision and remanding the action to the Michigan Tax Tribunal is denied.

LEE v CROSKEY, Nos. 147167 and 147168; Court of Appeals Nos. 313217 and 313218. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MAGDICH & ASSOCIATES PC v NOVI DEVELOPMENT ASSOCIATES LLC, No. 147217; Court of Appeals No. 314518. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to the Court of Appeals for plenary consideration.

Leave to Appeal Denied September 30, 2013:

PEOPLE v DOMINIQUE JOHNSON, No. 146408; Court of Appeals No. 309337.

MILTON TOWNSHIP v KAMINSKY, No. 146427; Court of Appeals No. 307682.

COVENTRY PARKHOMES CONDOMINIUM ASSOCIATION v FEDERAL NATIONAL MORTGAGE ASSOCIATION, No. 146600; reported below: 298 Mich App 252.

PEOPLE v FIELDS, No. 146696; Court of Appeals No. 306624.

PEOPLE v LARRY SMITH, No. 146697; Court of Appeals No. 312697.

PEOPLE v HEART, No. 146823; Court of Appeals No. 313699.

CAVANAGH, J., would grant leave to appeal.

GREENBROOKE PARKHOMES CONDOMINIUM ASSOCIATION v THOMAS, No. 146832; Court of Appeals No. 305985.

WIEGMANN v THOMAS, No. 146865; Court of Appeals No. 306137.

STANLEY v JAIN, No. 146898; Court of Appeals No. 301237.

WHITE LAKE CHARTER TOWNSHIP v AZAC HOLDINGS, LLC, No. 146948; Court of Appeals No. 305294.

SHELBY CHARTER TOWNSHIP v TECHNOLOGY INTEGRATION GROUP SERVICES, INC, No. 146999; Court of Appeals No. 297190.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v MINICHIELLO, No. 147008; Court of Appeals No. 307962.

PEOPLE v BACALL, No. 147010; Court of Appeals No. 306269.

PEOPLE v RAHKAIM, No. 147021; Court of Appeals No. 313843.

PEOPLE v KING, No. 147029; Court of Appeals No. 314595.

PEOPLE v IDALSKI, No. 147034; Court of Appeals No. 310385.

PEOPLE v MICHAEL WITHERSPOON, No. 147045; Court of Appeals No. 312330.

PEOPLE v ATWOOD, No. 147046; Court of Appeals No. 313341.

PEOPLE v FORD, No. 147065; Court of Appeals No. 314943.

PEOPLE v MILLS, No. 147066; Court of Appeals No. 311918.

PEOPLE v MCCLOUD, No. 147070; Court of Appeals No. 311044.

PEOPLE v DEVIN COOPER, No. 147079; Court of Appeals No. 314638.

In re DORIS M HEINZERLING LIVING TRUST, Nos. 147109 and 147110; Court of Appeals Nos. 299555 and 299557.

UNITED FEDERAL CREDIT UNION v TAPP, No. 147118; Court of Appeals No. 309356.

PEOPLE v MCCRAY, No. 147120; Court of Appeals No. 311456.

PEOPLE v LAWSON, No. 147133; Court of Appeals No. 314385.

PEOPLE v MARK HOWARD, No. 147140; Court of Appeals No. 311235.

PEOPLE v ELLEDGE, No. 147142; Court of Appeals No. 308379.

PEOPLE v HOTCHKISS, No. 147143; Court of Appeals No. 311275.

PEOPLE v BUTLER, No. 147145; Court of Appeals No. 305756.

PEOPLE v ALLEN (PEOPLE v MIMS), Nos. 147146 and 147147; Court of Appeals Nos. 311298 and 311299.

PEOPLE v FISHER, No. 147148; Court of Appeals No. 312403.

PEOPLE v ALGERNON MOORE, No. 147153; Court of Appeals No. 311881.

PEOPLE v WELLONS, No. 147155; Court of Appeals No. 307526.

PEOPLE v SHAHBAZ, No. 147157; Court of Appeals No. 310686.

RAPP REALTY, LLC v CITY OF EAST LANSING, No. 147159; Court of Appeals No. 310902.

FILAS v DEARBORN HEIGHTS SCHOOL DISTRICT 7, No. 147165; Court of Appeals No. 308395.

PEOPLE v JEREMY KIRK, No. 147169; Court of Appeals No. 310617.

PEOPLE v HUGULEY, No. 147170; Court of Appeals No. 314381.

RICHMOND TOWNSHIP v RONDIGO, LLC, No. 147177; Court of Appeals No. 307520.

ZAHRA, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v KENNETH WITHERSPOON, No. 147180; Court of Appeals No. 300875.

PEOPLE v MCFARLAND, No. 147184; Court of Appeals No. 304647.

HODGE v MICHIGAN FIRST CREDIT UNION, No. 147185; Court of Appeals No. 311019.

PEOPLE v SHEETS, No. 147188; Court of Appeals No. 315140.

PEOPLE v SANTEE FRANKLIN, No. 147189; Court of Appeals No. 314177.

PEOPLE v REED, No. 147193; Court of Appeals No. 314388.

PEOPLE v DARRYL BELL, No. 147194; Court of Appeals No. 311669.

PEOPLE v CHU, No. 147195; Court of Appeals No. 314412.

PEOPLE v GREGORY MANN, No. 147197; Court of Appeals No. 308945.

PEOPLE v SOUTHWELL, No. 147206; Court of Appeals No. 307608.

PEOPLE v WESTLEY JOHNSON, No. 147207; Court of Appeals No. 309264.

PEOPLE v CARL HUBBARD, No. 147211; Court of Appeals No. 311427.

CITY OF EAST LANSING v RAPP REALTY, LLC, No. 147212; Court of Appeals No. 310834.

PEOPLE v MCDOWELL, No. 147221; Court of Appeals No. 315063.

PEOPLE v LAMB, No. 147223; Court of Appeals No. 314585.

PEOPLE v MATA, No. 147226; Court of Appeals No. 314745.

PEOPLE v TONY WELLS, No. 147227; Court of Appeals No. 315250.

PEOPLE v ATKINS, No. 147231; Court of Appeals No. 311455.

PEOPLE v STRONG, No. 147234; Court of Appeals No. 311419.

PEOPLE v MCSWAIN, No. 147237; Court of Appeals No. 309023.

PEOPLE v ROBERT KEMP, No. 147243; Court of Appeals No. 311444.

PEOPLE v JOHN SIMS, No. 147249; Court of Appeals No. 308711.

PEOPLE v MICHAEL B WILLIAMS, No. 147254; Court of Appeals No. 310272.

PEOPLE v CHARLES HOUSTON, No. 147255; Court of Appeals No. 314793.

PEOPLE v LOVE, No. 147256; Court of Appeals No. 312756.

PEOPLE v MORALES, No. 147257; Court of Appeals No. 315828.

PEOPLE v LYLES, No. 147258; Court of Appeals No. 313808.

PEOPLE v PROCTOR, No. 147260; Court of Appeals No. 315449.

WYOMING CHIROPRACTIC HEALTH CLINIC, PC v AUTO-OWNERS INSURANCE COMPANY, No. 147263; Court of Appeals No. 313176.

PEOPLE v GILMORE, No. 147266; Court of Appeals No. 312585.

PEOPLE v ROBIN MANNING, No. 147267; Court of Appeals No. 312992.

PEOPLE v LETEZ THREATT, No. 147279; Court of Appeals No. 305350.

PEOPLE v LONG, No. 147282; Court of Appeals No. 308709.

COMERICA BANK v BATESON, No. 147286; Court of Appeals No. 314784.

MCMILLAN v GENERAL MOTORS CORPORATION, No. 147290; Court of Appeals No. 311638.

PEOPLE v MANNION, No. 147293; Court of Appeals No. 315999.

In re CORRION, No. 147300; Court of Appeals No. 315536.

ZAHER v MIOTKE, No. 147301; reported below: 300 Mich App 132.

PEOPLE v QUINNEY, No. 147304; Court of Appeals No. 308407.

PEOPLE v OLIVER WOODS, No. 147305; Court of Appeals No. 307515.

PEOPLE v MICHAEL WELLS, No. 147307; Court of Appeals No. 312320.

PEOPLE v CHRISTIAN, No. 147309; Court of Appeals No. 309981.

AGEMA, LLC v GREENSTONE FARM CREDIT SERVICES, FLCA, No. 147313; Court of Appeals No. 309984.

PEOPLE v DONNAL, No. 147316; Court of Appeals No. 315123.

REIDENBACH v CITY OF KALAMAZOO, Nos. 147317 and 147491; Court of Appeals Nos. 306671 and 306404.

PEOPLE v HERBERT WITHERSPOON, No. 147327; Court of Appeals No. 302711.

PEOPLE v LINDSEY, No. 147340; Court of Appeals No. 310503.

TUDOR v AUTOMOTIVE COMPONENT CARRIER, No. 147361; Court of Appeals No. 311807.

PEOPLE v JAMES JONES, No. 147396; Court of Appeals No. 309917.

KNUCKLES v GENERAL MOTORS CORPORATION, No. 147402; Court of Appeals No. 312329.

In re FORFEITURE OF BAIL BOND, No. 147436; Court of Appeals No. 308512.

PEOPLE v CAROL WILSON, No. 147468; Court of Appeals No. 308076.

PEOPLE v ELLIOTT, No. 147470; Court of Appeals No. 305215.

ISRAEL v PUTRUS, No. 147475; Court of Appeals No. 306249.

PEOPLE v KINCAID, No. 147478; Court of Appeals No. 314932.

PEOPLE v BROSCH, No. 147553; Court of Appeals No. 311915.

Superintending Control Denied September 30, 2013:

BROWN v ATTORNEY GRIEVANCE COMMISSION, No. 147144.

EBERLINE v ATTORNEY GRIEVANCE COMMISSION, No. 147303.

Reconsideration Denied September 30, 2013:

PEOPLE v DUSTIN MARSHALL, No. 146241; reported below: 298 Mich App 607. Summary disposition at 493 Mich 1020.

CITY OF BAY CITY v HAMPTON, No. 146243; Court of Appeals No. 308849. Leave to appeal denied at 493 Mich 953.

PEOPLE v FRED RUSSELL, No. 146379; reported below: 297 Mich App 707. Leave to appeal denied at 494 Mich 863.

BIES-RICE v RICE, Nos. 146402, 146403, and 146404; Court of Appeals Nos. 295631, 295634, and 300271. Leave to appeal denied at 493 Mich 969.

PEOPLE v MENDE, No. 146438; Court of Appeals No. 305558. Leave to appeal denied at 493 Mich 969.

In re STILLWELL TRUST, No. 146489; reported below: 299 Mich App 289. Leave to appeal denied at 494 Mich 868.

PEOPLE v GRAYS, No. 146500; Court of Appeals No. 310824. Leave to appeal denied at 494 Mich 881.

PEOPLE v STEELE, No. 146513; Court of Appeals No. 311432. Leave to appeal denied at 494 Mich 881.

PEOPLE v DONYELLE WOODS, No. 146566; Court of Appeals No. 310536. Leave to appeal denied at 494 Mich 882.

MCCORMACK, J., not participating because of her prior involvement as counsel for a party.

PEOPLE v BAILEY, No. 146592; Court of Appeals No. 310664. Leave to appeal denied at 494 Mich 882.

PEOPLE v VENDEVILLE, No. 146711; Court of Appeals No. 311795. Leave to appeal denied at 494 Mich 882.

PEOPLE v JAGARLAMUDI, No. 146750; Court of Appeals No. 311375. Leave to appeal denied at 494 Mich 882.

KARAUS v BANK OF NEW YORK MELLON, No. 146892; reported below: 300 Mich App 9. Leave to appeal denied at 494 Mich 883.

WARE v DEPARTMENT OF COMMUNITY HEALTH, No. 146942; Court of Appeals No. 313652. Leave to appeal denied at 494 Mich 884.

PEOPLE v LARRY JONES, No. 146953; Court of Appeals No. 313270. Leave to appeal denied at 494 Mich 884.

Summary Disposition October 2, 2013:

PEOPLE v TION TERRELL, No. 146850; Court of Appeals No. 303717. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Wayne Circuit Court's determination that the defendant's trial attorney testified credibly at the hearing held pursuant to *People v Ginther*, 390 Mich 436 (1973), specifically, the Wayne Circuit Court's holding that the defendant's trial attorney made a valid strategic decision not to present expert testimony regarding the number of times that the complainant was shot. To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney's performance was not based on strategic decisions, but was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney's error, a different outcome was reasonably probable. This is a mixed question of law and fact. Findings of fact are reviewed for clear error; questions of law are reviewed de novo. *People v Armstrong*, 490 Mich 281 (2011). The trial court clearly erred in finding that the defendant's trial attorney was credible. We therefore vacate those portions of the Court of Appeals opinion relying on the trial court's credibility determination to affirm the defendant's conviction in the face of his claims of ineffective assistance of counsel, including the holding that the decision not to present expert testimony was a legitimate trial strategy. We remand this case to the Court of Appeals for reconsideration of the defendant's ineffective assistance claims in light of this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

FUHR v TRINITY HEALTH CORPORATION, No. 147158; Court of Appeals No. 309877. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the March 30, 2012 order of the Kent Circuit Court granting summary disposition to the defendants.

PEOPLE v BERRY ROBINSON, No. 147236; Court of Appeals No. 307104. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals to the extent that it affirmed the defendant's conviction for assault with intent to murder, we vacate the defendant's conviction and sentence for that offense, and we remand this case to the Wayne Circuit Court for entry of an amended judgment of sentence consistent with this order. There was no evidence that the defendant was connected to the shots fired at the victim from a passing car, or evidence that connected the defendant to that car. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

STOEPKER v ATTORNEY DISCIPLINE BOARD, No. 147494. The complaint for superintending control is considered and—the Court having concluded that the Attorney Discipline Board failed in part to perform a clear legal duty and abused its discretion in part by denying the plaintiff's application for review of the hearing panel's order denying the plaintiff's motion to dismiss—the May 6, 2013 order of the hearing panel is vacated in part. The portions of the formal complaint against the plaintiff that allege attorney misconduct premised on violations of Section 54 of the Michigan Campaign Finance Act, MCL 169.254, are moot in light of *Citizens United v Federal Election Comm'n*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010). See *In re Investigative Subpoenas*, 780 NW2d 585 (2010). Relief is otherwise denied, because the Court is not persuaded that it should grant the requested relief prior to the completion of the attorney discipline proceedings. The motion to stay is denied as moot.

Leave to Appeal Granted October 2, 2013:

HOWARD v KOWALSKI, No. 145773; Court of Appeals No. 297066. The parties shall address: (1) whether the affidavit of Charles J. Urse, M.D. is admissible; and (2) whether correspondence between the plaintiff's counsel and Dr. Urse's claims representative is admissible.

LAFONTAINE SALINE, INC v CHRYSLER GROUP LLC, Nos. 146722 and 146724; reported below: 298 Mich App 576. The parties shall address whether the Court of Appeals erred in holding that the 2010 PA 139 definition of "relevant market area," MCL 445.1566(1)(a), applied to enable the plaintiff to challenge the future dealer agreement between the defendants under MCL 445.1576(3). Compare *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 735 (CA 6, 2013).

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

In re COH, No. 147515; Court of Appeals No. 309161. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals erred in holding that there is a preference for relatives under MCL 712A.19c(2) when a circuit court decides whether to create a juvenile guardianship after parental rights have been terminated; (2) if such a preference exists, whether the paternal grandmother was entitled to that preference where her son's parental rights to the children had been terminated; (3) whether the Court of Appeals erred by not applying a clear error standard of review to the Muskegon Circuit Court Family Division's determination of the children's best interests pursuant to MCL 712A.19c; (4) whether the circuit court erred by using the best interests factors enumerated in MCL 722.23 of the Child Custody Act in deciding whether to grant the petition for a juvenile guardianship; and (5) whether the Court of Appeals erred by reversing the circuit court on the ground that it was improper to compare the foster parents with the proposed guardian, or erred on any other basis.

The Clerk of the Court is directed to place this case on the December 2013 session calendar for argument and submission. Appellant Department of Human Services' brief and appendix must be filed no later than November 4, 2013. Appellee Lori Scribner's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than November 25, 2013. Intervenor Michigan Children's Institute's brief must be filed no later than November 25, 2013.

The Children's Law Section and the Family Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs are to be filed no later than December 2, 2013.

Leave to Appeal Denied October 2, 2013:

SPEICHER v COLUMBIA TOWNSHIP BOARD OF ELECTION COMMISSIONERS, No. 146583; reported below: 299 Mich App 86.

CHICO-POLO v DEPARTMENT OF CORRECTIONS, No. 146643; reported below: 299 Mich App 193.

PEOPLE v BEEBE, No. 146809; Court of Appeals No. 305890.

BAUR v INTERNATIONAL TRANSMISSION COMPANY, No. 146926; Court of Appeals No. 309664.

PEOPLE v CORTEZ, No. 147055; reported below: 299 Mich App 679.

In re COH, No. 147664; Court of Appeals No. 312691.

Superintending Control Denied October 2, 2013:

MEIJER, INC v ATTORNEY DISCIPLINE BOARD, No. 147543.

Summary Disposition October 4, 2013:

CITY OF WESTLAND v KODLOWSKI, No. 146575; reported below: 298 Mich App 647. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate part D of the Court of Appeals opinion, which addresses the potential application of *People v Moreno*, 491 Mich 38 (2012), to this case. The Court of Appeals raised this issue sua sponte, but noted correctly, in deciding it, that the defendant claimed that he did not resist arrest for the alleged assault on Officer Little, and contended that he was charged with resisting arrest only to "cover up" the excessive force the officers used in effecting that arrest. As the defendant acknowledged in his testimony that he twice touched Officer Little, probable cause existed to effect his arrest. Therefore, the Court of Appeals had no occasion to discuss or decide the applicability of *People v Moreno* to this case, or to

determine whether, and to what extent, *People v Moreno* will be given retroactive effect in this or other cases.

We also reverse that part of the Court of Appeals decision holding that the evidence regarding the nature of the defendant's injuries was properly excluded under MRE 402. That evidence was relevant to the defendant's claim that the arresting officers fabricated charges to justify their actions. We decline to reverse the result reached by the Court of Appeals, however, as the error did not result in a manifest injustice because the defendant was not entirely deprived of his fabrication defense. *People v Lukity*, 460 Mich 484 (2006).

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

CAVANAGH, J., would grant leave to appeal.

BENEFIELD v THE CINCINNATI INSURANCE COMPANY, Nos. 147192 and 147214; Court of Appeals No. 300307. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment that reversed the trial court's exclusion of emotional distress damages for the plaintiff's breach of contract and negligence claims. Emotional distress damages are generally not recoverable for breach of a commercial contract, and the plaintiff did not establish that such damages were within the contemplation of the parties at the time the contract was made. *Kewin v Massachusetts Mutual Ins Co*, 409 Mich 401, 419 (1980). Emotional distress damages are also generally not recoverable for the negligent destruction of property. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 264 (2013). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Denied October 4, 2013:

PEOPLE v SANFORD DAVIS, No. 146938; Court of Appeals No. 306461.

Leave to Appeal Denied October 11, 2013:

RICHMOND TOWNSHIP v RONDIGO, LLC, No. 147175; Court of Appeals No. 304444. On order of the Court, the application for leave to appeal the March 5, 2013 judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

YOUNG, C.J. and VIVIANO, J., would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent. In my judgment, the Court of Appeals erred by holding that defendant could not receive attorney fees and costs pursuant to MCL 286.473b absent compliance by defendant's farm or farm operation with "generally accepted agricultural and management practices" (GAAMPs).

MCL 286.473b states:

> In *any nuisance action* brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees. [Emphasis added.]

MCL 286.473(1) states in part:

> A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.

The Court of Appeals held that "the plain language of MCL 286.473(1) expressly conditions [Right to Farm Act] immunity from characterization as a nuisance on a farm's or a farm operation's conformance to [GAAMPs]." *Richmond Twp v Rondigo, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2013 (Docket No. 304444), p 6. I disagree. The provision in MCL 286.473(1) that a GAAMPs-compliant farm or farm operation is immune from characterization as a "nuisance" constitutes *one* way, but not the *only* way, in which a defendant farm or farm operation can prevail in a nuisance action and thus receive costs under MCL 286.473b. Furthermore, MCL 286.473b states that a defendant farm or farm operation that prevails in *any nuisance action* in which that defendant is alleged to be a nuisance is entitled to expenses. MCL 286.473b contains no language limiting the award of fees and costs to defendants who are compliant with GAAMPs. Simply, if a farm or farm operation is not compliant with GAAMPs but prevails in a nuisance action, nothing in MCL 286.473b suggests that the farm or farm operation cannot receive costs. Because there was no dispute that defendant's composting activity constituted a "farm or farm operation," and because defendant prevailed in the litigation of the township's failed nuisance claims pertaining to defendant's composting activities, defendant should have been permitted to recover costs and expenses reasonably incurred "in connection with the defense of the action, together with reasonable and actual attorney fees." MCL 286.473b. Accordingly, I would reverse this portion of the judgment of the Court of Appeals and award attorney fees and costs to defendant.

ZAHRA, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

Reconsideration Denied October 11, 2013:

In re JORDAN, No. 147588; Court of Appeals No. 313789. Leave to appeal denied at 495 Mich 856.

Leave to Appeal Before Decision by the Court of Appeals Denied October 16, 2013:

MICHIGAN FINANCE AUTHORITY v KIEBLER, No. 147804; Court of Appeals No. 318451.

MARKMAN, J. (*dissenting*). I would grant the request for a bypass of the Court of Appeals pursuant to MCR 7.302(B)(4) and (C)(1)(b) and thereby expedite final resolution of this dispute. I would do so because, in my judgment, the issues are of considerable public interest and a delay in their resolution conceivably may impact that interest. In particular, I would facilitate the resolution of this case because the issues in dispute: (a) appear to be of fiscal consequence to the people of this state, involving the refinancing of $650 million in student-loan-related obligations and an estimated potential loss of $54 million to the Michigan Finance Authority, (b) appear to implicate the asserted "entitlement" to public funds of a significant number of citizens of this state, (c) appear to implicate the integrity of the state itself in assertedly entering into a commitment of public funds to those citizens, and (d) appear to be related to the issues in dispute in an ongoing federal case in which their resolution may possibly affect the resolution of the issues in the instant case and vice versa. As the role of the state judiciary in this country erodes over time, and the role of the federal judiciary grows, it becomes increasingly imperative, I believe, that this Court act when it can to preserve and protect judicial federalism and maintain its primary constitutional role in construing the laws of Michigan. In short, the instant lawsuit seems to me to be of a character that ought to be decided, and decided promptly, by the highest court of this state.

Leave to Appeal Denied October 18, 2013:

LASLEY v MILLER, No. 147646; Court of Appeals No. 313005.

MAHJOUB v CARDIOLOGY AND VASCULAR ASSOCIATES, PC, No. 147778; Court of Appeals No. 317489.

Summary Disposition October 23, 2013:

PEOPLE v CAIN, No. 146662; reported below: 299 Mich App 27. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion stating that a "completed larceny" is an element of unlawfully driving away a motor vehicle (UDAA). A "completed larceny" is not an element of UDAA because the offense does not require felonious intent, only movement of the vehicle without the owner's consent. MCL 750.413; *People v Stanley*, 349 Mich 362, 364 (1957) ("Intent to steal is not an ingredient of the offense."). Instead, UDAA merely requires driving or taking away a motor vehicle without the owner's consent. See MCL 750.413. We otherwise affirm the Court of Appeals holding that defendant's multiple punishments for carjacking and UDAA do not violate his double jeopardy rights because UDAA requires proof that defendant moved the vehicle, which carjacking

does not, and carjacking requires proof of the use of force or violence, or the threat thereof, which UDAA does not. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v ARISTA DE LA ROSA, No. 147084; Court of Appeals No. 314596. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for it to correct the judgment of sentence by striking the language prohibiting the defendant's deportation until he serves 17.5 years. Although the defendant is not currently eligible for early parole and deportation pursuant to MCL 791.234b, the language of the statute is mandatory, and a sentencing judge may not prevent application of the statute if a defendant eventually becomes eligible.

PEOPLE v LACOSSE, No. 147122; Court of Appeals No. 310987. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied October 23, 2013:

PEOPLE v AARON HERNANDEZ, No. 146636; Court of Appeals No. 310978.

PEOPLE v HEFT, No. 146687; reported below: 299 Mich App 69.

PEOPLE v DEBUS, No. 146952; Court of Appeals No. 308996.
CAVANAGH, J., would grant leave to appeal.

LUCAS v AWAAD, Nos. 147060 and 147061; reported below: 299 Mich App 345.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v ELLIOTT PATTERSON, No. 147137; Court of Appeals No. 304724.

NOVUS CENTURIAE, INC v SMITH & ASSOCIATES INSURANCE AGENCY, INC, No. 147203; Court of Appeals No. 308875.

PEOPLE v DEMARCUS THOMPSON, No. 147328; Court of Appeals No. 307449.

Leave to Appeal Granted October 23, 2013:

In re AJR, No. 147522; reported below: 300 Mich App 597. The parties shall address: (1) whether the Court of Appeals properly interpreted the statutory phrase "the parent having legal custody of the child" in the stepparent adoption statute, MCL 710.51(6), as necessarily referring to "*the*" sole parent with legal custody; (2) whether the phrase "legal custody" in § 51(6) is synonymous with the concept of joint custody in the Child Custody Act, MCL 722.26a(7)(b), whereby "the parents share decision-making authority as to the important decisions affecting the welfare of the child"; and (3) if the Court of Appeals did not err in

interpreting the statute, what, if any, remedy is available to the petitioners in this case that is consistent with the general purposes of the Adoption Code, MCL 710.21a.

The State Bar of Michigan Family Law Section and the Michigan Chapter of the American Academy of Matrimonial Lawyers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition October 25, 2013:

PEOPLE v RATCLIFF, No. 146861; reported below: 299 Mich App 625. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that the defendant's argument that his conviction was against the great weight of the evidence was unpreserved. Because this was a bench trial, the defendant was not required to file a motion to remand to preserve this issue. MCR 7.211(C)(1)(c). Relief is not warranted, however, because the evidence was not so heavily opposed to the verdict that the verdict can be said to be a miscarriage of justice. *People v Lemmon*, 456 Mich 625, 627 (1998). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v GRATSCH, No. 147018; reported below: 299 Mich App 604. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that offense variable scoring errors are reviewed to determine whether there is adequate evidentiary support for a particular score and whether the sentencing court properly exercised its discretion. As this Court stated in *People v Hardy*, 494 Mich 430, 438 (2013): "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." (Citing *People v Osantowski*, 481 Mich 103 (2008)). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered October 25, 2013:

PEOPLE v THOMAS WHITE, No. 146872; Court of Appeals No. 308275. The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the defendant's unconditional guilty plea waived any violation of the 180-day rule, MCL 780.131 and MCL 780.133; see *People v Lown*, 488 Mich 242, 268-270 (2011), where the prosecutor had received (albeit possibly not by certified mail)

a written Department of Corrections (DOC) notice of the defendant's incarceration and a request for final disposition of the pending charges, had responded to the notice stating that there were no pending charges against the defendant, and commenced the criminal action five years after receipt of the notice, and where the defendant and the Wayne Circuit Court were unaware of the notice and the response at the time of the plea proceeding; and (2) whether the defendant's guilty plea was properly set aside by the trial court for the reason that it was unknowing and involuntary due to the defendant's and the court's unawareness of the DOC notice and prosecutorial response. The parties should not submit mere restatements of their application papers.

PORTER v HILL, No. 147333; reported below: 301 Mich App 295. The parties shall submit supplemental briefs within 35 days of the date of this order addressing: (1) whether the parents of a man whose parental rights to his minor children were terminated prior to his death have standing to seek grandparenting time with the children under the Child Custody Act, MCL 722.21 *et seq*., and (2) whether the term "natural parent" in MCL 722.22(d) and (g) is the equivalent of "legal parent" or "biological parent." The parties should not submit mere restatements of their application papers.

The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 25, 2013:

PEOPLE v OLSICK, No. 146719; Court of Appeals No. 344102.

MARKMAN, J. (*concurring*). The trial court proceedings raise the question whether that court imposed a different sentence than the one the parties agreed to in the *Cobbs* agreement,[1] without affording defendant an opportunity to withdraw his plea. At the plea hearing, defense counsel stated that he believed he and the prosecutor had reached a sentencing agreement, if the court would agree. The following exchange then transpired:

> [*Defense Counsel*]: Okay. There's a felony firearm count, so we have that. If we could agree that the minimum on the other matters does not exceed 48 months, then in adding the 48 months with the 2 years we'd have 6. We would have the matter resolved, Judge.
>
> [*Prosecutor*]: . . . [T]he People would have no objection if the Court wants to enter into an agreement with the defendant to sentence him to 48 months on the non felony firearm charges plus the 2 for the felony firearm. That gives us our 6 [years]. . . . [Plea Tr, pp 4-5.]

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[1] *People v Cobbs*, 443 Mich 276 (1993).

Subsequently, the trial court stated, "If you agree I'll do it." The prosecutor stated, "I will agree." Thus, this exchange strongly indicates that the parties agreed to a total minimum sentence of six years. Yet later at the plea hearing, after the trial court had advised defendant of the consequences of entering a no-contest plea, the following exchange occurred:

> *The Court*: Now as far as the deal goes, . . . it's basically guidelines minimum in prison, Mr. Lazzio [defense counsel].
>
> [*Defense Counsel*]: That would be fair, Judge.
>
> * * *
>
> *The Court*: So you get 2 years in prison on the felony firearm and I give you the guideline minimums on the other charges. Is that what you understand, Mr. Olsick?
>
> *The Defendant*: Yes, Your Honor. [*Id.* at 15-16.]

This latter exchange, in contrast to the former, predicates the sentencing agreement on the sentencing guidelines minimum range, rather than 48-month sentences for the non-felony-firearm charges. There is similar confusion in the written documentation of the sentencing agreement. While a form signed by defendant, titled "Request by Defendant for Statement of Preliminary Evaluation of Sentence," stated that "the court's preliminary evaluation of sentence length is guideline minimum in prison," another form signed by defendant stated that the "maximum sentence is 6 years in jail/prison, and the minimum sentence is 20 years[.]"

Notwithstanding this confusion, I concur in this Court's denial of leave to appeal, as defendant's failure to file a motion to withdraw his plea within six months after sentencing precludes defendant from raising on appeal any claim of noncompliance with the rules set forth in subchapter 6.300 of the Michigan Court Rules or any other claim that the plea was not an understanding, voluntary, or accurate one. MCR 6.310(C) and (D). Defendant is not precluded, however, from filing a motion for relief from judgment in accordance with the rules described in subchapter 6.500 of the court rules, MCR 6.501 *et seq*.

PEOPLE v TERENCE JENKINS, No. 147230; Court of Appeals No. 312664.

MARKMAN, J. For the reasons set forth in my separate dissenting statement in *People v Alexander*, 494 Mich 876, 878-879 (2013), I would remand this case to the trial court and require that court to articulate reasons explaining and justifying its specific upward departure from the sentencing guideline range in this case in accordance with *People v Smith*, 482 Mich 292 (2008).

MCCORMACK, J., joins the statement of MARKMAN, J.

In re DAVILA, No. 147766; Court of Appeals No. 313019.

Summary Disposition October 28, 2013:

PEOPLE v WEST, No. 146136; Court of Appeals No. 309821. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's April 19, 2012 delayed application for leave to appeal under the standard applicable to direct appeals. The defendant's former appellate attorney failed to timely file in the trial court a motion to withdraw the defendant's plea, and failed to file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in MCR 7.205(F). Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of appellate counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the Clerk of this Court. We do not retain jurisdiction.

GUST v LENAWEE COUNTY ROAD COMMISSION, No. 147132; Court of Appeals No. 311844. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MCAFEE v D&G DOLLAR ZONE, INC, No. 147272; Court of Appeals No. 311501. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MULVENA v DEPARTMENT OF TRANSPORTATION, No. 147356; Court of Appeals No. 311126. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Michigan Compensation Appellate Commission (MCAC) for the MCAC to review and assess all of the evidence in the record beyond that of Dr. Knitter's testimony and, in light of that evidence, to reconsider whether the magistrate's decision is supported by competent, material, and substantial evidence on the whole record. Although the MCAC's decision that Dr. Knitter's testimony is not competent evidence to prove causation is supported by the record, the magistrate relied on more than just Dr. Knitter's testimony to rule in favor of the plaintiff, and the MCAC's opinion fails to discuss this remaining evidence. As a result, the MCAC failed to assess the whole record as required by MCL 418.861a(3). We do not retain jurisdiction.

PEOPLE v TEMELKOSKI, No. 147624; Court of Appeals No. 313670. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied October 28, 2013:

SLICER v CITY OF ST. JOHNS, Nos. 146525 and 146532; Court of Appeals No. 298068.

DALLAIRE v TREATMENT WORKS, INC, No. 146567; Court of Appeals No. 308028.

PEOPLE v BUSBY, No. 146700; Court of Appeals No. 305055.

In re PATTERSON, No. 146701; Court of Appeals No. 307456.

PEOPLE v REMINGTON WILLIAMS, No. 146731; Court of Appeals No. 312381.

PEOPLE v LAGINESS, No. 146875; Court of Appeals No. 306965.

PEOPLE v CALE, No. 146905; Court of Appeals No. 310955.

PEOPLE v HINES, No. 147023; Court of Appeals No. 311886.

PEOPLE v WEAVER, No. 147035; Court of Appeals No. 308964.

PEOPLE v SHAUN FERGUSON, No. 147049; Court of Appeals No. 307666.

PEOPLE v ROSTICK, No. 147078; Court of Appeals No. 314814.

PEOPLE v BRENT MORRIS, No. 147092; Court of Appeals No. 305872.

PEOPLE v STINSON, No. 147121; Court of Appeals No. 311011.

PEOPLE v KELVIN HAWKINS, No. 147123; Court of Appeals No. 308742.

PEOPLE v CISLER, No. 147138; Court of Appeals No. 315218.

C D BARNES ASSOCIATES, INC v STAR HEAVEN, LLC, No. 147151; Court of Appeals No. 300263.

PEOPLE v CRISWELL, No. 147154; Court of Appeals No. 314961.

PEOPLE v GORECKI, No. 147179; Court of Appeals No. 311584.

PEOPLE v DAMIEN JACKSON, No. 147196; Court of Appeals No. 315374.

PEOPLE v WILLIAM WRIGHT, No. 147201; Court of Appeals No. 315286.

PEOPLE v KOHN, No. 147210; Court of Appeals No. 311985.
CAVANAGH, J., would grant leave to appeal.

JACKSON v JACKSON, No. 147232; Court of Appeals No. 312676.

PEOPLE v RAISBECK, Nos. 147240 and 147241; Court of Appeals Nos. 3085810 and 308601.

PEOPLE v TERRENCE BANKS, No. 147259; Court of Appeals No. 308181.

PEOPLE v KEVIN SMITH, No. 147265; Court of Appeals No. 309950.

PEOPLE v WILLIAM JOHNSON, No. 147268; Court of Appeals No. 312521.

PEOPLE v NIX, No. 147269; reported below: 301 Mich App 195.

HOLLOWAY v MACOMB CORRECTIONAL FACILITY WARDEN, No. 147271; Court of Appeals No. 311765.

PEOPLE v SWANSON, No. 147277; Court of Appeals No. 311132.

PEOPLE v DARNELL BROWN, No. 147280; Court of Appeals No. 309552.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HAYNES, No. 147283; Court of Appeals No. 308491.

PEOPLE v WALLIS-BAUMGARTNER, No. 147289; Court of Appeals No. 314078.

PEOPLE v JOSEPH WRIGHT, No. 147292; Court of Appeals No. 308158.

PEOPLE v JOSE GONZALES, No. 147298; Court of Appeals No. 315199.

PEOPLE v KORESJZA, No. 147299; Court of Appeals No. 311260.

HODGES v CITY OF DEARBORN, No. 147315; Court of Appeals No. 308642.

PEOPLE v KNOTT, No. 147319; Court of Appeals No. 315500.

PEOPLE v VAUGHN MITCHELL, No. 147320; Court of Appeals No. 293284.

PEOPLE v FRIAS, No. 147326; Court of Appeals No. 312109.

PEOPLE v BARTELL, No. 147330; Court of Appeals No. 313891.

LATIMORE v CITIMORTGAGE, No. 147331; Court of Appeals No. 312661.

PEOPLE v MCLEMORE, No. 147336; Court of Appeals No. 314795.

PEOPLE v BARRY JENKINS, No. 147337; Court of Appeals No. 311486.

PEOPLE v KILBY, No. 147339; Court of Appeals No. 311160.

PEOPLE v SASSE, No. 147343; Court of Appeals No. 310928.

PEOPLE v HANN, No. 147344; Court of Appeals No. 307341.

PEOPLE v LENNIE JACKSON, No. 147345; Court of Appeals No. 312586.

PEOPLE v DEANDREA FREEMAN, No. 147346; Court of Appeals No. 315264.

PEOPLE v LENNIE JACKSON, No. 147347; Court of Appeals No. 312636.

FLAGSTAR BANK v GREENSTONE INVESTMENTS LLC, No. 147348; Court of Appeals No. 309110.
VIVIANO, J., not participating due to a familial relationship with counsel of record. MCR 2.003(C)(1)(g)(ii).

HURON VALLEY EDUCATION ASSOCIATION, MEA/NEA v HURON VALLEY SCHOOLS, No. 147350; Court of Appeals No. 311887.

PEOPLE v ZACKARY WILLIAMS, No. 147357; Court of Appeals No. 316225.

PEOPLE v SZYDLEK, No. 147358; Court of Appeals No. 311747.

LEE v AAA AUTO SALES OF GRAND RAPIDS, INC, No. 147359; Court of Appeals No. 314647.

SILVERNAIL v LIBERTY MUTUAL INSURANCE COMPANY, No. 147360; Court of Appeals No. 308762.

PEOPLE v HESTER, No. 147363; Court of Appeals No. 311826.

PEOPLE v MONTGOMERY, No. 147364; Court of Appeals No. 309993.

PEOPLE v DUKE, No. 147366; Court of Appeals No. 314645.

PEOPLE v JAMES THOMPSON, No. 147369; Court of Appeals No. 311265.

STAPLETON v MARQUETTE BRANCH PRISON WARDEN, No. 147371; Court of Appeals No. 312503.

NORMANDY APARTMENTS CONDOMINIUM ASSOCIATION, INC v BANK OF AMERICA, NA, No. 147372; Court of Appeals No. 311735.

PEOPLE v CHARLES JENKINS, No. 147374; Court of Appeals No. 304644.

PEOPLE v RIVERA-ESTRADA, No. 147375; Court of Appeals No. 316069.

PEOPLE v DARRYL COOPER, No. 147378; Court of Appeals No. 301485.

WILLIAMS v GLENNBROOK BEACH ASSOCIATION, Nos. 147379 and 147383; Court of Appeals Nos. 301496 and 301490.

AMERICAN FAMILY HOMES, INC v GLENNBROOK BEACH ASSOCIATION, No. 147381; Court of Appeals No. 301489.

PEOPLE v MARCUS WASHINGTON, No. 147386; Court of Appeals No. 312704.

PEOPLE v WHITSETT, No. 147389; Court of Appeals No. 312218.

PEOPLE v TUCKER, No. 147397; Court of Appeals No. 315509.

TATE v PLASTOMER CORPORATION, No. 147403; Court of Appeals No. 307963.

PEOPLE v DALE LEWIS, No. 147405; Court of Appeals No. 311159.

PEOPLE v BEARDSLEY, No. 147408; Court of Appeals No. 315915.

PEOPLE v STEVEN POWELL, No. 147409; Court of Appeals No. 315841.

PEOPLE v BARRERA, No. 147413; Court of Appeals No. 311530.

PEOPLE v DWAYNE ADAMS, No. 147419; Court of Appeals No. 309679.

PEOPLE v AWRAHA, No. 147420; Court of Appeals No. 309022.

PEOPLE v DENHAM, No. 147421; Court of Appeals No. 309171.

PEOPLE v ANTHONY PHILLIPS, No. 147423; Court of Appeals No. 300533.

PEOPLE v DASGUPTA, No. 147432; Court of Appeals No. 308869.

PEOPLE v YARBROUGH, No. 147443; Court of Appeals No. 316597.

PEOPLE v SHERMAN WASHINGTON, No. 147445; Court of Appeals No. 310969.

PEOPLE v JETT, No. 147448; Court of Appeals No. 309536.

PEOPLE v LOMASNEY, No. 147456; Court of Appeals No. 301620.

MEADOWS VALLEY, LLC v VILLAGE OF REESE, No. 147461; Court of Appeals No. 309549.

COUNTY OF MIDLAND v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 147462; Court of Appeals No. 303611.

GENESEE COUNTY ROAD COMMISSION v BLUE CROSS AND BLUE SHIELD OF MICHIGAN, No. 147477; Court of Appeals No. 313023.

PEOPLE v MORGAN, No. 147479; Court of Appeals No. 312038.

PEOPLE v WOODWORTH, No. 147484; Court of Appeals No. 301619.

PEOPLE v LARSON, No. 147488; Court of Appeals No. 315538.

MCCASKILL v USAA CASUALTY INSURANCE COMPANY, No. 147501; Court of Appeals No. 310068.

DEPARTMENT OF COMMUNITY HEALTH v VELEZ-RUIZ, No. 147516; Court of Appeals No. 315966.

PEOPLE v MIGUEL VIDANA, No. 147520; Court of Appeals No. 311319.

PEOPLE v JAMES TAYLOR, No. 147537; Court of Appeals No. 309145.

PEOPLE v DAVID VIDANA, No. 147541; Court of Appeals No. 307409.

PEOPLE v CRAWFORD, Nos. 147557 and 147559; Court of Appeals Nos. 310137 and 310179.

PEOPLE v MAY, No. 147644; Court of Appeals No. 308504.

SPRAGUE v MCMILLAN, No. 147768; Court of Appeals No. 315206.

Superintending Control Denied October 28, 2013:

MOTLEY v ATTORNEY GRIEVANCE COMMISSION, No. 147181.

Reconsideration Denied October 28, 2013:

PEOPLE v IBRAGIMOVA, No. 145005; Court of Appeals No. 308153. Leave to appeal denied at 494 Mich 866.

PEOPLE v TIMOTHY TAYLOR, No. 146338; Court of Appeals No. 306567. Leave to appeal denied at 494 Mich 855.

ADAIR v STATE OF MICHIGAN, No. 146371; Court of Appeals No. 230858. Summary disposition at 494 Mich 852.

GREER v DETROIT PUBLIC SCHOOLS, No. 146426; Court of Appeals No. 304197. Leave to appeal denied at 494 Mich 855.

MOHNEY v AMERICAN INTERNATIONAL GROUP, No. 146846; Court of Appeals No. 303797. Summary disposition at 494 Mich 866.

JOHNSON v GENERAL MOTORS COMPANY, No. 146935; Court of Appeals No. 313204. Leave to appeal denied at 494 Mich 871.

Summary Disposition October 30, 2013:

SHAFT v JACKSON NATIONAL LIFE INSURANCE COMPANY, No. 147789; Court of Appeals No. 315030. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

We further order that the proceedings in the Ingham Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Before Decision by the Court of Appeals Denied October 30, 2013:

WHITE v CITY OF DETROIT ELECTION COMMISSION, No. 147875; Court of Appeals No. 318683.

BARROW v CITY OF DETROIT ELECTION COMMISSION, No. 147877; Court of Appeals No. 317540.

Summary Disposition November 1, 2013:

In re APPLICATION OF THE DETROIT EDISON COMPANY TO INCREASE RATES, No. 145750; reported below: 297 Mich App 377. leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we affirm the result reached in the July 26, 2012 judgment of the Court of Appeals. The Michigan Public Service Commission (PSC) was not obligated by MCL 460.6a(1) to order a refund based on the actual amount that each customer overpaid, and the PSC did not abuse its discretion in approving the refund methodology at issue. We note, however, that the Court of Appeals erred by concluding that MCL 460.6a(1) is ambiguous because it is subject to reasonable but differing interpretations. The standard for determining ambiguity is whether a provision of the law " 'irreconcilably conflict[s]' with another provision . . . or . . . is *equally* susceptible to more than a single meaning." See *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166 (2004), and *Klapp v United Ins Group Agency*, 468 Mich 459, 467 (2003).

CAVANAGH, J. (*concurring*). I concur in the order affirming the judgment of the Court of Appeals. However, I write separately to note that I

continue to adhere to my past position regarding the standard for determining ambiguity. See *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 173-185 (2004) (CAVANAGH, J., dissenting).

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court's decision to affirm the judgment of the Court of Appeals. In my view, the Michigan Public Service Commission (PSC) approved a refund methodology contrary to the language of MCL 460.6a(1). Of course, this Court owes respectful consideration to an agency's interpretation of a statute that it is charged with administering.[1] But that interpretation does not bind the judiciary, and this Court must step in when the agency's interpretation conflicts with the statutory language. I would therefore reverse the Court of Appeals' decision that deferred to the PSC's erroneous interpretation.

MCL 460.6a(1) governs electric rate changes, including the procedure for effectuating a temporary rate increase:

> A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section. . . . If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. . . . *If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission.* [Emphasis added.]

In 2009, relying on MCL 460.6a(1), Detroit Edison applied for an increase in rates of $378 million. When the PSC failed to issue an order within 180 days, Detroit Edison elected to self-implement an increase of $280 million. But the PSC ultimately approved an increase of only $217,392,000, so MCL 460.6a(1) required Detroit Edison to refund the excess revenue that it had collected—$26,872,231 after interest. Detroit Edison proposed to allocate this refund among its customer classes on the basis of each class's share of total revenue. The refund would then be allocated within each class to individual customers using a formula created by the PSC and would be provided as a credit on a future bill. The Association of Businesses Advocating Tariff Equity (ABATE) objected to this methodology as applied to primary customers on the basis that the plain language of MCL 460.6a(1) required a refund based on the exact

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[1] *In re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 259 (2008).

amount each primary customer had paid.[2] The PSC rejected ABATE's contention, concluding that an allocation based on rate class complied with the statute and that calculating the exact refund amount for each primary customer would be overly burdensome and costly.

The Court of Appeals deferred to the PSC's decision because it determined that MCL 460.6a(1) was ambiguous and "cogent reasons" existed to support the PSC's interpretation.[3] In my view, the Court of Appeals erred twice. First, as stated in the Court's order today, the Court of Appeals applied the wrong standard for discerning ambiguity in a statute. Second, no matter what standard of ambiguity is used, MCL 460.6a(1) unambiguously requires a utility to refund a precise amount to primary customers that overpaid and curtails the PSC's discretion to fashion an alternative refund methodology. Thus, the PSC abused its discretion by approving a refund methodology that is contrary to the statute's language.

The Legislature's carefully chosen language supports my understanding of the statute. First, the Legislature said that any refund should be divided "among" the primary customers. The appropriate definition of "among" in this context is "with a share for each of[.]"[4] Thus, rather than the whole class being allocated a share of the refund, each primary customer is entitled to a particular share of the refund. The Legislature also instructed the PSC how to calculate each primary customer's refund: "based upon their pro rata share of the total revenue collected through the applicable increase . . . ."[5] The refund is a sum certain, not an indeterminate amount at the PSC's discretion. Each primary customer must receive a percentage of the refund required by MCL 460.6a(1) equal to the percentage of the total revenue generated by that primary customer during the self-implementation period, plus interest. Yet the methodology that the PSC approved in this case would result in refunds that exceed or fall short of the precise amounts that the statute requires.

Traditional precepts of statutory interpretation also support my reading of the statute. Courts must strive to interpret statutes in a way that gives effect to every word and phrase and avoids rendering any part of the statute surplusage or nugatory.[6] But the PSC's interpretation of MCL 460.6a(1), which today receives the Court's stamp of approval, renders a portion of the statute pure surplusage. Under the PSC's interpretation, once a utility allocates a block of the refund to the class of primary customers, any further distribution of the refund is done pursuant to the PSC's discretion. This grant of discretion, the PSC suggests, is implicit in the statute's silence on how to divide the primary customer class's portion of the refund. But if

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[2] A "primary customer" is a high-voltage customer that takes power directly from Detroit Edison's primary lines.

[3] *In re Detroit Edison Co Application*, 297 Mich App 377, 385-386; 823 NW2d 433 (2012).

[4] *Random House Webster's College Dictionary* (2005).

[5] MCL 460.6a(1).

[6] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

legislative silence conferred carte blanche on the PSC, then the Legislature would not have had any reason to state in the very next clause that the refund to secondary and residential customers should be performed "in a manner to be determined by the commission."[7] The PSC's interpretation renders this portion of the statute pure surplusage because, according to the PSC, it would have had discretion over the secondary and residential customers' refunds even if the Legislature had not said so. Put another way, the PSC's interpretation holds that it has discretion over the allocation of the refunds to all three customer classes even though the Legislature explicitly granted it discretion over the refunds to two classes and was silent regarding the third. My understanding reaches the much more logical conclusion that the PSC has discretion over the refunds to the two customer classes for which discretion was expressly granted and no discretion over the customer class for which the Legislature provided a precise formula to calculate the refund for each customer. Only my interpretation gives every word meaning.

Finally, I find unavailing the PSC's argument that providing exact refunds to primary customers would be too difficult and costly for Detroit Edison. While providing such a refund may be difficult, the statute contains no indication that the Legislature intended to make it easy for utilities to self-implement rate increases. And indeed, public policy would seem to indicate that precisely the opposite is true. When a utility makes the decision to self-implement a rate increase on its customers, it runs a risk that the final approved rate might be lower than its self-implemented rate. And there is no reason to believe that the Legislature would write the statute in a way that would alleviate that risk. The Legislature's carefully crafted procedure is not concerned merely with preventing a windfall to the utilities; it is designed to protect the customers—particularly the primary customers who buy the most power. Under the PSC's interpretation, on the other hand, utilities would have an incentive to self-implement rates as fast and as high as possible to the detriment of the customers. Then, if the final rate is as high as the self-implemented rate, the utility reaps the benefit of having charged a higher rate for a longer period of time, and if the final rate is lower, there is no consequence to the utility. The Legislature would not have intentionally created incentives so damaging to consumers.

While an agency's interpretation of a statute that it is charged with executing is generally entitled to respectful consideration, this Court is ultimately tasked with enforcing the Legislature's language. Giving respectful consideration to the PSC's interpretation of the statute, I nonetheless conclude that the words the Legislature chose to use in MCL 460.6a(1) do not support the PSC's interpretation of the statute. Accordingly, I respectfully dissent.

Summary Disposition November 6, 2013:

PEOPLE v TOMASIK, No. 144414; Court of Appeals No. 279161. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in

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[7] MCL 460.6a(1).

part the judgment of the Court of Appeals. We remand this case to the Court of Appeals for reconsideration, in light of *People v Musser*, 494 Mich 337 (2013), *People v Kowalski*, 492 Mich 106 (2012), and *People v Grissom*, 492 Mich 296 (2012), of the following issues: (1) whether the Kent Circuit Court erred by admitting the entire recording of the defendant's interrogation; (2) whether the circuit court erred in admitting Thomas Cottrell's expert testimony regarding Child Sexually Abusive Accommodation Syndrome under current MRE 702, and, if so, whether the error was harmless; (3) whether the circuit court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders; and (4) whether the defendant's trial counsel was ineffective by failing to object to the admission of the defendant's entire interrogation, by failing to object to Thomas Cottrell's testimony, and by failing to procure the expert testimony of Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V KEVIN FERGUSON, No. 145127; Court of Appeals No. 307416. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Hardy* [Docket No. 144327] and *Glenn* [Docket No. 144979]. We do not retain jurisdiction.

PEOPLE V GUILE, No. 146505; Court of Appeals No. 309283. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court for an evidentiary hearing and reconsideration of the issue whether the time in which to file an appeal of right should be restarted pursuant to MCR 6.428. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

HASTINGS MUTUAL INSURANCE COMPANY V MOSHER, DOLAN, CATALDO & KELLY, INC, No. 146900; Court of Appeals No. 296791. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals in part and we remand this case to the Court of Appeals for consideration of the issues: (1) which insurance policy or policies govern coverage in this case; and (2) whether any exclusions in the governing policy or policies apply. The Court of Appeals erred in concluding that it was bound by the law of the case to accept a prior panel's implicit determination that the policy exclusions do not apply. The prior panel did not make any implicit or explicit determination regarding the application of the policy exclusions. In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v KULINSKI, No. 147295; Court of Appeals No. 311898. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court. We direct that court to conduct an evidentiary hearing to resolve challenges to the accuracy or relevancy of information contained in the presentence report in accordance with the requirements of MCL 771.14(6) and MCR 6.425(E)(1)(b) and (E)(2) and to resentence the defendant, if necessary. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We order the trial court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant. We do not retain jurisdiction.

PEOPLE v BLAKE, No. 147385; Court of Appeals No. 315676. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and we remand this case to the Kent Circuit Court for reinstatement of the August 14, 2012 judgment of sentence. Defendant received the exact minimum and maximum prison terms for which he bargained, and he expressly stated on the record that lifetime electronic monitoring was of no concern to him. Consequently, the defendant's guilty plea was not rendered involuntary or unknowing by the failure of either the trial court or defense counsel to inform him of a mandatory minimum sentence, and he is not entitled to withdraw his guilty plea.

Leave to Appeal Denied November 6, 2013:

PEOPLE v DANNY SIMMONS, No. 146046; Court of Appeals No. 301445.

PEOPLE v JESSE COLLINS, Nos. 146457 and 146748; reported below: 298 Mich App 458.

PEOPLE v TYRELL HENDERSON, No. 146732; reported below: 299 Mich App 473.

PEOPLE v ALFRED HARRIS, No. 146821; Court of Appeals No. 308733.

ROHDE v NALLANI, Nos. 146915, 146917, and 146927; Court of Appeals No. 308773.

PEOPLE v PHILLIP GIBBS, No. 146937; reported below: 299 Mich App 473.

LOZANO v DETROIT MEDICAL CENTER, Nos. 147162, 147163, and 147164; Court of Appeals Nos. 300463, 300466, and 300751.

LOZANO v DETROIT MEDICAL CENTER, Nos. 147425, 147426, and 147427; Court of Appeals Nos. 300463, 300751, and 306703.

DAIRYLAND INSURANCE COMPANY v AFFIRMATIVE INSURANCE COMPANY, No. 147215; Court of Appeals No. 307467.

MARKMAN, J., would grant leave to appeal for the reasons set forth in his dissenting statement in *Farmers Ins Exchange v Farm Bureau General Ins Co of Mich*, 478 Mich 880 (2007).

ELDE v CASTLES BROTHERS, INC, No. 147382; Court of Appeals No. 308638.

Petition for Injunction Denied November 6, 2013:

In re FRYHOFF, No. 147718. The petition for injunction pursuant to MCR 9.108(E)(4) is considered, and it is denied. In lieu of granting the relief requested, we invite the Attorney Grievance Commission to file with the Court its proposal for amending the Michigan Rules of Professional Conduct so as to clarify the status of attorney fee provisions such as that utilized by the attorney who is the subject of the petition for injunction. The issues are whether the use of a "results obtained" or "value added" provision in the calculation of attorney fees in a divorce case makes the fee "contingent" and thus impermissible under MRPC 1.5(d), and if so, whether the rules should be amended to permit such fee provisions under certain conditions.

The State Bar Family Law Council and Standing Committee on Professional Ethics are also invited to file proposed rule amendments addressing the issue presented.

Leave to Appeal Granted November 6, 2013:

PEOPLE v CARP, No. 146478; reported below: 298 Mich App 472. The motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the November 15, 2012 judgment of the Court of Appeals is considered, and it is granted, limited to whether *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), applies retroactively under federal law, per *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), and/or retroactively under state law, per *People v Maxson*, 482 Mich 385 (2008), to cases that have become final after the expiration of the period for direct review.

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Eliason* (Docket No. 147428) and *People v Davis* (Docket No. 146819). The Court will issue a separate scheduling order specifying the parameters for oral argument, including time limits, allocation of time, and additional parties invited to participate in oral argument.

PEOPLE v CORTEZ DAVIS, No. 146819; Court of Appeals No. 314080. The application for leave to appeal the January 16, 2013 order of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution, and/or the prohibition against "cruel or unusual punishment" found in Const 1963, art 1, § 16, categorically bar the imposition of a life without parole sentence on a defendant under the age of 18 convicted of first-degree murder for having aided and abetted the commission of a felony murder; and (2) if such a categorical bar exists, whether it applies retroactively, under federal or state law, to cases that have become final after the expiration

of the period for direct review. See *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989); *People v Maxson*, 482 Mich 385 (2008).

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Carp* (Docket No. 146478) and *People v Eliason* (Docket No. 147428). The Court will issue a separate scheduling order specifying the parameters for oral argument, including time limits and allocation of time.

PEOPLE V ELIASON, No. 147428; reported below: 300 Mich App 293. The application for leave to appeal the April 4, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the Court of Appeals correctly applied *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), to Michigan's sentencing scheme for first-degree murder; (2) whether that sentencing scheme amounts to cruel or unusual punishment under Const 1963, art 1, § 16 as applied to defendants under the age of 18; and (3) what remedy is required for defendants whose sentences have been found invalid under *Miller* or Const 1963, art 1, § 16.

We invite the Wayne County Prosecuting Attorney to file a brief amicus curiae addressing the issue of what remedy is required for defendants under the age of 18 whose sentences of life without parole for murder have been found invalid under *Miller* or Const 1963, art 1, § 16.

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Carp* (Docket No. 146478) and *People v Davis* (Docket No. 146819). The Court will issue a separate scheduling order specifying the parameters for oral argument, including time limits, allocation of time, and additional parties invited to participate in oral argument.

Summary Disposition November 8, 2013:

PEOPLE V MESECAR, No. 147075; Court of Appeals No. 312292. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the sentence of the Barry Circuit Court imposing fines, costs, and fees, and we remand this case to that court. On remand, the circuit court shall articulate on the record the basis for imposing the fines, costs, and fees, and provide the defendant an opportunity to object. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Granted November 8, 2013:

PEOPLE V BYNUM, No. 147261; Court of Appeals No. 307028. The application for leave to appeal the April 18, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to the following issues: (1) whether the police officer's expert testimony regarding gangs and gang membership—especially the testimony as to the defendant's gang, the defendant's role in his gang, and premeditation—was more prejudi-

cial than probative under MRE 403; (2) the extent to which the profiling factors listed in *People v Murray*, 234 Mich App 46, 56-58 (1999), apply to the admissibility of this expert testimony; (3) whether any error by the trial court with respect to this testimony was preserved; and (4) whether, if there was any such error by the trial court, the Court of Appeals correctly held that the defendant was entitled to a new trial or whether any error was harmless. The defendant's application for leave to appeal as cross-appellant remains pending.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 8, 2013:

In re MILLER OSBORNE PERRY TRUST, No. 146901; reported below: 299 Mich App 525.

MARKMAN, J. (*dissenting*). Appellee is a beneficiary of the Miller Osborne Perry Trust. The trust contains a "no-contest" or "*in terrorem*" clause stating that

> [i]f any beneficiary under this trust or any heir of mine . . . shall challenge or contest the admission of this trust to probate, or challenge or contest any provision of this trust, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this trust.

Under MCL 700.7113, such a clause is enforceable against a challenging beneficiary or heir unless "probable cause exists for instituting a proceeding contesting the trust . . . ." Appellee brought the instant declaratory judgment action, requesting that the trial court assess whether he had probable cause to file a future action directly challenging the trust. Appellant, as trustee, defended the action and countered that the action constituted a direct challenge to the trust in violation of the no-contest clause. The trial court determined that appellee lacked probable cause for his proposed future action but that the declaratory judgment action did not constitute a prohibited challenge to the trust, and appellant appealed the latter holding. The Court of Appeals indicated that the trial court lacked jurisdiction over the action because of its hypothetical nature, but proceeded nonetheless to hold that by bringing the action, appellee had not thereby breached the no-contest clause.

I would grant leave to appeal to consider the following three questions: (a) as addressed at greater length in Justice VIVIANO's thoughtful dissent, whether in light of MCL 700.7113 the trial court possessed jurisdiction to hear the instant declaratory judgment action, see *McLeod v McLeod*, 365 Mich 25 (1961); (b) whether the Court of Appeals erred by concluding that appellee's declaratory judgment action did not breach the

no-contest clause; and (c) whether a beneficiary relying on the exception to the enforcement of a no-contest clause in MCL 700.7113 that enables the beneficiary to receive a portion of, or benefits under, the trust despite having raised a legal challenge to the trust, can establish "probable cause" for bringing his legal challenge when he or she did not ultimately prevail in the legal challenge, see, e.g., *In re Stan Estate*, 301 Mich App 435, 444-445 (2013), citing 2 Restatement Property, 3d, Wills & Other Donative Transfers, § 8.5, comment *c*, at 195.

VIVIANO, J. (*dissenting*). I respectfully dissent because I believe the lower courts may have erred by reaching a nonjusticiable question.

In its opinion, the Court of Appeals stated:

> When the petition is examined as a whole, it is clear that Mark Perry asked the probate court to examine his evidence and determine whether that evidence *would* give him probable cause—as that phrase is understood under MCL 700.7113—if he *were* to challenge the Trust. That is, he essentially posed a hypothetical scenario to the probate court and asked it to advise him about the probable application of a statute—MCL 700.7113—to his proposed scenario. For that reason, Mark Perry likely failed to allege a justiciable controversy. See *Shavers v Attorney General*, 402 Mich 554, 588-589, 267 NW2d 72 (1978) (stating that court should not decide hypothetical issues; rather, declaratory relief is only appropriate where the plaintiff has sufficiently alleged an actual justiciable controversy). [*In re Miller Osborne Perry Trust*, 299 Mich App 525, 531 (2013).]

Despite its doubts about whether the case presented a justiciable controversy, the Court of Appeals went on to address the merits of the issue presented. I believe that it should not have done so without first addressing, as a threshold matter, whether petitioner had sufficiently alleged a justiciable controversy.

As (now) Chief Justice YOUNG has explained,

> [q]uestions of justiciability may be raised at any stage in the proceedings, even sua sponte, and may not be waived by the parties. Where a lower court has erroneously exercised its judicial power, an appellate court has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. [*Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 374 (2006) (opinion by YOUNG, J.) (quotation marks and citation omitted), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 n 18 (2010).]

Therefore, I would remand this case to the Court of Appeals for a determination of whether the probate court exceeded the constitutional limits of its "judicial power" under Const 1963, art 6, § 1. On remand, I

would direct the Court of Appeals to consider *McLeod v McLeod*, 365 Mich 25 (1961), a case that appears to be on point.

In *McLeod*, four children promised their father that they would not sue to recover the assets of their deceased mother. In exchange, the father promised to leave those assets to his children upon his own death. Subsequently, the father remarried and executed a will bequeathing a large portion of the assets in dispute to his new wife. The new will contained an *in terrorem* clause that was to be enforced against anyone who " 'contest[ed]' " its provisions. *Id*. at 27-29.

Following the father's death, his son filed a complaint for declaratory relief. The son asked the trial court to declare whether a suit to enforce the oral agreement between the father and his children would qualify as a "contest" to the will. *Id*. at 29-30. The court dismissed the action on the ground that the son's legal question was inappropriate in the context of a declaratory action.

This Court affirmed the trial court's order, emphasizing that declaratory relief is not appropriate when " 'a declaration . . . can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action.' " *Id.* at 32, quoting *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 678 (1930). The Court also explained that a declaratory action " 'is not a substitute for the regular actions, and is not an exercise of general equity jurisdiction in which the court may grant consequential relief . . . .' " *McLeod*, 365 Mich at 32, quoting *Gross Pointe Shores v Ayres*, 254 Mich 58, 62 (1931). The Court continued, "It has been repeatedly declared that [declaratory actions] may not be regarded as a substitute for other legal actions." *McLeod*, 365 Mich at 33, citing *Brown v Brodsky*, 348 Mich 16, 20 (1957).

In *McLeod*, the plaintiff's legal question did not arise in a justiciable manner because he had not brought "a suit for specific performance of the alleged verbal agreement between his father and the plaintiff and [his siblings] and fail[ed] to prevail therein." *McLeod*, 365 Mich at 34. For this reason, this Court concluded that it was "not concerned, in other words, with rights that *must vest* in the future or with the interpretation of a written instrument purporting to create such rights." *Id.* Accordingly, this Court held that declaratory judgment was not appropriate "for the determination of the question of law submitted by plaintiff . . . ." *Id*.

Thus, *McLeod* may be read as establishing the following rule: a party may not use a declaratory action to preview whether a specific course of conduct would violate an *in terrorem* clause. Yet that is exactly what petitioner did in this case. He also asked the probate court to order that "the existence of probable cause renders unenforceable the [no-contest] clause [in view of MCL 700.7113]." *Perry Trust*, 299 Mich App at 531 (first alteration in original). Finally, just as in *McLeod*, petitioner sought a judgment that would be res judicata in the event that someone tried to enforce the *in terrorem* clause against him in subsequent litigation.

In this case, the Court of Appeals did not examine the justiciability of Mark Perry's petition, despite expressing concerns that the case was nonjusticiable and despite caselaw from this Court suggesting that these concerns may have been well founded. Consequently, the law in the area

remains unclear. The published Court of Appeals opinion casts serious doubt on the justiciability of the type of question raised by petitioner without ever deciding whether the probate court erred by reaching the merits in the case before it. Absent resolution of this issue by the Court of Appeals or this Court, I believe we are passing on an opportunity to bring clarity to this area of the law and police the constitutional limits of the judicial power. Therefore, I respectfully dissent.

Leave to Appeal Denied November 13, 2013:

MICHIGAN FINANCE AUTHORITY v KIEBLER, No. 147954; Court of Appeals No. 318451.

MARKMAN, J. I would grant the application for leave to appeal for the reasons generally set forth in my statement of October 16, 2013, in *Mich Fin Auth v Kiebler*, 495 Mich 874 (2013) (Docket No. 147804).

Reconsideration Denied November 13, 2013:

MICHIGAN FINANCE AUTHORITY v KIEBLER, No. 147804; Court of Appeals No. 318451. Leave to appeal before decision by the Court of Appeals denied 495 Mich 874.

Leave to Appeal Denied November 15, 2013:

CITY OF GIBRALTAR v CITY OF FLAT ROCK, No. 146184; Court of Appeals No. 304247.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's decision to deny the application for leave to appeal. I believe the issue presented in this case—whether, in these circumstances, a state court may issue the extraordinary remedy of a writ of mandamus to compel a member of an administrative body to vote in a particular manner—is of great importance to this state and warrants the Court's full attention. Of particular concern is the Court of Appeals holding that the city of Flat Rock, a constituent member of the South Huron Valley Utility Authority (SHVUA), had a clear legal duty to vote in favor of certain construction contracts and bond sales because the SHVUA had entered into an agreement with the Michigan Department of Environmental Quality to approve those contracts by a future date certain. However, that agreement expressly provided that approval would be achieved "consistent with the provisions of Article IX of the SHVUA Articles of Incorporation," which require unanimous approval of such proposals. I agree with the Court of Appeals dissent that reading the unanimity requirement as imposing a duty on minority members to vote in a certain manner effectively nullifies the unanimity provision of the articles of incorporation.[1] I believe the Court of Appeals decision raises important

[1] *City of Gibraltar v City of Flat Rock*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2012 (Docket No. 304247), p 11 (BOONSTRA, J., dissenting).

separation of powers issues, and I would grant leave to appeal to examine the propriety of the Court of Appeals judgment.

TITAN INSURANCE COMPANY v AMERICAN COUNTRY INSURANCE COMPANY, No. 147342; Court of Appeals No. 308401.

MARKMAN, J. (*concurring*). I write separately only to highlight this case for the possible attention of the Legislature. Plaintiff was assigned two personal protection insurance claims involving the same uninsured claimant. Having been assigned both claims, plaintiff was obligated under MCL 500.3175(1) to adjust the claims and "make prompt payment of loss" to the claimant. This remained the case even after it was discovered that defendant owed coverage on the second accident.

The record suggests that the two claims should have been adjusted so that the claimant received a substantially greater settlement for the claim arising from the first accident, in which she sustained back and neck injuries, than for the claim arising from the second accident, in which she sustained no significant injuries. Despite this, plaintiff's settlement with the claimant allocated $10,000 to the first accident and $25,000 to the second accident. Defendant asserts that plaintiff's motivation for this allocation was a function of its statutory entitlement to reimbursement from defendant for the second, but not the first, claim.

MCL 500.3172(1) specifies that "the insurer to which [a] claim is assigned is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility." Furthermore, it indicates that a default on insurance coverage occurs when "the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage . . . ." *Id*. As defendant disputed whether any payment was due on the second claim, a default occurred, allowing plaintiff to adjust the claims at its discretion with the awareness that it would only be entitled to reimbursement for the second accident, which arguably created an incentive on its part to allocate a greater percentage of the losses to the second accident.

Currently, the law accommodates the kind of gamesmanship that defendant alleges occurred here, and leaves defendant without any effective means of ensuring that its liability for reimbursement is limited to the claims that arose from the accident that defendant is *obligated* to cover and not from other accidents that defendant is *not* obligated to cover. The Legislature might wish to further examine the potential unfairness that may result under the circumstances of cases such as this.

Summary Disposition November 20, 2013:

PEOPLE v ENGLISH, No. 147059; Court of Appeals No. 308852. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. The defendant's delayed application was not untimely under MCR 7.205(F)(4) because, under the unique circumstances presented, it was reasonable for appointed appellate counsel to calculate the due date for the delayed application from the date he received official and final notice that the outstanding transcript did

not exist. On remand, the Court of Appeals shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). We do not retain jurisdiction.

FOWLER v MENARD, INC, No. 147323; Court of Appeals No. 310890. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Remanding to Court of Appeals While Retaining Jurisdiction Entered November 20, 2013:

SAL-MAR ROYAL VILLAGE, LLC v MACOMB COUNTY, No. 147384; reported below: 301 Mich App 234. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of whether the plaintiff's complaint for relief falls under the exclusive jurisdiction of the Michigan Tax Tribunal pursuant to MCL 205.731. See *Hillsdale Senior Servs v Hillsdale Co*, 494 Mich 46 (2013).

We retain jurisdiction.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

Leave to Appeal Granted November 20, 2013:

PEOPLE v MCKINLEY, No. 147391; Court of Appeals No. 307360. The application for leave to appeal the May 16, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether an order of restitution is equivalent to a criminal penalty, and (2) whether Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt. See *Southern Union Co v United States*, 567 US ___; 132 S Ct 2344; 183 L Ed 2d 318 (2012); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); contra *People v Gahan*, 456 Mich 264 (1997).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v CUNNINGHAM, No. 147437; reported below: 301 Mich App 218. The parties shall include among the issues to be briefed: (1) whether *People v Sanders*, 296 Mich App 710 (2012), and *People v Sanders (After Remand)*, 298 Mich App 105 (2012), correctly held that the Legislature's intent in authorizing an assessment of "[a]ny cost" under MCL 769.1k(1)(b)(*ii*) was to adopt a "reasonable flat fee" approach that does not require precision, and does not require separately calculating the costs involved in a particular case; (2) whether assessments of "court costs" are similar to, or interchange-

able with, "costs of prosecution"; (3) whether the general principles set out in *People v Wallace*, 245 Mich 310 (1929), *People v Teasdale*, 335 Mich 1 (1952), and *People v Dilworth*, 291 Mich App 399 (2011), which dealt with statutory costs of prosecution and probation costs, have any applicability to an assessment pursuant to MCL 769.1k(1)(b)(*ii*); and (4) whether the Court of Appeals in this case properly applied *Sanders* to affirm the assessment of $1,000 in court costs on the basis that it was reasonably related to the $1,238.48 average actual cost per criminal case in Allegan Circuit Court, which included overhead costs and indirect expenses.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 20, 2013:

CAPITAL AREA DISTRICT LIBRARY v MICHIGAN OPEN CARRY, INC, No. 146596; reported below: 298 Mich App 220.

CAVANAGH, J., would grant leave to appeal.

POLANIA v STATE EMPLOYEES' RETIREMENT BOARD, No. 146797; reported below: 299 Mich App 322.

PEOPLE v TRICE, No. 147131; Court of Appeals No. 309314.

HUNTER v SISCO, No. 147335; reported below: 300 Mich App 229.

PEOPLE v GODBOLDO, No. 147355; Court of Appeals No. 308459.

PEOPLE v EUBANKS, No. 147373; Court of Appeals No. 311820.

YOST v FALKER, No. 147493; reported below: 301 Mich App 362.

ZAHODNIC v STEPHENS, No. 147607; Court of Appeals No. 312785.

Summary Disposition November 25, 2013:

PEOPLE v DARWIN MOORE, No. 147447; Court of Appeals No. 309651. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part, vacate the defendant's conviction of first-degree criminal sexual conduct arising from Count 5 of the amended information, and remand this case to the Wayne Circuit Court for amendment of the judgment of sentence consistent with this order. The prosecutor has conceded that Count 5 was erroneously included in the amended information and that the defendant's conviction arising from that count should be vacated. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Denied November 25, 2013:

PEOPLE v CLARK-WILLIS, No. 145062; Court of Appeals No. 302388.

PEOPLE v DAJUAN GEORGE, No. 145779; Court of Appeals No. 304998.

PEOPLE v JONATHAN HUNTER, No. 145863; Court of Appeals No. 305475.

FUN FEST PRODUCTIONS, INC v GREATER BOSTON RADIO, INC, No. 146252; Court of Appeals No. 303980.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v MURAD, No. 147009; Court of Appeals No. 306327.

PEOPLE v HEARD, No. 147012; Court of Appeals No. 306589.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v BALDWIN, No. 147054; Court of Appeals No. 312730.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v JACQUES, No. 147087; Court of Appeals No. 308967.

PEOPLE v ANTHONY ALLEN, No. 147097; Court of Appeals No. 306796.

PEOPLE v CORDNEY SMITH, No. 147108; Court of Appeals No. 313489.

GLOTFELTY v MERLOS, No. 147135; Court of Appeals No. 311960.

PEOPLE v BURKS, No. 147172; Court of Appeals No. 306588.

PEOPLE v JIMMY SCOTT, No. 147200; Court of Appeals No. 314075.

PEOPLE v ST. ANN, No. 147204; Court of Appeals No. 312465.

PEOPLE v STANLEY SMITH, No. 147209; Court of Appeals No. 308549.

PEOPLE v AVERY PARKER, No. 147242; Court of Appeals No. 308224.

PEOPLE v HOLSTON, No. 147244; Court of Appeals No. 310848.

PEOPLE v DARRELL MANN, No. 147245; Court of Appeals No. 308706.

PEOPLE v SYZAK, No. 147247; Court of Appeals No. 305310.

MCNEIL v ANTRIM COUNTY GUN BOARD, No. 147251; Court of Appeals No. 311229.

PEOPLE v STEPHEN PORTER, No. 147273; Court of Appeals No. 311780.

PEOPLE v DYER, No. 147274; Court of Appeals No. 310887.

PEOPLE v SCARBER, No. 147275; Court of Appeals No. 311388.

PEOPLE v RUDDENE MILLER, No. 147281; Court of Appeals No. 311163.

KYLE v GARABALGI, No. 147285; Court of Appeals No. 312955.

PEOPLE v JERRELL JONES, No. 147288; Court of Appeals No. 314942.

PEOPLE v TERRENCE WILLIAMS, No. 147302; Court of Appeals No. 310538.

PEOPLE v MACON, No. 147306; Court of Appeals No. 315102.

PEOPLE v VINCE MANN, No. 147308; Court of Appeals No. 311545.

PEOPLE v CHARLESTON WASHINGTON, No. 147310; Court of Appeals No. 304611.

PEOPLE v SEATON, No. 147311; Court of Appeals No. 311907.

PEOPLE v ETCHISON, No. 147312; Court of Appeals No. 315151.

LENAWEE COUNTY v WAGLEY, No. 147314; reported below: 301 Mich App 134.

PEOPLE v HURT, No. 147362; Court of Appeals No. 301915.

PEOPLE v WITBRODT, No. 147368; Court of Appeals No. 314944.

PEOPLE v TORRES, No. 147370; Court of Appeals No. 312681.

PEOPLE v SHELTON CARTER, No. 147388; Court of Appeals No. 312414.

SHERMAN v SHERROD, No. 147392; Court of Appeals Nos. 299045 and 299775.

SAGINAW COUNTY COMMUNITY MENTAL HEALTH AUTHORITY v DEPARTMENT OF COMMUNITY HEALTH, No. 147394; Court of Appeals No. 311192.

PEOPLE v LICEAGA, No. 147395; Court of Appeals No. 315578.

PEOPLE v SWAIZEY, No. 147398; Court of Appeals No. 308710.

PEOPLE v MARSEE, No. 147400; Court of Appeals No. 307929.

PEOPLE v WILBERN COOPER, No. 147404; Court of Appeals No. 304610.

PEOPLE v KEOTHES MILLER, No. 147407; Court of Appeals No. 309324.

PEOPLE v WYATT, No. 147414; Court of Appeals No. 308187.

PEOPLE v DAMIEN JOHNSON, No. 147416; Court of Appeals No. 313520.

PEOPLE v JENNINGS, No. 147429; Court of Appeals No. 312438.

PEOPLE v MARTELL HARPER, No. 147431; Court of Appeals No. 309321.

PEOPLE v CALL, No. 147433; Court of Appeals No. 312839.

PEOPLE v KENNETH HOPKINS, No. 147441; Court of Appeals No. 312293.

PEOPLE v ANIBAL MARTINEZ, No. 147442; Court of Appeals No. 315606.

PEOPLE v KENNETH PATTERSON, No. 147444; Court of Appeals No. 312148.

PEOPLE v HALE, No. 147446; Court of Appeals No. 315722.

PEOPLE v LARRY ADAMS, No. 147453; Court of Appeals No. 312621.

PEOPLE v TIETZ, No. 147455; Court of Appeals No. 309767.

PEOPLE v ERIC WELCH, No. 147457; Court of Appeals No. 312623.

PEOPLE v WILLIE MOORE, No. 147458; Court of Appeals No. 311987.

PEOPLE v ANTONIO DAVIS, No. 147459; Court of Appeals No. 312326.

PEOPLE v CADARO COLLINS, No. 147463; Court of Appeals No. 315836.

PEOPLE v HERMENITT, No. 147465; Court of Appeals No. 309560.

PEOPLE v BERRY, No. 147466; Court of Appeals No. 308408.

PEOPLE v MCCRARY, No. 147473; Court of Appeals No. 308237.

GRAND/SAKWA PROPERTIES, INC v CITY OF TROY, No. 147482; Court of Appeals No. 307242.

PEOPLE v GORDON, No. 147489; Court of Appeals No. 309427.

PEOPLE v VANDENBOSCH, No. 147495; Court of Appeals No. 315569.

PEOPLE v ARTHUR THOMPSON, No. 147498; Court of Appeals No. 304160.

WRIGHT v BATTANI, No. 147499; Court of Appeals No. 303491.

PEOPLE v BACON, No. 147500; Court of Appeals No. 316264.

PEOPLE v WALTON, No. 147502; Court of Appeals No. 306950.

BANK OF AMERICA v MCKINNEY, No. 147503; Court of Appeals No. 312165.

PEOPLE v SWIFT, No. 147505; Court of Appeals No. 310173.

PEOPLE v MUHAMMAD, No. 147509; Court of Appeals No. 309769.

POTTER v DEVINE, No. 147512; Court of Appeals No. 308878.

PEOPLE v MCMURREN, No. 147513; Court of Appeals No. 312454.

PEOPLE v DANCY, No. 147530; Court of Appeals No. 309319.

PEOPLE v HOWARD SMITH, No. 147532; Court of Appeals No. 314049.

PEOPLE v MICHAEL J WILLIAMS, No. 147534; Court of Appeals No. 310136.

PEOPLE v BRENEMAN, No. 147535; Court of Appeals No. 311618.

PEOPLE v ASSINK, No. 147545; Court of Appeals No. 315414.

PEOPLE v DEON JOHNSON, No. 147546; Court of Appeals No. 309243.

GRIEVANCE ADMINISTRATOR v KRINOCK, No. 147547.

PEOPLE v HAHN, No. 147548; Court of Appeals No. 305509.

PEOPLE v BADGER, No. 147551; Court of Appeals No. 316303.

PEOPLE v COREY BELL, No. 147558; Court of Appeals No. 312646.

PEOPLE v KANNE, No. 147561; Court of Appeals No. 312644.

PEOPLE v FLOWERS, No. 147563; Court of Appeals No. 313318.

PEOPLE v ELVE, No. 147565; Court of Appeals No. 316477.

PEOPLE v HANKINSON, No. 147566; Court of Appeals No. 311473.

PEOPLE v IRVIN JOHNSON, No. 147567; Court of Appeals No. 310443.

In re OLSON TRUST, No. 147570; Court of Appeals No. 307835.

PEOPLE v SHAMMAMI, No. 147574; Court of Appeals No. 309603.

PEOPLE v DUBOSE, No. 147580; Court of Appeals No. 304072.

PEOPLE v HAYWARD, No. 147583; Court of Appeals No. 309550.

PEOPLE v HUTCHESON, No. 147584; Court of Appeals No. 312923.

STATE PACKARD, LLC v ARTISAN BISTRO, LLC, No. 147597; Court of Appeals No. 308546.

PEOPLE v HUTCHESON, No. 147601; Court of Appeals No. 313177.

PEOPLE v BRADLEY, No. 147604; Court of Appeals No. 309986.

PEOPLE v RICHARD THOMAS, No. 147605; Court of Appeals No. 309353.

PEOPLE v DICKSON, No. 147622; Court of Appeals No. 312789.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v CALLAHAN, No. 147628; Court of Appeals No. 313064.

PEOPLE v LESTER MASON, No. 147630; Court of Appeals No. 317127.

PEOPLE v TUER, No. 147631; Court of Appeals No. 314914.

PEOPLE v DUNLAP, No. 147634; Court of Appeals No. 312783.

PEOPLE v JOHN LAWRENCE, No. 147635; Court of Appeals No. 316561.

WAMSLEY v CHEBOYGAN COUNTY ROAD COMMISSION, No. 147639; Court of Appeals No. 309802.

PEOPLE v OLIVER, No. 147643; Court of Appeals No. 314511.

BAC HOME LOANS SERVICING, LP v LUNDIN, No. 147648; Court of Appeals No. 309048.

PEOPLE v DIAPOLIS SMITH, No. 147649; Court of Appeals No. 316387.

PITTMAN v ROTHENBERGER COMPANY, INC, Nos. 147652 and 147653; Court of Appeals Nos. 312732 and 313593.

In re MARTINDALE TRUST, Nos. 147654 and 147655; Court of Appeals Nos. 302978 and 303478.

PEOPLE v CLAIRMONT, No. 147659; Court of Appeals No. 314448.

PEOPLE v LONNIE BRIDGES, No. 147669; Court of Appeals No. 310176.

PEOPLE v OGILVIE, No. 147671; Court of Appeals No. 298302.

PEOPLE v OGILVIE, No. 147673; Court of Appeals No. 307897.

PEOPLE v ANTHONY WILLIAMS, No. 147676; Court of Appeals No. 310441.

PEOPLE v MACKENCHNIE, No. 147677; Court of Appeals No. 316724.

NICHOLS v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 147682; Court of Appeals No. 314552.

PEOPLE v ARABIE, No. 147685; Court of Appeals No. 316277.

PEOPLE v DOUGLAS BROWN, No. 147686; Court of Appeals No. 315787.

PEOPLE v SYLVIA THOMPSON, No. 147687; Court of Appeals No. 313534.

In re VELEZ-RUIZ, No. 147692; Court of Appeals No. 316578.

ABUNDANT LIFE CHRISTIAN CENTER v CHARTER TOWNSHIP OF REDFORD, No. 147708; Court of Appeals No. 310713.

PEOPLE v IRISH, No. 147711; Court of Appeals No. 315956.

PEOPLE v CALHOUN, No. 147717; Court of Appeals No. 313107.

PEOPLE v ANDRE MARSHALL, No. 147720; Court of Appeals No. 313572.

PEOPLE v RICHARD CLARK, No. 147732; Court of Appeals No. 309930.

PEOPLE v INDIA PORTER, No. 147736; Court of Appeals No. 315789.

PEOPLE v ASHOUR, No. 147746; Court of Appeals No. 313192.

PEOPLE v ROBERT NATHANIEL REEVES, No. 147775; Court of Appeals No. 313662.

Superintending Control Denied November 25, 2013:

THOMAS v ATTORNEY GRIEVANCE COMMISSION, No. 147321.

ROGERS v ATTORNEY GRIEVANCE COMMISSION, No. 147351.

GATES v ATTORNEY GRIEVANCE COMMISSION, No. 147365.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147454.

Reconsideration Denied November 25, 2013:

PEOPLE v BRADFORD, No. 146304; Court of Appeals No. 310222. Leave to appeal denied at 494 Mich 868.

PEOPLE v CRAIG, No. 146308; Court of Appeals No. 310515. Leave to appeal denied at 494 Mich 868.

PEOPLE v MCMUTUARY, No. 146415; Court of Appeals No. 313137. Leave to appeal denied at 494 Mich 868.

PEOPLE v TION TERRELL, No. 146850; Court of Appeals No. 303717. Summary disposition at 495 Mich 869.

PEOPLE v CRAIG JACKSON, No. 146882; Court of Appeals No. 304163. Leave to appeal denied at 494 Mich 870.

STATE TREASURER v PONTIUS, No. 146906; Court of Appeals No. 309693. Leave to appeal denied at 495 Mich 858.

PEOPLE v DOUGLAS REESE, No. 146934; Court of Appeals No. 307736. Leave to appeal denied at 494 Mich 871.

FINDLING v PARKER, No. 146951; Court of Appeals No. 307442. Leave to appeal denied at 494 Mich 884.

PEOPLE v STREETS, No. 146975; Court of Appeals No. 309672. Leave to appeal denied at 494 Mich 884.

PEOPLE v RIMMER-BEY, No. 146994; Court of Appeals No. 314131. Leave to appeal denied at 494 Mich 884.

US BANK, NA v HILLS, No. 147003; Court of Appeals No. 310318. Leave to appeal denied at 495 Mich 852.

ABE v MICHIGAN STATE UNIVERSITY, No. 147020; Court of Appeals No. 310585. Leave to appeal denied at 495 Mich 852.

LANG v GREENPOINT MORTGAGE FUNDING, No. 147198; Court of Appeals No. 307141. Leave to appeal denied at 495 Mich 854.

PEOPLE v WATKINS, No. 147222; Court of Appeals No. 310875. Leave to appeal denied at 495 Mich 854.

WAGGONER v CIVIL SERVICE COMMISSION, No. 147229; Court of Appeals No. 311853. Leave to appeal denied at 495 Mich 854.

FISHER v SULIEMAN, No. 147467; Court of Appeals No. 299212. Leave to appeal denied at 495 Mich 859.

Summary Disposition November 27, 2013:

PEOPLE v FULTON, No. 147202; Court of Appeals No. 312122. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for a determination whether the presentence report contains information that is inaccurate, relating to the defendant's prior criminal history. If it is determined by the circuit court that inaccurate information is included in the presentence report, the report shall be corrected or the information deleted in accordance with MCR 6.425(E)(2), and the corrected report shall be forwarded to the

Michigan Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v FREDERICK FREEMAN, No. 147449; Court of Appeals No. 311257. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. While retaining jurisdiction, the Court of Appeals shall then remand the case to the St. Clair Circuit Court, which shall conduct an evidentiary hearing to determine whether the issue raised by the defendant merits the relief requested. Upon making its findings, the St. Clair Circuit Court shall return the case to the Court of Appeals, which shall then review the lower court's findings and determine whether to affirm, reverse, or order other relief.

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v BOWERS, No. 147611; Court of Appeals No. 311811. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Gratiot Circuit Court for further proceedings. A bailment existed as a matter of law between the boat's owners and the defendant Nicholas Bowers. See, *Godfrey v City of Flint*, 284 Mich 291 (1938). He also had, as a matter of law, custody or use of the watercraft at the time of the incident. Therefore, he was an insured under the terms of the insurance policy because he was "legally responsible" for and had "custody or use" of the watercraft at the time of the incident.

Leave to Appeal Granted November 27, 2013:

PEOPLE v THABO JONES, No. 147735; reported below: 302 Mich App 434. The parties shall include among the issues to be briefed: (1) whether a legislative provision barring consideration of a necessarily included lesser offense violates the separation of powers doctrine, Const 1963, art 3, § 2; (2) whether MCL 257.626(5) violates a defendant's right to a jury trial by foreclosing a jury instruction on a lesser offense; and (3) whether MCL 257.601d is a necessarily included lesser offense of MCL 257.626(4).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 27, 2013:

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM v CHARTER COUNTY OF WAYNE, No. 147296; reported below: 301 Mich App 1. The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the

Public Employee Retirement System Investment Act, MCL 38.1132 *et seq*.; and (2) whether the ordinance violates Const 1963, art 9, § 24. The parties should not submit mere restatements of their application papers.

PEOPLE v WILDING, No. 147675; Court of Appeals No. 309245. At oral argument, the parties shall address whether the trial court erroneously assessed 15 points each for offense variables 8 (MCL 777.38(1)(a)) and 10 (MCL 777.40(1)(a)). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied November 27, 2013:

BENDER v DEPARTMENT OF CORRECTIONS, No. 147213; Court of Appeals No. 312987.

PEOPLE v SHANNON, No. 147287; Court of Appeals No. 315426.

PEOPLE v VAN, No. 147367; Court of Appeals No. 315625.

MARKMAN, J. (*concurring*). As previously set forth in my separate statements in *People v Touchstone*, 483 Mich 947, 948-949 (2009), and *People v Parks*, 493 Mich 944, 944-945 (2013), MCL 771.3c(1) provides that in "determining the amount of the [supervision] fee, the court shall consider the probationer's projected income and financial resources." The table contained in that provision proceeds to instruct that if probationer's projected monthly income is less than $250, the amount of such fee should be zero dollars. Per defendant's presentencing report, there was evidence that his projected monthly income was $100 a month and that his total financial resources were $200 a month. If that information was accurate, no fee should have been imposed upon defendant. Yet, absent any explanation, the trial court assessed a $10 monthly fee. Because defendant did not object at sentencing, the issue is unpreserved. For that reason alone, I concur in the Court's order.

MCCORMACK, J., joins the statement of MARKMAN, J.

HECT v CAPACHE TRANSPORTATION, LLC, No. 147555; Court of Appeals No. 312461.

In re SCP, No. 147798; Court of Appeals No. 317207.

In re LONGHWAY, No. 147998; Court of Appeals No. 314560.

Leave to Appeal Denied December 6, 2013:

In re SPENCER, No. 147973; Court of Appeals No. 315658.

Leave to Appeal Denied December 13, 2013:

PEOPLE v BIGELOW, No. 147166; Court of Appeals No. 305758. The application for leave to appeal the April 4, 2013 judgment of the Court of

Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Even if the trial court erred by denying the defendant's request to change into civilian clothes on the first day of trial, we conclude that this error was harmless beyond a reasonable doubt.

VIVIANO, J. (*concurring*). I agree with the Court's decision to deny leave to appeal. I write separately to state that in my view, the trial court committed error, albeit harmless, by denying defendant's request to change into civilian clothing.

Before defendant's court appearance, defendant's mother brought civilian clothing to the jail for inspection. Jail officials refused to accept the clothing, saying that it had to be brought to court for defendant's trial. Defense counsel then brought the clothes to court, objected to defendant appearing before the jury in jail attire, and asked that defendant be allowed to change prior to appearing before the jury. The trial court denied the request, noting that "any jail markings have been turned inside out," and then commenced the trial. Defendant appeared before the jury for the first day of trial wearing "jail green" trousers turned inside out, jail-issue sandals, and a white T-shirt.

This Court has stated before that "[n]othing could more surely destroy the presumption of innocence and . . . the impartiality of the jury, than to force the defendant to be tried in prison clothes." *People v Shaw*, 381 Mich 467, 480 (1969). This is because "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Estelle v Williams*, 425 US 501, 504-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Accordingly, "a court has no discretion as to a criminal defendant's attire" under normal circumstances. *Shaw*, 381 Mich at 474. Rather, a "defendant's timely request to wear civilian clothing *must* be granted." *People v Harris*, 201 Mich App 147, 151 (1993) (emphasis added). However, the Court of Appeals has held that a trial court may deny the defendant's request if it finds that the inmate's attire does "not look like prison clothing." *Id.* at 152; accord *People v Woods*, 32 Mich App 358, 359 (1971) (noting that defendant's request was untimely and that the trial court found that his prison attire resembled "work clothes").

It appears that defendant made a timely request to change into civilian clothes, which the trial court denied. Although the court noted that all jail markings had been hidden from view, it did not make a finding that defendant's clothing resembled ordinary civilian attire and was not recognizable as jail attire. Absent such a finding, I believe that the trial court erred by denying defendant's request to change into civilian clothes. As noted, requiring a defendant to appear before the jury in jail attire undermines the presumption of innocence and the impartiality of the jury. See *Shaw*, 381 Mich at 480. Therefore, although the strong evidence introduced at trial rendered the error harmless beyond a reasonable doubt, I still believe this Court should state unequivocally that the trial court committed constitutional error by denying defendant's request.

MCCORMACK, J., joins the statement of VIVIANO, J.

CAVANAGH, J., would grant leave to appeal.

Summary Disposition December 20, 2013:

PEOPLE v WILLIAM GARRETT, No. 145594; Court of Appeals No. 307728. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we affirm the Wayne Circuit Court's November 30, 2011 Opinion and Order denying defendant's motion for relief from judgment. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508. Because defendant alleges grounds for relief which were previously decided against him by the Court of Appeals and has not established that a retroactive change in law has undermined those prior decisions, defendant is not entitled to relief under MCR 6.508(D)(2). To the extent defendant alleges grounds for relief which could have been raised on appeal, defendant is also not entitled to relief under MCR 6.508(D)(3), as he has failed to demonstrate "good cause" for the failure to raise such grounds on appeal and "actual prejudice" resulting from the alleged irregularities that support his claim for relief. MCR 6.508(D)(3)(a); MCR 6.508(D)(3)(b)(i)-(iv).

MCCORMACK, J. (*dissenting*). I respectfully dissent. I would remand this case to the trial court for consideration of whether defendant's claim of ineffective assistance of counsel relating to his trial counsel's failure to call or investigate a critical alibi witness entitles defendant to relief. Because defendant is not alleging grounds for relief that were previously litigated, I do not believe that MCR 6.508(D)(2) bars his instant motion for relief from judgment. Although the cumulative nature of the proposed alibi testimony might prevent defendant from demonstrating "actual prejudice" under MCR 6.508(D)(3)(b), see *People v Carbin*, 463 Mich 590, 603 (2001), I believe that the trial court abused its discretion by dismissing defendant's motion without a hearing at which defendant could attempt to meet his burden for relief.

CAVANAGH, J., joins the statement of MCCORMACK, J.

PEOPLE v JOHNNY HARRIS, No. 145833; Court of Appeals No. 296631. On November 7, 2013, this Court heard oral argument on the application for leave to appeal the July 19, 2012 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the July 19, 2012 judgment of the Court of Appeals and we again remand this case to that Court. In this Court's April 18, 2012 order, we concluded that "[t]he trial court impermissibly allowed Dr. Carrie Ricci to testify that the complainant was the victim of child sexual abuse and trial counsel was ineffective for failing to object to this evidence." Our April 18, 2012 order remanded this case to the Court of Appeals to "determine whether the defendant was prejudiced by the admission of the doctor's diagnosis and whether the defendant is entitled to a new trial." On remand, the Court of Appeals erred by focusing on whether the complainant's "testimony alone was sufficient to sustain Harris's conviction." On remand, we direct the Court of Appeals to determine whether the defendant was prejudiced by the admission of the doctor's diagnosis under both the plain error test articulated in *People v Carines*, 460 Mich 750, 763-764 (1999), and the ineffective assistance of counsel standard. *People v Toma*, 462 Mich 281, 302-303 (2000), quoting *People v Mitchell*,

454 Mich 145, 167 (1997). See, also, *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

MAJESTIC GOLF, LLC v LAKE WALDEN COUNTRY CLUB, INC, No. 145988; reported below: 297 Mich App 305. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we reverse the July 10, 2012 judgment of the Court of Appeals, and remand this case to the Livingston Circuit Court for further proceedings not inconsistent with this order.

On October 7, 2008, Majestic Golf, LLC sent a letter to its tenant, Lake Walden Country Club, Inc. asking it to fulfill certain obligations under the parties' lease agreement within thirty days. Lake Walden did not do so. Majestic Golf contends that the letter constituted notice under ¶ 26 of the lease, pertaining to defaults, and that Lake Walden's failure to fulfill its obligations within thirty days constituted a default.

We conclude that there are genuine issues of material fact regarding whether Majestic Golf's October 7, 2008 letter constituted notice under ¶ 26 of the lease, in light of the parties' course of conduct surrounding the letter and the failure of the letter to identify itself as such. We further conclude that, if the letter was sufficient to provide such notice, there are genuine issues of material fact regarding whether Majestic Golf's subsequent conduct constituted a waiver of its claim of default based thereon. The Livingston Circuit Court erred in holding that, as a matter of law, Lake Walden was in breach of the lease agreement. The Court of Appeals similarly erred in affirming that holding. Accordingly, those portions of the panel's opinion relying on that holding are vacated.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order reversing the judgment of the Court of Appeals. Because I believe that the Court of Appeals correctly held that defendant's failure to consent to the road easement constituted a default entitling plaintiff to terminate the lease, I would affirm the judgment of the Court of Appeals.

The lease at issue here expressly provides, "Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate." The lease also states that the tenant's failure to perform any of the terms of the lease for "a period of thirty (30) days after notice thereof by Landlord to Tenant" shall constitute a default and that in the event of a default the "Landlord shall have the right to cancel and terminate this Lease . . . ."

Defendant (the tenant) failed to permit a road crossing to be developed by plaintiff (the landlord), as required by the lease. On October 7, 2008, plaintiff sent defendant a letter "request[ing] that [defendant] fulfill its obligation under the lease" by "execut[ing] the Consent portion of the enclosed Grant of Easement" and "return[ing] the enclosed Consent within thirty (30) days." The letter stated that "Section 22 of the golf course lease obligates [defendant] to permit road crossing ease-

ments," observed that defendant's consent had already been requested and "[d]espite the request, the written Consent has not been received," and stated that such consent is "urgently required." This letter clearly provided defendant with notice that plaintiff was demanding that defendant sign the consent within 30 days, as required by the lease. Although the letter does not expressly state that if defendant failed to sign the consent within 30 days, plaintiff was going to hold defendant in default and terminate the lease, plaintiff was nowhere required to state that in the notice.

Absent any explanation, the majority concludes that "there are genuine issues of material fact regarding whether [plaintiff's] October 7, 2008 letter constituted notice under ¶ 26 of the lease, in light of the parties' course of conduct surrounding the letter and the failure of the letter to identify itself as such." I presume the majority's reference to "the parties' course of conduct" refers to the fact that the parties were involved in merger negotiations at the time that the letter was delivered. However, there is no evidence that during these negotiations the parties in any way amended the lease, and therefore the lease continued to control. Because (a) as defendant conceded in its answer to plaintiff's complaint, the "granting of an easement by [defendant] [was] required by ¶ 22 of the Lease," (b) ¶ 26 of the lease required defendant to grant the easement within 30 days of the notice, and (c) it is undisputed that defendant did *not* grant the easement within 30 days of the notice, defendant as a matter of law breached the lease.

Furthermore, contrary to the majority's suggestion, there is nothing in ¶ 26, or anywhere else in the lease, that required plaintiff to label or designate its notice as comprising the notice required in ¶ 26. Instead, ¶ 26 simply provides that if defendant "fails to perform" and if that "nonperformance shall continue for . . . a period of thirty (30) days after notice thereof," this "shall be a default . . . and a breach of the Lease." There is no question that plaintiff's letter constituted a notice of nonperformance, and was easily identifiable as such, and that defendant's nonperformance continued for a period of 30 days after notice. Therefore, there was a default and a breach of the lease.

Finally, the majority concludes that "there are genuine issues of material fact regarding whether [plaintiff's] subsequent conduct constituted a waiver of its claim of default . . . ." I presume by this reference the majority is referring to the October 8, 2008 e-mail from Mr. Crouse (plaintiff's manager) and his October 13, 2008 letter. I do not believe that either one of these communications somehow constituted a waiver of the default. Indeed, Mr. Crouse's October 8 e-mail clearly indicated that he was demanding that defendant sign the consent for the road easement and that it do so within 30 days. This e-mail stated:

> We . . . have previously asked for your concurrence, which has not be[en] provided as is required by Section 22 of the Lease. Failure to obtain [defendant's] concurrence was a major reason why we were not able to finalize a Master Plan for our property. Now we again request that [defendant] promptly fulfill its obligation under the lease.

Given this language, it cannot reasonably be argued that the e-mail waived the default. And the October 13 letter was simply silent with regards to the consent and thus cannot possibly be viewed as a waiver of the default.

This Court has repeatedly held that the straightforward language of a contract must control. *Terrien v Zwit*, 467 Mich 56, 71 (2002) (" 'The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' ") (citation omitted); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52 (2003) ("The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable."); *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370 (2003) ("[T]he freedom to contract principle is served by requiring courts to enforce unambiguous contracts according to their terms . . . ."); *Rory v Continental Ins Co*, 473 Mich 457, 461 (2005) ("[A] court must construe and apply unambiguous contract provisions as written."); *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212 (2007) ("We 'respect[] the freedom of individuals freely to arrange their affairs via contract' by upholding the 'fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be enforced as written' . . . .") (citation and emphasis omitted) (alterations in the original).

The lease at issue here clearly required that (a) defendant sign the consent for the road easement, which it did not do, (b) plaintiff provide defendant with written notice of defendant's nonperformance, which it did do, and (c) defendant perform its contractual obligations within 30 days of plaintiff's notice, which it did not do. Equally clearly, the lease provides that (a) defendant's failure to perform within 30 days of the notice constitutes a default and (b) in the event of a default, plaintiff has the right to cancel and terminate the lease. Because the Court of Appeals correctly held that the contract means what it says, I would affirm its judgment.

Leave to Appeal Denied December 20, 2013:

In re HOPKINS-WEBSTER, No. 147989; Court of Appeals No. 315194.

Summary Disposition December 23, 2013:

PEOPLE v JOSEPH RIVERS, No. 147376; Court of Appeals No. 308871. By order of October 28, 2013, the prosecuting attorney was directed to answer the application for leave to appeal the May 23, 2013 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the

judgment of sentence. The prosecuting attorney has conceded that the defendant was not previously convicted of possession of a firearm during the commission of a felony, MCL 750.227b(1), and that the defendant's sentence for felony-firearm should not have been enhanced in this case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

STONE v AUTO-OWNERS INSURANCE COMPANY, No. 147745; Court of Appeals No. 314427. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v FAULKNER, No. 147761; Court of Appeals No. 315302. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to that court for reconsideration of the defendant's delayed application for leave to appeal. Our review of the available trial court record reveals that the defendant is appealing the denial of his first motion for relief from judgment under MCR Subchapter 6.500 filed after August 1, 1995. See MCR 6.502(G)(1). Thus, it appears that the Court of Appeals erred in dismissing the delayed application for leave to appeal for lack of jurisdiction under MCR 6.502(G) as a prohibited successive motion. We note that in 2006 the defendant filed a petition for DNA testing under MCL 770.16, but the filing of that petition did not preclude him from filing a motion for relief from judgment under MCR Subchapter 6.500. We do not retain jurisdiction.

Leave to Appeal Denied December 23, 2013:

PEOPLE v DAMIEN GREENE, No. 147032; Court of Appeals No. 314372.

PEOPLE v BULLOCK, No. 147119; Court of Appeals No. 314842.

PEOPLE v CHAD CURTIS, No. 147174; Court of Appeals No. 314004.

MOON v OCWEN LOAN SERVICING, LLC, Nos. 147182 and 147183; Court of Appeals Nos. 308529 and 311330.

PEOPLE v STEVEN WHITE, No. 147216; Court of Appeals No. 308784.

PEOPLE v LUSTER NELSON, No. 147248; Court of Appeals No. 308954. CAVANAGH, J., would grant leave to appeal.

PEOPLE v NAVA, No. 147253; Court of Appeals No. 310726.

PEOPLE v DABNEY, No. 147297; Court of Appeals No. 312489.

PEOPLE v ALBANE, No. 147325; Court of Appeals No. 304331.

PEOPLE v KNAPP, No. 147341; Court of Appeals No. 316117.

PEOPLE v HALEY, Nos. 147352 and 147353; Court of Appeals Nos. 310261 and 310267.

In re SCHWARTZ, No. 147354; Court of Appeals No. 316621.

PEOPLE v SCHERER, No. 147390; Court of Appeals No. 309532.

PEOPLE v TYJUAN HUDSON, No. 147417; Court of Appeals No. 308576.

PEOPLE v DMITRI ANDERSON, No. 147430; Court of Appeals No. 310378.

COMMERCE AND INDUSTRY INSURANCE COMPANY v DEPARTMENT OF TREASURY, No. 147440; reported below: 301 Mich App 256.

PEOPLE v DALGLIESH, No. 147460; Court of Appeals No. 312805.

PEOPLE v DEANDRE MULLINS, No. 147464; Court of Appeals No. 312358.

PEOPLE v MCCLUSKY, No. 147472; Court of Appeals No. 312111.

PEOPLE v ROBERT REEVES, No. 147476; Court of Appeals No. 312010.

PEOPLE v MCKINZIE, No. 147481; Court of Appeals No. 315981.

PEOPLE v SAMUEL BAKER, No. 147486; Court of Appeals No. 312815.

PEOPLE v TRUMELL TURNER, No. 147496; Court of Appeals No. 307748.

PEOPLE v PAYNE, No. 147497; Court of Appeals No. 308357.

PEOPLE v LIENEMANN, No. 147514; Court of Appeals No. 310374.

PEOPLE v PETITE, No. 147518; Court of Appeals No. 312006.

PEOPLE v BLAIR, No. 147528; Court of Appeals No. 311007.

PEOPLE v LATHROP, No. 147529; Court of Appeals No. 312452.

PEOPLE v STANTON, No. 147531; Court of Appeals No. 313542.

PEOPLE v JAMES MOSS, Nos. 147538 and 147539; Court of Appeals Nos. 307893 and 307913.

PEOPLE v FALTING, No. 147549; Court of Appeals No. 312555.

PEOPLE v PORTER SMITH, No. 147550; Court of Appeals No. 312297.

PEOPLE v BLACK, No. 147556; Court of Appeals No. 309477.

PEOPLE v BULLARD, No. 147562; Court of Appeals No. 310854.

PEOPLE v SID JONES, No. 147568; Court of Appeals No. 315230.

PEOPLE v WATTS, No. 147569; Court of Appeals No. 312930.

PEOPLE v WILLIAM THOMAS, No. 147572; Court of Appeals No. 309957.

PEOPLE v ZEEK, No. 147576; Court of Appeals No. 311831.

PEOPLE v DOWELL, No. 147578; Court of Appeals No. 310122.

PEOPLE v NAYKIMA HILL, No. 147582; Court of Appeals No. 313220.

PEOPLE v DEVIN ARMOUR, No. 147585; Court of Appeals No. 314450.

PEOPLE v PRYOR, No. 147586; Court of Appeals No. 315336.

PEOPLE v DAVID WRIGHT, No. 147589; Court of Appeals No. 312669.

PEOPLE v AARON THOMAS, No. 147592; Court of Appeals No. 309420.

PEOPLE v DONYA DAVIS, No. 147594; Court of Appeals No. 312935.

PEOPLE v EMERY, No. 147595; Court of Appeals No. 316396.

SHORE FINANCIAL SERVICES, INC v LAKESIDE TITLE AND ESCROW AGENCY, INC, Nos. 147598, 147599, and 147600; Court of Appeals Nos. 301143, 302707, and 302723.

PEOPLE v AUTMAN, Nos. 147602 and 147603; Court of Appeals Nos. 307878 and 311805.

LEGACE v LEGACE, No. 147606; Court of Appeals No. 312307.

KC TRANSPORTATION, INC v DEPARTMENT OF TREASURY, No. 147610; Court of Appeals No. 310428.

PEOPLE v TODD COLLINS, No. 147614; Court of Appeals No. 311283.

PEOPLE v WHITING-BROWN, No. 147615; Court of Appeals No. 315749.

PEOPLE v FICK, No. 147617; Court of Appeals No. 316212.

PEOPLE v MORRIS THOMAS, Nos. 147619, 147620, and 147621; Court of Appeals Nos. 314071, 314239, and 315493.

RED RUN WILDLIFE SANCTUARY, LLC v RED RUN INTERCOUNTY DRAINAGE DISTRICT, No. 147623; Court of Appeals No. 307742.

PEOPLE v TRACY MARTIN, No. 147625; Court of Appeals No. 310740.

PEOPLE v JASON JORDAN, No. 147626; Court of Appeals No. 312998.

PEOPLE v VICTOR, No. 147627; Court of Appeals No. 312570.

PEOPLE v LAMONT ROBINSON, No. 147629; Court of Appeals No. 316416.

PEOPLE v BREWER, No. 147632; Court of Appeals No. 310306.

PEOPLE v BEYERLEIN, No. 147637; Court of Appeals No. 316490.

PEOPLE v LONNIE THOMAS, No. 147638; Court of Appeals No. 309339.

PEOPLE v KEITH, No. 147642; Court of Appeals No. 310211.

ADAIR v STATE OF MICHIGAN, No. 147645; reported below: 301 Mich App 547.

PEOPLE v CURB, No. 147650; Court of Appeals No. 315725.

ND PROPERTY MANAGEMENT, INC v NAUTILUS INSURANCE AGENCY, No. 147660; Court of Appeals No. 317204.

PEOPLE v ALON TURNER, No. 147665; Court of Appeals No. 315943.

NOVODAI, INC v PRO-CAM SERVICES, LLC, No. 147667; Court of Appeals No. 310000.

PEOPLE v RODRIGUEZ, No. 147668; Court of Appeals No. 307317.

MELKI v CLAYTON CHARTER TOWNSHIP, No. 147672; Court of Appeals No. 309964.

VELA v WAYNE COUNTY AIRPORT AUTHORITY, No. 147674; Court of Appeals No. 310174.

PEOPLE v GEORGE TAYLOR, No. 147680; Court of Appeals No. 310134.

PEOPLE v VONZEL SIMMONS, No. 147681; Court of Appeals No. 307749.

PEOPLE v INGRAM, No. 147683; Court of Appeals No. 309035.

PEOPLE v PECK, No. 147684; Court of Appeals No. 313286.

PEOPLE v FERQUERON, No. 147688; Court of Appeals No. 313382.

PEOPLE v QUIROGA, No. 147690; Court of Appeals No. 316440.

PEOPLE v AUGUSTUS ROBINSON, No. 147693; Court of Appeals No. 304878.

PEOPLE v SEWELL, No. 147694; Court of Appeals No. 310043.

PEOPLE v BRANDON THOMPSON, No. 147695; Court of Appeals No. 310308.

PEOPLE v JOMO KIRK, No. 147696; Court of Appeals No. 316495.

BELLOR v BAY METROPOLITAN TRANSPORTATION AUTHORITY, No. 147697; Court of Appeals No. 312840.

PEOPLE v THREAT, No. 147699; Court of Appeals No. 310331.

PEOPLE v HUDGINS, No. 147701; Court of Appeals No. 309652.

PEOPLE v MARCO MARTIN, No. 147703; Court of Appeals No. 310635.

PEOPLE v OSBY, No. 147704; Court of Appeals No. 308494.

PEOPLE v CLEGG, No. 147705; Court of Appeals No. 309991.

PEOPLE v DZIERWA, Nos. 147709 and 147710; Court of Appeals Nos. 314462 and 314468.

PEOPLE v HEATH, No. 147713; Court of Appeals No. 310897.

PEOPLE v WALTER STEPHENS, No. 147715; Court of Appeals No. 310243.

PEOPLE v BRUCE TATE, No. 147716; Court of Appeals No. 310847.

PEOPLE v LOREN ROBINSON, No. 147721; Court of Appeals No. 303236.

PEOPLE v PRATHER, No. 147722; Court of Appeals No. 310005.

PEOPLE v COTTRELL, No. 147723; Court of Appeals No. 306952.

VELEZ-RUIZ v BOARD OF MEDICINE, No. 147724; Court of Appeals No. 314140.

ALLEN v DEMMER CORP, No. 147725; Court of Appeals No. 313013.

PEOPLE v MCQUEEN, No. 147729; Court of Appeals No. 306317.

PEOPLE v STANLEY WHITE, No. 147731; Court of Appeals No. 310918.

PEOPLE v MARK BENNETT, No. 147733; Court of Appeals No. 310425.

PEOPLE v TIGGART, No. 147737; Court of Appeals No. 314815.

PEOPLE v OWENS, No. 147738; Court of Appeals No. 309027.

PEOPLE v HENRY BROWN, No. 147739; Court of Appeals No. 310156.

PEOPLE v JUSTICE, No. 147740; Court of Appeals No. 312464.

SCHWEIM v STEVE'S BLINDS AND WALLPAPER, LLC, No. 147742; Court of Appeals No. 314426.

VELEZ-RUIZ v BOARD OF MEDICINE, No. 147744; Court of Appeals No. 314787.

PEOPLE v LANG, No. 147748; Court of Appeals No. 308985.

PEOPLE v JAMES ADAMS, No. 147753; Court of Appeals No. 316794.

PEOPLE v STEPHEN FLOYD, No. 147757; Court of Appeals No. 313186.

PEOPLE v BEVERLY, No. 147762; Court of Appeals No. 313701.

PEOPLE v HARVEY, No. 147763; Court of Appeals No. 317484.

PEOPLE v STRINGER, No. 147767; Court of Appeals No. 310228.

PEOPLE v EARLS, No. 147770; Court of Appeals No. 281248.

PEOPLE v BURKETT, No. 147771; Court of Appeals No. 313269.

PEOPLE v RONNIE THOMAS, No. 147772; Court of Appeals No. 314947.

PEOPLE v VARGAS, No. 147773; Court of Appeals No. 316971.

WOODWARD v SCHWARTZ, No. 147774; Court of Appeals No. 317270.

PEOPLE v JORDAN RUSSELL, No. 147776; Court of Appeals No. 313633.

PEOPLE v NEIBLER, No. 147777; Court of Appeals No. 313734.

PEOPLE v PALMER, No. 147779; Court of Appeals No. 313545.

PEOPLE v HERMAN, No. 147780; Court of Appeals No. 317150.

PEOPLE v SHIMEL, No. 147781; Court of Appeals No. 312375.

NELSON v ARVCO CONTAINER CORPORATION, No. 147782; Court of Appeals No. 313551.

PEOPLE v GOODIN, No. 147783; Court of Appeals No. 310292.

MELKI v CLAYTON CHARTER TOWNSHIP, No. 147787; Court of Appeals No. 306135.

PEOPLE v TOMMIE THREATT, No. 147788; Court of Appeals No. 306599.

PEOPLE OF THE TOWNSHIP OF WEST BLOOMFIELD v PEREZ-DELEON, No. 147791; Court of Appeals No. 312878.

PEOPLE v EMANUEL WILLIAMS, No. 147793; Court of Appeals No. 306987.

CASTELL v PECKOVER METAL, No. 147795; Court of Appeals No. 305648.

DETROIT MEDICAL CENTER v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 147796; Court of Appeals No. 316945.

PEOPLE v BUSWA, No. 147800; Court of Appeals No. 314293.

PEOPLE v JAMARIO MITCHELL, No. 147805; Court of Appeals No. 314357.

PEOPLE v WALTHALL, No. 147806; Court of Appeals No. 317052.

PEOPLE v BRUCE PARKER, No. 147807; Court of Appeals No. 318132.

PEOPLE v ANTOINE, No. 147809; Court of Appeals No. 310544.

PEOPLE v JAMES SMITH, No. 147813; Court of Appeals No. 315925.

PEOPLE v DUANE BELL, No. 147814; Court of Appeals No. 315620.

PEOPLE v MERIDY, No. 147815; Court of Appeals No. 309341.

PEOPLE v LYNCH, No. 147816; Court of Appeals No. 310489.

PEOPLE v DAVIDSON, No. 147818; Court of Appeals No. 314187.

PEOPLE v LEMONT HOPKINS, No. 147823; Court of Appeals No. 314690.

PEOPLE v MCCOY, No. 147829; Court of Appeals No. 310786.

PEOPLE v CLOY, No. 147830; Court of Appeals No. 311659.

PEOPLE v HAROLD MOORE, No. 147831; Court of Appeals No. 314671.

PEOPLE v DENNIS COTTON, No. 147832; Court of Appeals No. 315089.

PEOPLE v WILLSON, No. 147833; Court of Appeals No. 314926.

PEOPLE v TODD, No. 147840; Court of Appeals No. 317476.

PEOPLE v DEMETRICK MOSS, No. 147841; Court of Appeals No. 314791.

PEOPLE v CASTILLO, No. 147844; Court of Appeals No. 314687.

PEOPLE v CARL JOHNSON, No. 147845; Court of Appeals No. 314047.

PEOPLE v LLOYD BRIDGES, No. 147846; Court of Appeals No. 312444.

PEOPLE v HAIRE, No. 147847; Court of Appeals No. 309850.

STACEY v VHS OF MICHIGAN, INC, No. 147849; Court of Appeals No. 317061.

PEOPLE v IATONDA TAYLOR, No. 147850; Court of Appeals No. 314708.

PEOPLE v TAMMY WILLIAMS, No. 147851; Court of Appeals No. 314404.

PEOPLE v TRAYVEON JACKSON, No. 147852; Court of Appeals No. 316994.

PEOPLE v WILLIAM GATES, No. 147853; Court of Appeals No. 314068.

HAYES v DEPARTMENT OF TREASURY, No. 147859; Court of Appeals No. 314394.

LALONE v RIEDSTRA DAIRY LTD, No. 147862; Court of Appeals No. 308207.

PEOPLE v LINTON, No. 147871; Court of Appeals No. 314338.

PEOPLE v WOODMANSEE, No. 147873; Court of Appeals No. 317223.

KERZKA v FARR, No. 147879; Court of Appeals No. 310938.

LATTURE v EMMERLING, No. 147888; Court of Appeals No. 304833.

ZUCKER v KELLEY, No. 147889; Court of Appeals No. 308470.

PEOPLE v MARK KEMP, No. 147894; Court of Appeals No. 314330.

PEOPLE v BRABSON, No. 147895; Court of Appeals No. 309750.

PEOPLE v LAMONT JONES, No. 147909; Court of Appeals No. 305586.

LATTURE v EMMERLING, No. 147913; Court of Appeals No. 304833.

PEOPLE v ANTHONY LANE, No. 147919; Court of Appeals No. 314162.

PEOPLE v DEONTAE DAVIS, No. 147936; Court of Appeals No. 314940.

PEOPLE v TYREE ROSS, No. 147945; Court of Appeals No. 315858.

PEOPLE v ANGER, No. 148002; Court of Appeals No. 314281.

Leave to Appeal Before Decision by the Court of Appeals Denied December 23, 2013:

PEOPLE v YANNA, No. 148039; Court of Appeals No. 318881.

Superintending Control Denied December 23, 2013:

BELL v ATTORNEY GRIEVANCE COMMISSION, No. 147435.

DENHOF v ATTORNEY GRIEVANCE COMMISSION, No. 147517.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147747.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147792.

CANNON v ATTORNEY GRIEVANCE COMMISSION, No. 147812.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147874.

Summary Disposition December 26, 2013:

PEOPLE v ALFONZO JOHNSON, No. 145477; Court of Appeals No. 304273. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we affirm the result reached in the June 21, 2012 judgment of the Court of Appeals. Defendant was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement. Relief is barred by MCL 769.26 because there was no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions or when it sentenced defendant as a fourth habitual offender. In addition, affirming defendant's sentence as a fourth habitual offender is not inconsistent with substantial justice. MCR 2.613(A). With regard to defendant's remaining issues, we are not persuaded that they should be reviewed by this Court.

PEOPLE v SITERLET, No. 146713; reported below: 299 Mich App 180. On November 6, 2013, this Court heard oral argument on the application for leave to appeal the December 27, 2012 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals because the defendant waived any error in the untimely amendment of the habitual offender enhancement notice by repeatedly admitting his status as a fourth habitual offender. This waiver extinguished any error. *People v Carter*, 462 Mich 206, 220 (2000). We thus vacate that part of the Court of Appeals judgment addressing plain error, because it was unnecessary to decide the case.

Leave to Appeal Denied January 10, 2014:

PEOPLE v MORAN, No. 147760; Court of Appeals No. 316723.

Leave to Appeal Denied January 17, 2014:

In re KMS, No. 147756; Court of Appeals No. 314151.

BAKER v LEGACY HHH, No. 148297; Court of Appeals No. 317780.

BAKER v LEGACY HHH, No. 148334; Court of Appeals No. 317791.

BAKER v LEGACY HHH, No. 148351; Court of Appeals No. 317788.

Leave to Appeal Denied January 22, 2014:

PEOPLE v TOOKES, No. 148472; Court of Appeals No. 311558.

Summary Disposition January 24, 2014:

PEOPLE v THOMAS WHITE, No. 146872; Court of Appeals No. 308275. On January 15, 2014, the Court heard oral argument on the application for leave to appeal the January 24, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Wayne Circuit Court's January 11, 2012 orders. Under the unique circumstances of this case, the trial court did not abuse its discretion, see *People v Bylsma*, 493 Mich 17, 26 (2012), and *People v Brown*, 492 Mich 684, 688 (2012), when it set aside the defendant's guilty plea, dismissed the case with prejudice, and vacated the defendant's sentence.

Leave to Appeal Denied January 24, 2014:

PEOPLE v JASON SHAVER, No. 146521; Court of Appeals No. 300959. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of September 20, 2013. The application for leave to appeal the December 4, 2012 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

Summary Disposition January 29, 2014:

PEOPLE v RADANDT, No. 147091; Court of Appeals No. 314337. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the police officers unlawfully expanded a "knock and talk" procedure by entering the defendant's backyard and walking onto a wooden deck, which was attached to the home, and, if a constitutional violation occurred, whether the good-faith exception to the exclusionary rule applies under these facts. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v FULLER, No. 147093; Court of Appeals No. 314431. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the police officers unlawfully expanded a "knock and talk" procedure by entering the defendant's backyard and walking onto a wooden deck, which was attached to the home, and, if a constitutional violation occurred, whether the good-faith exception to the exclusionary rule applies under these facts. In all other respects, leave to appeal is

denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v REGAN REYNOLDS, No. 147377; Court of Appeals No. 311244. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentences of the Kent Circuit Court and remand this case to the trial court for resentencing. When scoring Offense Variables 12 and 13 of the sentencing guidelines, the trial court considered the defendant's conspiracy conviction to be a crime against a person. A conspiracy conviction cannot be scored as a crime against a person pursuant to *People v Bonilla-Machado*, 489 Mich 412 (2011), and *People v Pearson*, 490 Mich 984 (2012). On remand, the trial court shall score OV 12 at 1 point and OV 13 at 0 points. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v HESS, No. 147487; Court of Appeals No. 312244. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for an evidentiary hearing on the defendant's motion for relief from judgment. The trial court abused its discretion in denying the defendant's motion for relief from judgment based on MCR 6.502(G) without assessing whether the newly discovered evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 682 (2003). On remand, if the trial court so finds, the defendant's motion for a new trial shall be granted. We do not retain jurisdiction.

Leave to Appeal Granted January 29, 2014:

UAW v GREEN, No. 147700; reported below: 302 Mich App 246. We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *Mich Coalition of State Employee Unions v Michigan* (Docket No. 147758).

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS v STATE OF MICHIGAN, No. 147758; reported below: 302 Mich App 187. The parties shall include among the issues to be briefed whether 2011 PA 264 is unconstitutional, in whole or in part, in violation of Const 1963, art 11, § 5.

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *UAW v Green* (Docket No. 147700).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered January 29, 2014:

BADEEN v PAR, INC, No. 147150; reported below: 300 Mich App 430. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the defendant forwarding companies engage in "soliciting a claim for collection" and therefore are "collection agenc[ies]" as defined by MCL 339.901(b). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 29, 2014:

MORRIS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 143432; Court of Appeals No. 296343.

PEOPLE v MORRIS HOUSTON, No. 147022; Court of Appeals No. 314613.

KAFTAN v KAFTAN, Nos. 147218 and 147219; reported below: 300 Mich App 661.

PEOPLE v JOHN MCCULLOUGH, No. 147239; Court of Appeals No. 311064.

WILLIAMS v WILLIAMS, No. 147324; Court of Appeals No. 307607.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v KERRY HAWKINS, No. 147387; Court of Appeals No. 315365.

PEOPLE v SLITER, No. 147406; Court of Appeals No. 315554.

PEOPLE v KHAN, No. 147504; Court of Appeals No. 312828.

In re STAN ESTATE, No. 147508; reported below: 301 Mich App 435.

MARKMAN, J. (*dissenting*). MCL 700.3905 provides that "a provision in a will purporting to penalize an interested person for contesting the will or instituting another proceeding relating to the estate shall not be given effect if *probable cause* exists for instituting a proceeding contesting the will or another proceeding relating to the estate." (Emphasis added.) I would grant leave to appeal to consider whether the beneficiary of a will relying on this statutory exception to the enforcement of a no-contest clause can establish "probable cause" for a legal challenge if he or she did not ultimately prevail in the challenge.

CINTAS CORPORATION v STATE TAX COMMISSION, No. 147571; Court of Appeals No. 312004.

CUMMINS BRIDGEWAY, LLC v STATE TAX COMMISSION, No. 147573; Court of Appeals No. 312005.

TARGET CORPORATION v STATE TAX COMMISSION, No. 147575; Court of Appeals No. 312045.

PEOPLE v SNYDER, No. 147577; Court of Appeals No. 315269.

FORSYTHE v ALLEGAN GENERAL HOSPITAL, No. 147749; Court of Appeals No. 311917.

FORSYTHE v ALLEGAN GENERAL HOSPITAL, No. 147755; Court of Appeals No. 311964.

Summary Disposition January 30, 2014:

FRAZIER v KIRKLAND, No. 148483; Court of Appeals No. 319225. The application for leave to appeal the January 10, 2014 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of

granting leave to appeal, we reverse the order of the Court of Appeals granting the motion for stay pending appeal. We do not retain jurisdiction.

Summary Disposition January 31, 2014:

GAYDOS v CITY OF ALLEN PARK, No. 147318; Court of Appeals No. 312725. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the plaintiff's age discrimination claim. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v CARL WILLIAMS, No. 147451; Court of Appeals No. 312687. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ENOS, Nos. 148343, 148344, and 148345; Court of Appeals Nos. 318200, 318201, and 318202. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals is directed to decide this case on an expedited basis.

Leave to Appeal Denied January 31, 2014:

PEOPLE v ALAN TAYLOR, No. 145491; Court of Appeals No. 295275.

MARKMAN, J. (*concurring*). Defendant, Alan Taylor, a business entrepreneur, was prosecuted for violations of the wetlands protection act, MCL 324.30301 *et seq*., Part 303 of the Natural Resources and Environmental Protection Act, MCL 324.30301 *et seq*. Taylor, the founder and principal owner of a medical-device manufacturer, Hart Enterprises, moved his company from Illinois to an industrial park in Sparta, Michigan, in 1998. In 2006, when the company was in the process of doubling the number of Michiganders it employed from 55 to 110, Taylor decided that the company needed to expand its employee parking lot in order to accommodate this growth. As the expansion was proceeding, the Department of Environmental Quality (DEQ) initiated an investigation into whether the expanded lot was intruding upon a wetland portion of Taylor's industrial-park property. Although DEQ officials first visited Sparta to assess the situation in May 2006, it took the department more than a year and a half — until January 2008 — to inform Hart that in its view the parking-lot-expansion project had resulted in the filling-in of one-quarter of an acre of regulated wetland and the drainage of another two-thirds of an acre of regulated wetland. Since the DEQ had not issued a permit for these alleged environmental intrusions, it ordered Taylor to undo the parking-lot expansion and restore the wetland.

Taylor denied that the area constituted a protected wetland and decided to continue with the project. Among other things, he noted that environmental engineers who had monitored the project had never mentioned the

presence of any wetland on the property. Moreover, the DEQ's own lead investigator himself later acknowledged at trial that it was not readily apparent that a wetland was present on Taylor's property. Nonetheless, criminal charges were eventually brought against Taylor, and he was convicted of one count of depositing fill material in a regulated wetland without a permit and one count of constructing a parking lot in such a wetland without a permit. He was ordered to pay fines and costs of $8,500.

The lower court proceedings in this case fostered much confusion concerning which arguments Taylor properly preserved for appellate review.[1] It appears, at least in my judgment, that Taylor's most compelling legal arguments were waived for one reason or another, and on that basis alone, I concur with regret with this Court's denial order. However, I write separately because I believe that this case highlights legal issues that are likely to arise increasingly in the prosecution of administratively defined *malum prohibitum* criminal offenses within this state and that our Legislature might wish to exercise care in avoiding defects in due process of the type that have come increasingly to characterize criminal offenses within our federal justice system.[2]

First, the statute under which Taylor was convicted provides that a person may not "[d]eposit or permit the placing of fill material in a

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[1] For instance, Taylor argued on appeal to the Court of Appeals that the trial court erroneously admitted into evidence an aerial photograph and the National Wetlands Inventory. *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2012 (Docket No. 295275), p 1. The Court of Appeals, however, determined that Taylor had conceded the admissibility of the aerial photograph and the National Wetlands Inventory and that his waiver extinguished any error. *Id*. at 2. Taylor also argued on appeal to the Court of Appeals that Mich Admin Code, R 281.921(1)(b) is an invalid product of an unconstitutional delegation of legislative authority and that it defines the term "contiguous" incompatibly with the wetlands protection act. *Id.* The Court of Appeals, however, determined that Taylor had expressly abandoned those arguments on appeal in the circuit court and that his waiver extinguished any error. *Id*. at 3. Additionally, Taylor argued on appeal in the Court of Appeals that violations of MCL 324.30304 require proof of *mens rea* and are not strict-liability offenses. *Id.* at 5. The Court of Appeals again determined that Taylor had waived any argument concerning that issue and that any error had been extinguished. *Id.*

[2] It is estimated that there are 4,500 federal crimes in the United States Code, not to mention the far larger, and virtually uncountable, additional number of federal regulations outside Title 18 of the code that impose criminal penalties. See US House of Representatives Judiciary Committee, Press Release, *House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization* (released May 5, 2013), available at <http://judiciary.house.gov/index.cfm/2013/5/housejudiciarycommitteecreatesbipartisantaskforceonovercriminalization> [http://perma.cc/BFP2-X6FU] (accessed January 24, 2014).

wetland" or "[c]onstruct, operate, or maintain any use or development in a wetland." MCL 324.30304(a) and (c). A person who violates this provision is guilty of a misdemeanor punishable by a fine of not more than $2,500. MCL 324.30316(2). The district court, accepting the notion that the statute imposes strict liability, instructed the jury that the prosecutor had to prove beyond a reasonable doubt only that Taylor did the filling and that he failed to obtain a permit, not that he had to be aware in any way that he was filling in a wetland.[3] On appeal, the circuit court reached a similar conclusion that "MCL 324.30304 is a strict liability 'public welfare offense,' " concluding that it is "the type of statute envisioned in *Morissette* [*v United States*, 342 US 246 (1952)]." *Michigan v Taylor*, unpublished opinion of the Kent County Circuit Court, issued August 28, 2009 (Docket No. 08-11574-AR).[4] As a public-

[3] It appears that the district court determined that a violation of MCL 324.30304 constitutes a strict-liability offense as a result of the following inexplicable exchange between the parties:

> *The Court*: . . . I don't know what the mens rae [sic] requirement is for this. Does he have to know it's a violation?
>
> [*Defense Counsel*]: There is (indiscernible) aiding and abetting statute I think you do.
>
> *The Court*: Well I think — isn't this strict liability? I mean, just if you —
>
> [*Defense Counsel*]: Under [the] wetlands act it's strict liability. Yes.

[4] In *Morissette*, the United States Supreme Court described public-welfare offenses as those that "do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." *Morissette*, 342 US at 255. Such offenses, the Court explained, may be regarded as offenses against the authority of the state, "for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted." *Id.* at 256. Further expounding on the nature of public welfare offenses, the Court asserted:

> In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to

welfare offense, the circuit court explained, MCL 324.30304 need not regulate conduct that seriously threatens the community's health or safety in order to impose strict liability. *Id.* Additionally, it observed that a violation of MCL 324.30304 results in a misdemeanor conviction and asserted therefore that its " 'penalties . . . are small, and conviction does [not do] grave damage to an offender's reputation.' "[5] *Id.*, quoting *Morissette*, 342 US at 256. On further appeal, the Court of Appeals declined to consider whether a violation of MCL 324.30304 constitutes a strict-liability offense, reasoning only that "defendant has waived this issue and any error has been extinguished." *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2012 (Docket No. 295275), p 6.[6]

It is settled in Michigan that strict-liability offenses, though disfavored, may be "proper under some circumstances." *People v Quinn*, 440 Mich 178, 188 (1992). Indeed, "a state may decide under the police power that public policy requires that certain acts or omissions to act be

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> construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. [*Id.*]

Nonetheless, in evaluating a federal theft statute, 18 USC 641, the Court declined to construe the mere omission of any mention of intent "as eliminating that element from the crimes denounced." *Id.* at 263. The Court found it significant that it had not located "any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." *Id.* at 265. See also *People v Tombs*, 472 Mich 446, 451 (2005) (opinion by MARILYN KELLY, J.) ("[W]e tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated.").

[5] A similar conclusion was reached by the Court of Appeals in *People v Schumacher*, 276 Mich App 165 (2007), regarding MCL 324.16902(1) of the Natural Resources and Environmental Protection Act, which provided at that time that "[a] person shall deliver a scrap tire only to a collection site registered under [MCL 324.16904], a disposal area licensed under part 115, an end-user, a scrap tire processor, a tire retailer, or a scrap tire recycler, that is in compliance with this part." Assessing whether the Legislature intended an otherwise silent statute to "nevertheless require fault as a predicate to guilt," the Court of Appeals concluded that "the Legislature intended in [MCL 324.16902(1)] to establish a so-called public-welfare offense: the only intent necessary to establish its violation is that the accused intended to perform the prohibited act." *Id.* at 171, 174-175.

[6] The Court of Appeals explained that "when trial counsel responded that 'under t[he] wetlands act it's strict liability,' he waived any argument that these were anything other than strict liability offenses." *Taylor*, unpub op at 5.

punished regardless of the actor's intent." *Id.* at 186-187. These public-welfare offenses generally are designed "to protect those who are otherwise unable to protect themselves by placing 'the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' " *Id.* at 187 (citations omitted). As the United States Supreme Court has explained:

> Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements. [*Staples v United States*, 511 US 600, 607 (1994) (citations omitted) (alterations in original).]

However, as illustrated by the instant case, the wetlands protection act regulates seemingly innocuous conduct including, as here, the expansion of a small parking lot. While that conduct may concededly under certain circumstances cause harm to a wetland, it is not necessarily of the type that even a "reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v United States*, 471 US 419, 433 (1985).[7] Imposing strict liability on an individual for a violation of MCL 324.30304 has the

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[7] As observed in dissent in *People v Wilson*, 159 F3d 280, 295 (CA 7, 1998) (Posner, C.J., dissenting),

> [s]ometimes the existence of the law is common knowledge, as in the case of laws forbidding people to own hand grenades, forbidding convicted felons to own any firearms, and requiring a license to carry a handgun. And sometimes, though the law is obscure to the population at large and nonintuitive, the defendant had a reasonable opportunity to learn about it, as in the case of persons engaged in the shipment of pharmaceuticals who run afoul of the criminal prohibitions in the federal food and drug laws. [Citations omitted.]

And sometimes it is neither "common knowledge" nor a matter as to which there is a "reasonable opportunity to learn about it" because one is in a particular business, such as a medical-device manufacturer who engages in the expansion of his small parking lot.

potential to subject Michigan property owners to criminal prosecution even when they are unaware that a property at issue comprises a wetland and, as a result, that certain not-obviously-damaging conduct affecting that land is prohibited. Moreover, while this case involved an industrial property, owners of residential properties are equally at risk of unknowingly exposing themselves to criminal prosecution under the act.

As a result, our Legislature might wish in the future to review this and similar criminal statutes and communicate with clarity and precision its specific intentions concerning which public-welfare offenses, or administratively defined *malum prohibitum* offenses, should be treated by the judiciary of this state as strict-liability offenses, " 'criminaliz[ing] a broad range of apparently innocent conduct.' " *Staples*, 511 US at 610, quoting *Liparota*, 471 US at 426. It is the responsibility of our Legislature to determine the state of mind required to satisfy the criminal statutes of our state, and the judiciary is ill-equipped when reviewing increasingly broad and complex criminal statutes to discern whether some *mens rea* is intended, for which elements of an offense it is intended, and what exactly that *mens rea* should be.

Second, the Legislature has defined a "wetland" as

> land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp or marsh, and which is any of the following:
>
> (*i*) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream. [MCL 324.30301(1)(m) (codified as MCL 324.30301(1)(p) at the time of trial).]

Although the prosecutor's witnesses testified that the land in question supported wetland vegetation, it appears that no witness identified the land as being of the kind that is "commonly referred to as a bog, swamp, or marsh."[8] Indeed, as previously noted, even the DEQ's principal investigator acknowledged that it was not readily apparent that a wetland was present on Taylor's property. As this case demonstrates,

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[8] While defendant apparently argued on appeal in the circuit court that the proofs failed to satisfy the definition of "wetland," the circuit court determined that the prosecution was not required to set forth evidence of the land as being "commonly referred to as a bog, swamp, or marsh" to satisfy the definition. In reaching its conclusion, the circuit court relied on *People v Kozak*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2008 (Docket No. 272945) p. 2, which determined that the phrase

> "commonly referred to as a bog, swamp, or marsh" as used in the statute to refer back to "land" is clearly intended to facilitate the ordinary reader's understanding of the *kind of* land involved. The

recognizing a potential violation of the wetlands protection act is both a complex and uncertain task. In the context of an administratively defined *malum prohibitum* offense that requires ordinary citizens to possess a heightened degree of technical skill to comprehend, the Legislature might wish to consider with particular care whether it intends that such offenses be treated by our judiciary as lacking any form of *mens rea* and thereby imposing strict liability.[9]

Third, while the Legislature did not itself define "contiguous," an administrative rule promulgated by the DEQ defines "contiguous" to mean "[a] seasonal or intermittent direct surface water connection to an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair." Mich Admin Code, R 281.921(1)(b)(ii). This rule significantly broadens the scope of the wetlands protection act, specifically MCL 324.30301 and MCL 324.30304, to find the presence of a wetland not merely where the land is genuinely contiguous to a river or stream, i.e., sharing a common border or touching, but also where there is a "direct surface water connection." Moreover, the rule countenances that the "direct surface water connection" might be an artificially constructed one. Indeed, a "guidance" document issued by the DEQ further expounds that a "direct surface water connection" may include "surface water within pipes, culverts, ditches, and other man-made structures of any length." Department of Environmental Quality, Land & Water Management Division, Guidance Document No. 303-06-01, issued April 18, 2006, p 2. Cf. MCL 324.30311a.

It has been said that "[t]here is precious little difference between a secret law and a published regulation that cannot be understood." Lynch, Introduction to *In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law"* (Lynch ed) (Washington, DC: Cato Institute, 2009), p. xi. Many *malum prohibitum* offenses are defined in significant part by administrative rules and regulations. Vague regulations, amorphous definitions of the elements of the crime, and rules not altogether compatible with the provisions of the statute are

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> Legislature did not intend it to mandate an inquiry into how a particular parcel of property is generally referred to in the community.

In *Kozak*, however, the Court of Appeals at least examined the common definitions of those words and noted that "[t]he testimony at trial from people who had been to the area of land in question all provided testimony that overwhelmingly described property meeting all three of these common definitions." *Id*. at 2-3.

[9] See, e.g., Gerger, *Environmental Crime*, 24 Champion 34, 36 (Oct 2000) (suggesting that in the context of environmental crimes, in which "the government prosecutes vague or complex regulations that ordinary people can easily misunderstand or even overlook, . . . it should have to prove that its targets understood the law and deliberately broke it").

distinguishing and continuingly problematic aspects of prosecutions of those administratively defined offenses. Again, as the United States Supreme Court has recognized:

> A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. [*Connally v Gen Constr Co*, 269 US 385, 393 (1926) (quotation marks and citation omitted).]

In the instant case, there was considerable confusion concerning the proper definition of the terms defining the substantive crime at issue, in particular the meaning of "contiguousness." The imprecise statute and administrative rule infused more confusion into an already complex area of law. It appears that both the parties and the district court itself experienced considerable difficulty in reconciling the words of the statutes with the words of the administrative rule to arrive at the proper understanding of "contiguous." When it is difficult for lawyers and judges to decipher the elements of the crime being prosecuted, it seems particularly problematic to adhere to the traditional maxim that the citizenry must be "presumed to know the law." See, e.g., *Mudge v Macomb Co*, 458 Mich 87, 109 n 22 (1998).

In drafting criminal statutes involving *malum prohibitum* administrative offenses, i.e., offenses that are not inherently wrongful such as homicide and theft but are wrongful only because they are prohibited by law, our Legislature might wish to take care in defining critical terms and elements with as much specificity as possible and in terms that are as accessible to ordinary citizens as possible so that they might readily understand what course of conduct it is lawful, and unlawful, to pursue. To the extent that this is not done, the terms and elements will come to be defined by administrative regulators, whose judgments in many instances may vary from those of the Legislature and in other instances may give rise to inconsistent obligations and duties on citizens by the effective enactment of a second law pertaining to the same subject matter. The applicability of administrative criminal offenses is not confined to large and sophisticated businesses, replete with their own legal counsel's office—as evidenced by the instant case; they apply equally to smaller enterprises, as well as to individuals and residential property owners. All who are subject to the criminal law should be able to assess with some measure of confidence whether they are at the risk of violating that law, and having to navigate among multiple bodies of law and choose between the terms of statutory Law A and regulatory Law B, as in a Chinese restaurant menu, renders this increasingly difficult.

Fourth, while the Legislature may grant administrative agencies the power to promulgate rules and regulations, it remains the constitutional province of the Legislature to legislate. See Const 1963, art 4, § 1 ("The

legislative power of the State of Michigan is vested in a senate and a house of representatives."). By broadly defining regulatory offenses in vague terms, the Legislature relinquishes, or "delegates," to administrative agencies (if there are sufficient standards accompanying the charge) the authority to enact critical policies for this state, in particular policies determining who will be subject to the sanctions of the criminal law. One need not be a constitutional fundamentalist to question the propriety of unelected and unaccountable administrative officials undertaking such decisions by defining the terms and scope of laws whose violation will engender a loss of personal freedom.

The Legislature might take care to recognize that its mission and that of the administrative "branch" of government are institutionally distinct in ways that may practically affect the criminal laws that each enacts or promulgates. The Legislature represents the whole of the people in the broadest possible manner, and the laws that it produces must pass muster by the support of at least a majority of legislators, representing constituencies that are urban, rural, and suburban; constituencies of every socioeconomic, racial, and ethnic composition; constituencies in which different businesses, interests, and political and partisan philosophies are reflected and balanced; and in which, however imperfectly, the "general welfare" standard is optimally realized. By contrast, administrative agencies are often defined by a mission consisting of a "single purpose," as to which "special interests," in contrast to "we the people" as a whole, are particularly focused, and in which the kind of give-and-take, negotiation, and compromise reflected within the legislative process tend to be replaced by a more narrow and singled-minded process of rulemaking. That is, the often "gray" decision-making of the Legislature, in which many points of view may prevail in some respect, is replaced by the "black-and-white" decision-making of regulators, in which "winners" and "losers" are more clearly demarcated. Therefore, in delegating criminal lawmaking responsibility to an administrative agency, the Legislature delegates that responsibility to a body that may possess a very different sense of what constitutes prudent and responsible public policy. If the Legislature is to maintain faith with its own broader constituency, it might wish to take care in recognizing these institutional differences and the varying incentives and disincentives that act on each body.

Fifth, the wetlands protection act provides the opportunity for either civil or criminal enforcement, and there are a number of discrete criminal offenses contemplated by the act.[10] The decision concerning which of

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[10] MCL 324.30316 provides:

> (1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under [MCL 324.30315(1)]. An action under this subsection may be brought in the circuit court for the county of Ingham or for a county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance with this part. In addition to

these sanctions to seek appears to be, for the most part, left necessarily to the discretion of the agency and the prosecutor. Administratively defined *malum prohibitum* criminal offenses tend to consist of multiple provisions, and the enumeration of multiple potential offenses, that can be pursued at the heightened discretion of the agency and the prosecutor. Although that discretion is an inevitable part of a criminal justice process in which there are inadequate resources (as well as little inclination) to pursue every possible violation of the criminal law, no matter how inconsequential, the "equal rule of law" would not seem to be furthered by a criminal justice regime in which prosecutorial discretion is maximized, rather than constrained, and in which similarly situated criminal offenders are subject to potentially widely varying sanctions. Indeed, the legislative sentencing guidelines enacted in Michigan were designed precisely to address such disparities, although largely with respect to criminal offenses that are not administratively defined.

As such, the Legislature might wish to consider with care whether the unfettered discretion of agencies and prosecutors to select among multiple available punishments for the same criminal offense should be limited, just as the sentencing guidelines have already limited the discretion of judges to determine precise criminal sentences. The criminal consequences of a regulatory violation should not be an afterthought on the part of the Legislature in a regulatory enactment, and it cannot be an aspect of such a scheme left to an agency's determination; rather, it should be the subject of as much definition as more traditional criminal statutes. Furthermore, as the numbers of statutes criminalizing regula-

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any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation. A person who violates an order of the court is subject to a civil fine not to exceed $10,000.00 for each day of violation.

(2) A person who violates this part is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00.

(3) A person who willfully or recklessly violates a condition or limitation in a permit issued by the department under this part, or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation, or by imprisonment for not more than 1 year, or both. A person who violates this section a second or subsequent time is guilty of a felony, punishable by a fine of not more than $50,000.00 for each day of violation, or by imprisonment for not more than 2 years, or both.

(4) In addition to the penalties provided under subsections (1), (2), and (3), the court may order a person who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.

tory offenses increases, the discretion afforded agencies and prosecutors will inevitably be amplified, creating the risk that those statutes will be "enforced sporadically, either as a matter of deliberate policy to proceed only on a private complaint, or as a matter of the accident of what comes to official attention or is forced upon it." Hart, *The Aims of Criminal Law*, 23 Law & Contemp Probs 401, 429 (Summer 1958). In order to ensure that criminal prosecutions are reserved for those crimes most destructive of persons and property, and to ensure to the fullest extent possible that laws are administered fairly and uniformly, the Legislature might wish to consider standards articulating the range of circumstances under which an administratively defined *malum prohibitum* offense warrants the imposition of the most severe and the least severe available sanctions.[11]

As demonstrated by the instant case, the criminalization of regulatory conduct is troubling to the constitutional order. Unlike its federal counterpart, one of the distinguishing characteristics of state criminal law has been its overwhelming focus on crimes that are *malum in se*, traditional common-law crimes that have been incorporated into our criminal statutes, in which perpetrators have, to paraphrase one commentator, "hit other people, taken other people's stuff, or failed to keep their promises." See Boaz, *The Politics of Freedom* (Washington, DC: Cato Institute, 2008), pp xv-xvi. This Court's criminal docket consists largely of crimes that are clearly defined by the Legislature, contain well-understood elements and straightforward *mens rea* requirements, are reasonably well understood by ordinary persons, and typically enjoy a broad consensus of support across the citizenry. Although strict-liability and regulatory crimes are hardly unknown to the state system, their prosecution is far less common than in the federal system, and the constitutional rules of the game are considerably less well developed.

While it is the obligation of this Court to give faithful meaning to *all* of our state's criminal laws, of whatever nature, and to presume their constitutionality, the proliferation of statutes such as the present act renders navigation of the legal system by citizens, lawyers, and judges increasingly difficult. In promulgating new statutes that criminalize regulatory offenses, our Legislature might wish to take the utmost care to ensure that such laws are accessible to the people and afford as much due process as reasonably possible in enabling their terms to be apprehended and their obligations to be understood.

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[11] In the view of at least one academic observer, it seems that one possible factor conducing in favor of an exercise of judgment to prosecute is that certain environmental cases "are unlikely to be prosecuted criminally unless there is a government perception that the offender ignored advice to obtain a permit or showed disrespect for authority[.]" Sharp, *Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment*, 21 Environ L Rep 10658, 10662 (1991). In these circumstances, "[c]riminal intent is derived almost wholly from the defiance of authority, and the defiance, not the environmental harm, dictates which cases involve criminal behavior." *Id*.

PEOPLE v HOUGH, No. 146824; Court of Appeals No. 302132.

STUDLEY v HILL TOWNSHIP, No. 147322; Court of Appeals No. 303845.

PEOPLE v JESSE WILSON, No. 147506; Court of Appeals No. 308330.

PEOPLE OF CANTON TOWNSHIP v PHOENIX, No. 147507; Court of Appeals No. 313823.

OGILVIE v OGILVIE, No. 147510; Court of Appeals No. 310935.

MCFADDEN v TITAN INSURANCE COMPANY, No. 147554; Court of Appeals No. 316012. As plaintiff McFadden has repeatedly abused the court system with frivolous and vexatious filings, we direct the Clerks of this Court, the Court of Appeals, and the Wayne Circuit Court not to accept any further filings from him in non-criminal matters unless Mr. McFadden has paid all necessary fees, sanctions assessed by the circuit court, and submitted his filings in full compliance with the court rules.

PEOPLE v CUMMINGS, No. 147593; Court of Appeals No. 310944.

DEUTSCHE BANK NATIONAL TRUST v FELDER, No. 147596; Court of Appeals No. 312769.

FRASCO, CAPONIGRO, WINEMAN, & SCHEIBLE, PLLC v IGC MANAGEMENT, INC, No. 147609; Court of Appeals No. 308405.

DETROIT MEDICAL CENTER v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 147662; reported below: 302 Mich App 392.

DAY LIVING TRUST v KELLEY, Nos. 147706 and 147707; Court of Appeals Nos. 309531 and 309566.

BRAVERMAN v AUTO-OWNERS INSURANCE COMPANY, No. 147728; Court of Appeals No. 306492.

PEOPLE v TOMMIE BROWN, No. 147730; Court of Appeals No. 310129.

PEOPLE v SEARCY, No. 147741; Court of Appeals No. 301751.

PEOPLE v JEFFREY WILLIAMS, No. 147764; Court of Appeals No. 309056.

PEOPLE v GOODWIN, No. 147769; Court of Appeals No. 314389.

CHARTER TOWNSHIP OF YPSILANTI v KIRCHER, No. 147784; Court of Appeals No. 313193.

WARD v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 147785; Court of Appeals No. 313557.

HURST v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 147786; Court of Appeals No. 313231.

PEOPLE v PUTMAN, No. 147799; Court of Appeals No. 310589.

PEOPLE v DABISH, No. 147801; Court of Appeals No. 301622.

PEOPLE v JASON ROSE, No. 147803; Court of Appeals No. 297769.

PEOPLE v ROBERT WILLIAMS, No. 147808; Court of Appeals No. 308866.

PEOPLE v EWING, No. 147811; Court of Appeals No. 301758.

PEOPLE v KARLSKIN, No. 147821; Court of Appeals No. 310734.

PEOPLE v COURTNEY WILLIAMS, No. 147824; Court of Appeals No. 313181.

OLSON v CITY OF GROSSE POINTE PARK, No. 147826; Court of Appeals No. 314662.

PEOPLE v JAMES TERRELL, No. 147828; Court of Appeals No. 302135.

PEOPLE v MOSER, No. 147836; Court of Appeals No. 313089.

KIRCHER v PARNALL CORRECTIONAL FACILITY WARDEN, No. 147848; Court of Appeals No. 314454.

PEOPLE v KETCHUM, No. 147854; Court of Appeals No. 313235.

PEOPLE v WALLACE, No. 147855; Court of Appeals No. 310442.

PEOPLE v JOHN PORTER, No. 147856; Court of Appeals No. 315724.

PEOPLE v BRANNON, No. 147861; Court of Appeals No. 303267.
CAVANAGH, J. would grant leave to appeal.

PEOPLE v MEADOWS, No. 147863; Court of Appeals No. 313526.

PEOPLE v RAMONE WILSON, No. 147865; Court of Appeals No. 313261.

LEWIS v CITY OF FERNDALE, No. 147878; Court of Appeals No. 311528.

PEOPLE v TATUM, No. 147881; Court of Appeals No. 314743.

PEOPLE v HOWELL, No. 147882; Court of Appeals No. 314738.

PEOPLE v DEQUEZE DIXON, No. 147891; Court of Appeals No. 305185.

PEOPLE v DONALD JOHNSTON, No. 147897; Court of Appeals No. 313395.

PEOPLE v CHRISTIAN SMITH, No. 147899; Court of Appeals No. 316155.

HUBBARD v NORFOLK SOUTHERN RAILWAY COMPANY, No. 147900; Court of Appeals No. 302325.

BULLER v DENHOF, No. 147901; Court of Appeals No. 316604.

PEOPLE v EBRIGHT, No. 147905; Court of Appeals No. 317015.

PEOPLE v COOK, No. 147906; Court of Appeals No. 313408.

MCINNIS v WOODLAND CENTER CORRECTIONAL FACILITY WARDEN, No. 147912; Court of Appeals No. 315224.

PEOPLE v DOUGLAS JACKSON, No. 147916; Court of Appeals No. 308329.

PEOPLE v HADLEY, No. 147932; Court of Appeals No. 316819.

PEOPLE v BERNARD SMITH, No. 147933; Court of Appeals No. 313365.

WARD v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 147941; Court of Appeals No. 310968.

PEOPLE v MARK ANDERSON, No. 147943; Court of Appeals No. 314358.

PEOPLE v LESEARS, No. 147947; Court of Appeals No. 305314.

VROOMAN v FORD MOTOR COMPANY, No. 147952; Court of Appeals No. 313437.

WEAVER v FABIAN, No. 147957; Court of Appeals No. 311428.

PEOPLE v IVORY, No. 147958; Court of Appeals No. 310380.

ALCONA COUNTY v ROBSON ACCOUNTING, INC, Nos. 147963 and 147964; Court of Appeals Nos. 301532 and 302134.

PEOPLE v GARY ROBINSON, No. 147965; Court of Appeals No. 304936.

MARSHALL v GENERAL MOTORS CORPORATION, No. 147966; Court of Appeals No. 314290.

PEOPLE v TYNER, No. 147967; Court of Appeals No. 317692.

PEOPLE v JAMES POWELL, No. 147969; Court of Appeals No. 314070.

PEOPLE v BURROWS, No. 147975; Court of Appeals No. 317806.

PEOPLE v RAU, No. 147980; Court of Appeals No. 316132.

PEOPLE v SCHMUCKER, No. 147983; Court of Appeals No. 316450.

PEOPLE v JOHN JONES, No. 147995; Court of Appeals No. 311587.

PEOPLE v MELVIN DALTON, No. 148003; Court of Appeals No. 310531.

PEOPLE v CHILDERS, No. 148006; Court of Appeals No. 316048.

PEOPLE v DANA HARRIS, No. 148007; Court of Appeals No. 314606.

PEOPLE v JAMES HARDY, No. 148015; Court of Appeals No. 315436.

PEOPLE v GILBERT, No. 148017; Court of Appeals No. 313807.

PEOPLE v WALLER, No. 148018; Court of Appeals No. 315421.

PEOPLE v GREGORY, No. 148022; Court of Appeals No. 313920.

PEOPLE v CELITA SANFORD, No. 148029; Court of Appeals No. 307747.

CARLSON v CARLSON, No. 148030; Court of Appeals No. 315528.

PEOPLE v PIETRANTONIO, No. 148040; Court of Appeals No. 313874.

PEOPLE v NIEPOKUJ, No. 148072; Court of Appeals No. 313901.

PEOPLE v FRAZIER, No. 148075; Court of Appeals No. 314835.

FISHER v JUSTRIBO, Nos. 148113, 148114, and 148115; Court of Appeals Nos. 312106, 313387, and 314077.

MCKINNEY v VILLALVA, Nos. 148409, 148410, and 148411; Court of Appeals Nos. 299736, 302444, and 302468.

Superintending Control Denied January 31, 2014:

HARPER v ATTORNEY GRIEVANCE COMMISSION, No. 146848.

PARSONS v ATTORNEY GRIEVANCE COMMISSION, No. 147329.

Reconsideration Denied January 31, 2014:

PEOPLE v LARRY SMITH, No. 146697; Court of Appeals No. 312697. Leave to appeal denied at 495 Mich 864.

BROWN v ATTORNEY GRIEVANCE COMMISSION, No. 147144. Superintending control denied at 495 Mich 868.

RICHMOND TOWNSHIP v RONDIGO, LLC, No. 147175; Court of Appeals No. 304444. Leave to appeal denied at 495 Mich 872.

ZAHRA, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v DARRYL BELL, No. 147194; Court of Appeals No. 311669. Leave to appeal denied at 495 Mich 866.

PEOPLE v LYLES, No. 147258; Court of Appeals No. 313808. Leave to appeal denied at 495 Mich 866.

PEOPLE v SZYDLEK, No. 147358; Court of Appeals No. 311747. Leave to appeal denied at 495 Mich 881.

NORMANDY APARTMENTS CONDOMINIUM ASSOCIATION, INC v BANK OF AMERICA, NA, No. 147372; Court of Appeals No. 311735. Leave to appeal denied at 495 Mich 882.

PEOPLE v SHELTON CARTER, No. 147388; Court of Appeals No. 312414. Leave to appeal denied at 495 Mich 900.

DEPARTMENT OF COMMUNITY HEALTH v VELEZ-RUIZ, No. 147516; Court of Appeals No. 315966. Leave to appeal denied at 495 Mich 883.

SPRAGUE v MCMILLAN, No. 147768; Court of Appeals No. 315206. Leave to appeal denied at 495 Mich 883.

Leave to Appeal Granted February 5, 2014:

ADAIR v MICHIGAN DEPARTMENT OF EDUCATION, No. 147794; reported below: 302 Mich App 305. The parties shall include among the issues to be briefed: (1) which party has the burden of proving underfunding of a

legislative mandate in a challenge under Const 1963, art 9, § 29, (2) what elements of proof are necessary to sustain such a claim, and (3) whether acceptance of a general appropriation from the Legislature which is specifically conditioned on compliance with reporting requirements pursuant to MCL 388.1622b(1)(c) waives any challenge to the funding level for those requirements under Const 1963, art 9, § 29. The application for leave to appeal as cross-appellants is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered February 5, 2014:

TIENDA v INTEGON NATIONAL INSURANCE COMPANY, No. 147483; reported below: 300 Mich App 605. The parties shall submit supplemental briefs within 42 days of the date of this order addressing the issue whether the insured upon whose policy the plaintiffs seek the payment of benefits was an "out-of-state resident," as that term is used in MCL 500.3163(1), at the time of the Michigan accident giving rise to the plaintiffs' claim. The parties should not submit mere restatements of their application papers.

Summary Disposition February 5, 2014:

VEREMIS v GRATIOT PLACE, LLC, No. 147411; Court of Appeals No. 302658. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals affirming the Saginaw Circuit Court's judgment with respect to the negligent nuisance in fact claim, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Saginaw Circuit Court for entry of an order granting the defendant's motion for directed verdict on that claim. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v RHODES, No. 147666; Court of Appeals No. 310135. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Hardy*, 494 Mich 430, 438 (2013), and *People v Osantowski*, 481 Mich 103, 111-112 (2008). Determining whether a trial court properly scored sentencing variables is a two-step process. First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made. See *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257 (2012). Second, the appellate court considers de novo "whether the facts, as found, are adequate to satisfy the scoring conditions

prescribed by statute." *Hardy*, 494 Mich at 438. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v OLEAR, No. 147719; Court of Appeals No. 307577. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to the Macomb Circuit Court to consider: (1) whether *People v Portellos*, 298 Mich App 431 (2012), is intervening case law providing an exception to the law of the case with regard to *People v Olear*, unpublished opinion per curiam of the Court of Appeals issued April 21, 2011 (Docket No. 297155); and (2) whether the factors offered by the defendant at the resentencing hearing of July 10, 2013 provide a substantial and compelling reason for departure from the applicable sentencing guidelines range, independent of the reasons that were rejected by the Court of Appeals in *People v Olear*. In the event that the circuit court answers one or both propositions in the affirmative, it may proceed to resentencing. We do not retain jurisdiction.

COSTELLA v TAYLOR POLICE & FIRE RETIREMENT SYSTEM, No. 147810; Court of Appeals No. 310276. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the March 26, 2012 order of the Wayne Circuit Court granting the defendants' motions for summary disposition, for the reasons stated in the Court of Appeals dissenting opinion. In particular, the circuit court did not clearly err in concluding that defendant Taylor Police and Fire Retirement System's final decision regarding the plaintiff's pension benefits was not contrary to law, was not arbitrary, capricious, or a clear abuse of discretion, and was supported by competent, material and substantial evidence on the whole record. See *Van-Zandt v State Employees' Retirement Sys*, 266 Mich App 579, 583-585 (2005).

Leave to Appeal Denied February 5, 2014:

PEOPLE v SHEFFIELD, No. 147450; Court of Appeals No. 312846.

PEOPLE v LEON HARRIS, No. 147485; Court of Appeals No. 311500.

PEOPLE v NICHOLS, No. 147564; Court of Appeals No. 308524.

SABATOS v CHERRYWOOD LODGE, INC, No. 147608; Court of Appeals No. 302644.

PEOPLE v CUPPLES, No. 147613; Court of Appeals No. 304393.

PEOPLE v HUGHES, No. 147616; Court of Appeals No. 304182.

PEOPLE v ANTON PHILLIPS, No. 147714; Court of Appeals No. 309661.

PEOPLE v JOSE, No. 147802; Court of Appeals No. 317688.

PEOPLE v HARRINGTON, No. 147835; Court of Appeals No. 313575.

Summary Disposition February 7, 2014:

PEOPLE v ROBERT GEORGE, No. 147612; Court of Appeals No. 309951. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the April 9, 2012 order of the Washtenaw Circuit Court. It appears that the circuit court did not recognize that it could exercise its discretion to modify the method of the defendant's restitution payment under MCL 780.766(12), even where the defendant's restitution stemmed from a plea agreement. The statute makes no distinction between restitution ordered as a part of a plea agreement or otherwise. We remand this case to the circuit court for a determination under the statute whether payment under the existing order will impose a manifest hardship on the defendant or his immediate family, and whether modifying the method of payment will impose a manifest hardship on the victims. Upon making these determinations, the circuit court may, in its discretion, determine whether to modify the method of payment.

Leave to Appeal Denied February 7, 2014:

PEOPLE v BRIGITTE REYNOLDS, No. 147220; Court of Appeals No. 311180.

CAVANAGH, J. (*dissenting*). I agree with Justice Viviano that this case raises serious concerns regarding the application of MRE 404(b); therefore, I would grant leave to appeal.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. I believe that defendant's prior convictions may have been improperly admitted under MRE 404(b) as evidence of her propensity to commit the charged offense. I would grant leave to appeal to consider the appropriate standard for admission of other-acts evidence when the prosecutor's stated purpose in seeking the admission of such evidence is to prove the defendant's intent.

Although defendant was discovered in the victim's home, she claimed innocent intent—that after discovering a broken door, she entered the home to see if anyone inside needed assistance. The prosecution sought to admit defendant's prior convictions for breaking and entering and home invasion as proof to rebut defendant's alleged innocent intent.

Other-acts evidence, including prior convictions, "is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). Such evidence may be admissible if offered for one of several enumerated non-character purposes. *Id.*; *People v Crawford*, 458 Mich 376, 386-389 (1998). However, "a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been 'offered' for one of the rule's enumerated proper purposes." *Crawford*, 458 Mich at 387. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id.* at 388. To this end, there must be some showing of similarity between the prior conviction and the present charge. The degree of similarity required differs depending on the theory of relevance proffered. *People v Mardlin*, 487 Mich 609, 622 (2010). When, as here, the theory of relevance goes to

intent, "logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.' " *People v VanderVliet*, 444 Mich 52, 79-80 (1993), quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23; see also *People v Sabin (After Remand)*, 463 Mich 43, 64 (2000) (stating that " 'mere similarity . . . suffices for evidencing intent' ") (citation omitted).

Even though the prior convictions here—breaking and entering and home invasion—are in the same general category as the offenses charged, I do not believe that they may properly be admitted without even a minimal inquiry into the similarity of the circumstances involved. Indeed, the requirement that "past events need only fall into the same 'general category' under these circumstances [to prove innocent intent] does not extinguish the need for similarity to whatever extent similarity is relevant in a particular case." *Mardlin*, 487 Mich at 623 n 39. For example, in *Mardlin*, when the defendant was accused of arson, this Court stated that evidence of the defendant's involvement in past fires was "sufficiently similar or related because they each involved a *home or vehicle that was under defendant's control*." *Id*.

In contrast, in *People v Crawford*, this Court held that the trial court abused its discretion by admitting the defendant's prior drug-delivery conviction because it was not sufficiently similar to the charged offense of possession with intent to deliver. The defendant had claimed innocent intent based on lack of knowledge of the drugs discovered in his vehicle. The prosecution sought to admit the prior drug-delivery conviction under the doctrine of chances, a theory that "rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.' " *Crawford*, 458 Mich at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 45. But this Court concluded that there was "an insufficient factual nexus between the prior conviction and the present charged offense to warrant admission of the evidence under the doctrine of chances." *Id.* at 395-396. In the prior crime, officers had caught the defendant in the act of selling drugs. *Id.* at 381-382, 396. In *Crawford*, a routine traffic violation eventually led to the discovery of cocaine hidden in the dashboard of the defendant's car, which he had purchased only 5 to 10 days before and had loaned to others before the traffic stop. *Id.* at 379-380, 396-397. Under these circumstances, this Court held that introduction of the prior conviction was improper:

> The facts of the 1988 drug offense simply do not bear out the prosecutor's contention that the defendant "obviously knew" the drugs were in his dashboard and that he intended to deliver them. The prior conviction only demonstrates that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine. To the extent that the 1988 conviction is logically relevant to show that the defendant was also a drug dealer in 1992, we believe it does so solely by way of the forbidden intermediate inference of bad character that is specifically prohibited by *MRE 404(b)*. Thus, the defendant's prior conviction was mere character

evidence masquerading as evidence of "knowledge" and "intent." [*Id.* at 396-397 (emphasis added).]

I believe that allowing admission of other-acts evidence *solely* on the ground that, because defendant has been convicted of offenses in the same general category of crime in the past, it is more probable than not that defendant had the requisite criminal intent in this case, "is a poorly disguised propensity argument, which is precisely what Rule 404(b) expressly forbids." *Id.* at 397 n 14. Given that "using bad acts evidence can weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," we should ensure that lower courts closely scrutinize "[t]he logical relationship between the proffered evidence and the ultimate fact sought to be proven . . . ." *Id.* at 384, 388 (quotation marks and citation omitted).

In this case, the prosecution offered absolutely no explanation of the circumstances of the past crimes, nor did the trial court determine whether they were similar to the present crimes. Absent such a determination, there was an insufficient showing of logical relevance between the prior convictions and the charged offenses. See *Mardlin*, 487 Mich at 623 n 39. Under these circumstances, it appears that the trial court succumbed to the "common pitfall" of admitting the prior misconduct evidence "merely because it has been 'offered' for one of the rule's enumerated proper purposes." *Crawford*, 458 Mich at 387. Although admission of other-acts evidence may be held to a relatively low bar of similarity for the purpose of proving intent, surely the bar is higher than what occurred in this case. Thus, I believe that the trial court may have abused its discretion by admitting evidence of defendant's prior convictions.

For these reasons, I would grant leave to appeal.

MCCORMACK, J., joins the statement of VIVIANO, J.

CITY OF HOLLAND V FRENCH, No. 147492; Court of Appeals No. 309367.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal because I would grant leave to appeal. Defendant was Holland's city clerk. She initially lived in Douglas with her husband and children, but in 2005, she allegedly moved to a house in Holland with her children while her husband continued to reside in Douglas. Defendant enrolled her children in a school in Holland, registered to vote as a Holland resident, changed her address on her driver's license to the Holland address, and filed an application for a personal residence property tax exemption (PRE) along with a homestead exemption affidavit averring that the Holland house was her principal residence. The city concluded in 2006 that the Holland house was not her primary residence and therefore denied her PRE application (a decision later affirmed by the Michigan Tax Tribunal) and terminated her from the city clerk position. The city's employee handbook provides for "binding arbitration" of grievances regarding the termination of employment and imposes a "just cause" termination standard.

The initial arbitrator determined that the city lacked "just cause" to terminate defendant and that it must reinstate her with back pay. The trial court vacated this award and required a second arbitration. The second arbitrator ruled in favor of the city, and the trial court affirmed. In a split decision, the Court of Appeals reversed the trial court's vacation of the first arbitration award and remanded for entry of an order enforcing that award. *City of Holland v French*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2013 (Docket No. 309367).

An arbitrator's award can be vacated only if "the arbitrator exceeded his or her powers[.]" MCR 3.602(J)(2)(c). I am inclined to agree with the trial court and the Court of Appeals dissent that the first arbitrator exceeded his powers by failing to "consider each of the reasons offered by [the city] to support its decision to terminate defendant's employment . . . ." The city's reasons for termination were that defendant (a) "submitted a voter registration application to the City of Holland incorrectly stating that [she] lived within the City of Holland," (b) "submitted a Homestead Property Tax application to the State of Michigan incorrectly stating [her] homestead of principal residency," and (c) "violated the public trust placed in [her] by the citizens of Holland, and will potentially subject the City of Holland to a negative image in the media and, as a result, negatively impact the City's image and credibility with the general public." The first arbitrator failed to address these arguments, but instead focused only on whether defendant had a "dishonest intent to deceive," and concluded that such an intent was required in order for the city to have had just cause to terminate defendant. However, this conclusion seems to be inconsistent with the employee handbook, which specifies "conduct detrimental to the image of the employer" as an example of just cause.

It is undisputed that the employee handbook was binding on the arbitrator not only because this is the very document from which the arbitrator obtained his authority, but also because the arbitration clause itself specifically states, "In deciding whether or not the discharge was for just cause or was otherwise improper, the definition of 'just cause' and the other rules and policies set forth in the Employee Handbook, and all other relevant policies and procedures, will be observed." See *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 432 (1982) ("Plainly, arbitrators who derive their authority from the contract calling for their services are bound to act within the terms of the submission."). Given that the handbook expressly specifies "conduct detrimental to the image of the employer" as an example of "just cause," it would seem that the arbitrator was required to determine whether defendant's conduct met that standard before it ruled that the city lacked just cause to terminate.

Moreover, the first arbitrator's finding of a lack of any "dishonest intent to deceive" on defendant's part should not have precluded him from finding that defendant's conduct was nonetheless "detrimental to the image of the employer." As the trial court subsequently explained,

> defendant was the City Clerk, responsible for maintaining the integrity of the City's voting process and voter rolls, not simply

> another city employee. Thus, her filing of an improper voter registration is of greater import . . . . The [Tax] Tribunal clearly and unequivocally concluded that the [Holland] address was not defendant's residence. That binding finding of fact means that defendant was not entitled to register to vote at the [Holland] address. That defendant submitted a voter registration when, as a matter of law, she did not "reside" at the [Holland] address indicates either an intent to deceive or a lack of knowledge of one of the core functions of her position. Either may be just cause to terminate her employment as City Clerk. . . .
>
> Similarly, a finding that defendant did not have the intent to deceive necessary for falsely filing a principal residence exemption affidavit does not necessitate a finding that her conduct is not detrimental to the image of the employer. In addition, her filing of an improper voter registration could also be seen as conduct detrimental to the image of the employer. In sum, the arbitrator should have determined whether *each* of the grounds [the city] set forth was just cause for terminating defendant's employment. Because he did not, he exceeded his powers and the court must vacate the award. [Emphasis added.]

That a reviewing court disagrees with the determinations of an arbitrator is no basis for reversing an arbitration. The parties to an arbitration have willingly relinquished all but the right to the most deferential judicial review, and they must accept the consequences of that decision. However, in discharging their duties, arbitrators can fairly and properly be said to exceed their power when they act clearly "beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Gavin*, 416 Mich at 434. As the Court of Appeals dissent asserted, "the first arbitrator in this case added a requirement to the Handbook by replacing the Handbook's *several* grounds for discharge with a *single* requirement that the City establish dishonesty as the sole ground for discharge." *French*, unpub op at 3 (O'CONNELL, J., dissenting) (emphasis added). By doing so, he may well have acted beyond the material terms of the contract from which he drew his authority and thereby exceeded his powers. For these reasons, I would grant leave to appeal.

In re DR, No. 148338; Court of Appeals No. 315353.

In re HEINZE, No. 148366; Court of Appeals No. 315821.

Summary Disposition February 21, 2014:

In re MOILES, No. 148094; reported below: 303 Mich App 59. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals regarding the sufficiency of the parties' affidavit under the Revocation of Paternity Act, MCL 722.1431 *et seq*. Under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*,

an acknowledging father is not required to attest that he is the biological father. Thus, the Court of Appeals erred in concluding that the parties' knowledge of the possibility that respondent was not the biological father of the child was sufficient to demonstrate either fraud or misrepresentation under MCL 722.1437(2). The circuit court similarly erred when, in partial reliance on the DNA identification profiling results, it granted the petition for revocation of the acknowledgment of parentage. We also vacate that part of the judgment of the Court of Appeals regarding the applicability of MCL 722.1443(4) to an action for revocation of an acknowledgment of parentage. Because the parties' affidavit did not meet the requirements of MCL 722.1437(2), the Court of Appeals erred in addressing the applicability of MCL 722.1443(4). We remand this case to the Mecosta Circuit Court for further proceedings not inconsistent with this order.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered February 21, 2014:

In re TALH, No. 148066; reported below: 302 Mich App 594. The parties shall submit supplemental briefs within 56 days of the date of this order addressing whether the lower courts erred in determining that the respondent substantially complied with his child support obligations for the pertinent timeframe under MCL 710.51(6). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 21, 2014:

In re GRODY, No. 148537; Court of Appeals No. 316271.

FIRST NATIONAL BANK OF MICHIGAN V PETERSON, No. 148568; Court of Appeals No. 312861.

In re CHAVEZ, Nos. 148590 and 148591; Court of Appeals Nos. 316163 and 316166.

MACDONALD V GOMEZ, No. 148670; Court of Appeals No. 319161.

Summary Disposition February 28, 2014:

PEOPLE V TULL, No. 147401; Court of Appeals No. 311876. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for reissuance of the defendant's judgment of conviction and sentence. The record makes clear that the failure to perfect an appeal of right was solely the fault of the defendant's trial counsel, who did not fulfill his promise in open court to file the necessary paperwork to begin the appellate process. Accordingly, the defendant was deprived of his appeal of right as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

We further order the Macomb Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant on appeal. We do not retain jurisdiction.

PEOPLE v BOURGEAU, No. 148371; Court of Appeals No. 318595. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for consideration, as on leave granted, of the prosecutor's argument that the 52-2nd District Court erred in directing the prosecutor to produce all of the evidence listed in its June 6, 2013 order. The prosecutor properly sought to appeal the district court ruling directing the production of certain materials. The issue was ripe for consideration, and it would be improper for the prosecutor to refuse to comply with the order instead of seeking to appeal the order. See *State Bar of Michigan v Cramer*, 399 Mich 116, 125 (1976), citing *Maness v Meyers*, 419 US 449, 458-459; 95 S Ct 584; 42 L Ed 2d 574 (1975).

Leave to Appeal Denied February 28, 2104:

PEOPLE v SPAYDE, No. 144423; Court of Appeals No. 294300.

PEOPLE v HASTINGS, No. 144479; Court of Appeals No. 299960.

PEOPLE v VINSON, No. 146128; Court of Appeals No. 303593.

CAVANAGH, J., would grant leave to appeal.

MCCORMACK, J., not participating because of her prior involvement as counsel for a party.

IF PROPERTIES, LLC, IMPRESS PACKAGING, INC v MACATAWA BANK CORPORATION, No. 146206; Court of Appeals No. 307554.

PEOPLE v WILLIE HUNTER, No. 147276; Court of Appeals No. 308519.

PEOPLE v MICHAEL GEORGE, No. 147424; Court of Appeals No. 307879.

SPE UTILITY CONTRACTORS, LLC v DEPARTMENT OF TREASURY, No. 147521; Court of Appeals No. 310885.

PEOPLE v LEONARD CARTER, No. 147536; Court of Appeals No. 312453.

PEOPLE v WILLIAM ARMOUR, No. 147542; Court of Appeals No. 311341.

PEOPLE v WILLIE WASHINGTON, No. 147552; Court of Appeals No. 311496.

PEOPLE v BOSTIC, No. 147702; Court of Appeals No. 316656.

MAPLE BPA, INC v BLOOMFIELD CHARTER TOWNSHIP, No. 147726; reported below: 302 Mich App 505.

PEOPLE v FREDERICK DIXON, No. 147790; Court of Appeals No. 317601.

PEOPLE v PETRIKEN, No. 147817; Court of Appeals No. 312926.

PEOPLE v WILLIE LAMBERT, No. 147820; Court of Appeals No. 307794.

PEOPLE v WARD, No. 147822; Court of Appeals No. 314054.

PLYMOUTH TRAIL CONDOMINIUM ASSOCIATION v GOUD, No. 147825; Court of Appeals No. 314724.

In re ISTIFAN, No. 147834; Court of Appeals No. 315679.

In re PETITION OF OCEANA COUNTY TREASURER FOR FORECLOSURE, No. 147838; Court of Appeals No. 313197.

HOME-OWNERS INSURANCE COMPANY v CHAMMAS, Nos. 147842 and 147843; Court of Appeals No. 310157 and 310167.

ZAREMBA EQUIPMENT, INC v HARCO NATIONAL INSURANCE COMPANY, Nos. 147857 and 147858; reported below: 302 Mich App 7.

PEOPLE v KELLY WRIGHT, No. 147864; Court of Appeals No. 313911.

PEOPLE v ROGER YOUNG, No. 147866; Court of Appeals No. 315348.

PEOPLE v HEIDI LEWIS, No. 147868; reported below: 302 Mich App 338.

PEOPLE v HEARN, No. 147870; Court of Appeals No. 313995.

PEOPLE v SAENZ, No. 147872; Court of Appeals No. 313570.

SPRENGER v BICKLE, No. 147880; reported below: 302 Mich App 400. CAVANAGH, J., would grant leave to appeal.

PEOPLE v ISOM, No. 147890; Court of Appeals No. 312567.

PEOPLE v LASHANDA KELLEY, No. 147892; Court of Appeals No. 309677.

PEOPLE v LAPPIN, No. 147896; Court of Appeals No. 316088.

GRUMBLEY v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 147902; Court of Appeals No. 315310.

PEOPLE v UNGER, No. 147914; Court of Appeals No. 315153.

MCCORMICK v LELAND, No. 147915; Court of Appeals No. 315674.

MCCORMICK v LELAND, No. 147917; Court of Appeals No. 315171.

PEOPLE v STATON, No. 147918; Court of Appeals No. 314265.

PEOPLE v WILLIE HARPER, No. 147921; Court of Appeals No. 308639.

PEOPLE v DAYSON, No. 147923; Court of Appeals No. 310974.

PEOPLE v MARIN, No. 147935; Court of Appeals No. 314422.

PEOPLE v O'BRYAN, No. 147937; Court of Appeals No. 314231.

PEOPLE v THURMOND, No. 147938; Court of Appeals No. 314946.

PEOPLE v PHILLIP ALEXANDER, No. 147939; Court of Appeals No. 317169.

PEOPLE v MOENCH, No. 147940; Court of Appeals No. 315905.

PEOPLE v LARNELL JOHNSON, No. 147942; Court of Appeals No. 313950.

PEOPLE v MATTHEWS, No. 147946; Court of Appeals No. 314691.

PEOPLE v LOREN GREENE, No. 147948; Court of Appeals No. 317186.

PEOPLE v HUNT, No. 147951; Court of Appeals No. 315498.

PEOPLE v SCOTTIE SHAVER, No. 147959; Court of Appeals No. 305945.

PEOPLE v HANDY, No. 147961; Court of Appeals No. 314121.

FEDERAL HOME LOAN MORTGAGE CORPORATION v TOSSA, No. 147962; Court of Appeals No. 313407.

PEOPLE v LORENZO ANTHONY, No. 147968; Court of Appeals No. 314742.

PEOPLE v MIRACLE, No. 147970; Court of Appeals No. 314576.

GORDON FOOD SERVICE, INC v STATE TAX COMMISSION, No. 147972; Court of Appeals No. 312204.

PEOPLE v TYWON BUFORD, No. 147976; Court of Appeals No. 313759.

PEOPLE v LAMAR JOHNSON, No. 147977; Court of Appeals No. 314052.

PEOPLE v LEFLEUR, No. 147984; Court of Appeals No. 314790.

PEOPLE v GILL, No. 147987; Court of Appeals No. 306288.

PEOPLE v WINSTON, No. 147988; Court of Appeals No. 314154.

PEOPLE v TYRONE WILSON, No. 147990; Court of Appeals No. 310033.

JONES v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 147996; Court of Appeals No. 314530.

DETROIT LIONS, INC v CITY OF DEARBORN, No. 148000; reported below: 302 Mich App 676.

PEOPLE v SHAWN TATE, No. 148005; Court of Appeals No. 314620.

BATESON v ABN AMRO MORTGAGE GROUP, INC, No. 148012; Court of Appeals No. 312342.

PEOPLE v RYAN, No. 148014; Court of Appeals No. 315897.

PEOPLE v HANEEF GARRETT, No. 148016; Court of Appeals No. 313630.

PEOPLE v POUNDS, No. 148023; Court of Appeals No. 315738.

PEOPLE v BOBBY WILLIAMS, No. 148024; Court of Appeals No. 315187.

PEOPLE v CLARKE, No. 148026; Court of Appeals No. 307187.

PEOPLE v SANDY HOLT, No. 148028; Court of Appeals No. 317689.

PEOPLE v FRANCO-AVINA, No. 148032; Court of Appeals No. 317443.

PEOPLE v CRAPOFF, No. 148033; Court of Appeals No. 311823.

PEOPLE v DIFFENDAL, No. 148035; Court of Appeals No. 315885.

PEOPLE v MCDANIEL, No. 148036; Court of Appeals No. 316008.

PEOPLE v KENNETH THOMAS, No. 148042; Court of Appeals No. 313330.

PEOPLE v TERRY, No. 148043; Court of Appeals No. 317776.

PEOPLE v MOTTEN, No. 148044; Court of Appeals No. 316881.

PEOPLE v ROY, No. 148048; Court of Appeals No. 314081.

PEOPLE v DELONNIE JOHNSON, No. 148049; Court of Appeals No. 314599.

PEOPLE v LAWRENCE WOODS, No. 148050; Court of Appeals No. 314972.

PEOPLE v KEVIN WILLIAMS, No. 148051; Court of Appeals No. 315817.

PEOPLE v JOHANSON, No. 148052; Court of Appeals No. 313585.

PEOPLE v ARENZA HUBBARD, No. 148053; Court of Appeals No. 311535.

PEOPLE v GLENN, No. 148054; Court of Appeals No. 315120.

PEOPLE v PETERSON, No. 148055; Court of Appeals No. 316697.

PEOPLE v MCKNIGHT, No. 148058; Court of Appeals No. 313889.

PEOPLE v CURTIS ANDERSON, No. 148068; Court of Appeals No. 314312.

PEOPLE v RONALD MCLEAN, No. 148069; Court of Appeals No. 314697.

PEOPLE v LEONARDROW SMITH, No. 148070; Court of Appeals No. 317321.

PEOPLE v LAUGHLIN, No. 148073; Court of Appeals No. 316605.

PEOPLE v FRISCH, No. 148084; Court of Appeals No. 316191.

PEOPLE v STRAIGHT, No. 148085; Court of Appeals No. 314371.

PEOPLE v JOHN ALEXANDER, No. 148088; Court of Appeals No. 316227.

PEOPLE v EDDIE BUFORD, No. 148090; Court of Appeals No. 315893.

PEOPLE v WILLIE MARSHALL, No. 148091; Court of Appeals No. 315805.

PEOPLE v BRICKER, No. 148092; Court of Appeals No. 314694.

PEOPLE v HATFIELD, No. 148099; Court of Appeals No. 311531.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v CHRISTOPHER BROWN, No. 148100; Court of Appeals No. 311771.

PEOPLE v HANNIBAL, No. 148106; Court of Appeals No. 312401.

PEOPLE v FRIAR, No. 148108; Court of Appeals No. 310002.

PEOPLE v FASEL, No. 148112; Court of Appeals No. 314746.

PEOPLE v FECHTALI, No. 148124; Court of Appeals No. 314831.

PEOPLE v JAMES, No. 148128; Court of Appeals No. 314526.

PEOPLE v MALTOS, No. 148138; Court of Appeals No. 314847.

PEOPLE v ERVIN BROWN, No. 148140; Court of Appeals No. 310818.

INDEPENDENT BANK v CITY OF THREE RIVERS, No. 148146; Court of Appeals No. 305914.

PEOPLE v WALRATH, No. 148163; Court of Appeals No. 310876.

PEOPLE v KELVIN GREEN, No. 148164; Court of Appeals No. 311217.

ZIEGLER v DEPARTMENT OF COMMUNITY HEALTH, No. 148166; Court of Appeals No. 314686.

PEOPLE v DENHOF, No. 148167; Court of Appeals No. 317418.

PEOPLE v REPPAS, No. 148172; Court of Appeals No. 314680.

PEOPLE v ZINNINGER, No. 148175; Court of Appeals No. 315902.

PEOPLE v YODER, No. 148178; Court of Appeals No. 314885.

PEOPLE v PIRANIAN, No. 148182; Court of Appeals No. 316410.

PEOPLE v ELISHA TILLMAN, No. 148191; Court of Appeals No. 314913.

PEOPLE v MCCOWAN, No. 148200; Court of Appeals No. 310123.

PEOPLE v WESLEY MITCHELL, No. 148202; Court of Appeals No. 315723.

PEOPLE v ANTONIO JOHNSON, No. 148205; Court of Appeals No. 310919.

BROWN v BROWN, No. 148236; Court of Appeals No. 315163.

PEOPLE v ARSENIO HENDRIX, No. 148241; Court of Appeals No. 311055.

PEOPLE v MARCUS KELLEY, No. 148284; Court of Appeals No. 310325.

PEOPLE v BOYD, No. 148328; Court of Appeals No. 313352.

PEOPLE v LONNIE CARTER, No. 148336; Court of Appeals No. 311880.

GERGES v SOUTHWESTERN MICHIGAN NEONATOLOGY, PC, No. 148342; Court of Appeals No. 314508.

PEOPLE v BRYANT, No. 148432; Court of Appeals No. 306602.

PEOPLE v DYE, No. 148460; Court of Appeals No. 318162.

PEOPLE v RAISBECK, No. 148482; Court of Appeals No. 318118.

PEOPLE v JOSE, No. 148585; Court of Appeals No. 319232.

Superintending Control Denied February 28, 2014:

WATSON v ATTORNEY GRIEVANCE COMMISSION, No. 148142.

SMITH v ATTORNEY GRIEVANCE COMMISSION, No. 148204.

Reconsideration Denied February 28, 2014:

FUN FEST PRODUCTIONS, INC v GREATER BOSTON RADIO, INC, No. 146252; Court of Appeals No. 303980. Leave to appeal denied at 495 Mich 899.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v JACQUES, No. 147087; Court of Appeals No. 308967. Leave to appeal denied at 495 Mich 899.

BENEFIELD v THE CINCINNATI INSURANCE COMPANY, No. 147192; Court of Appeals No. 300307. Summary disposition at 495 Mich 872.

PEOPLE v JIMMY SCOTT, No. 147200; Court of Appeals No. 314075. Leave to appeal denied at 495 Mich 899.

PEOPLE v MACON, No. 147306; Court of Appeals No. 315102. Leave to appeal denied at 495 Mich 900.

LENAWEE COUNTY v WAGLEY, No. 147314; reported below: 301 Mich App 134. Leave to appeal denied at 495 Mich 900.

PEOPLE v ALBANE, No. 147325; Court of Appeals No. 304331. Leave to appeal denied at 495 Mich 912.

PEOPLE v WITBRODT, No. 147368; Court of Appeals No. 314944. Leave to appeal denied at 495 Mich 900.

BELL v ATTORNEY GRIEVANCE COMMISSION, No. 147435; superintending control denied at 495 Mich 918.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147454; superintending control denied at 495 Mich 903.

MEADOWS VALLEY, LLC v VILLAGE OF REESE, No. 147461; Court of Appeals No. 309549. Leave to appeal denied at 495 Mich 883.

PEOPLE v ROBERT REEVES, No. 147476; Court of Appeals No. 312010. Leave to appeal denied at 495 Mich 913.

BANK OF AMERICA v MCKINNEY, No. 147503; Court of Appeals No. 312165. Leave to appeal denied at 495 Mich 901.

PEOPLE v DONYA DAVIS, No. 147594; Court of Appeals No. 312935. Leave to appeal denied at 495 Mich 914.

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v BOWERS, No. 147611; Court of Appeals No. 311811. Summary disposition at 495 Mich 905.

PEOPLE v CURB, No. 147650; Court of Appeals No. 315725. Leave to appeal denied at 495 Mich 914.

PITTMAN v ROTHENBERGER COMPANY, INC, Nos. 147652 and 147653; Court of Appeals Nos. 312732 and 313593. Leave to appeal denied at 495 Mich 902.

ND PROPERTY MANAGEMENT, INC v NAUTILUS INSURANCE COMPANY, No. 147660; Court of Appeals No. 317204. Leave to appeal denied at 495 Mich 914.

PEOPLE v VONZEL SIMMONS, No. 147681; Court of Appeals No. 307749. Leave to appeal denied at 495 Mich 915.

Leave to Appeal Denied March 5, 2014:

PEOPLE v KAHN, No. 148713; Court of Appeals No. 319754.

Leave to Appeal Denied March 7, 2014:

PEOPLE v ECHOLS, No. 147533; Court of Appeals No. 312933. The application for leave to appeal the June 18, 2013 order of the Court of Appeals is considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). However, the defendant may seek relief through an application for commutation pursuant to MCL 791.243, or, the Parole Board may initiate an application for commutation pursuant to MCL 791.244(2).

CAVANAGH, J. (*dissenting*). I disagree with the decision to deny leave to appeal in this case. While I agree that defendant is not entitled to relief under MCR 6.508(D), I think that this is an exceptional case in which defendant's sentence is illegal. Therefore, I would grant defendant's application for leave to appeal under MCR 7.316(A)(7), vacate defendant's sentence, and remand to the trial court for resentencing.

On June 14, 1989, the then 18-year-old defendant shot and killed a man during an altercation over the purchase of a vehicle. From the preliminary examination testimony,[1] it appears that a disagreement concerning payment between defendant (who was buying the car) and the victim (who was selling the car) escalated into a physical confrontation. Defendant was cut in the hand by the knife-wielding victim, and defendant's friend was also shot. The victim was shot twice by defendant: once in the shoulder and once in the head. A jury subsequently convicted defendant of second-degree murder and felony-firearm. Defendant's minimum sentence range under the judicial sentencing guidelines applicable at the time was 120 to 300 months (10 to 25 years); however, the trial court sentenced defendant to a prison term of 75 to 150 years for the murder conviction and a consecutive 2-year sentence for the felony-firearm conviction.

Defendant appealed, arguing, among other things, that he was entitled to resentencing under *People v Moore*, 432 Mich 311 (1989), because there is no reasonable probability that he would serve both his minimum and maximum sentences, the trial court failed to justify the upward departure, and the sentence was disproportionate. On February

[1] The trial transcript and the sentencing transcript are both unavailable.

6, 1992, the Court of Appeals affirmed defendant's conviction and sentence. *People v Echols*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 1992 (Docket Nos. 124510 and 124515). Defendant did not seek leave to appeal in this Court. In September 2011, defendant filed a motion to correct an invalid sentence pursuant to MCR 6.429(A), which the trial court and the Court of Appeals denied under MCR 6.508(D).

Sentences must be proportionate. *People v Milbourn*, 435 Mich 630, 651 (1990). "[A] judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing." *Id*. In assessing proportionality, a court must consider both the background of the offender and the nature of the offense. Thus, "[t]he trial court appropriately exercises the discretion left to it by the Legislature *not by* applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination." *Id*. at 653-654.

Applying these principles, I believe that defendant's sentence is disproportionate. The sentence imposed by the trial court is a threefold upward departure from the high end of the guidelines. The reasons given for the upward departure on the sentencing departure form were "punishment and [to] protect society."[2] While under extreme circumstances such an upward departure may be proportionate, I do not think that the facts in this case present that situation. When defendant committed the offense he was only 18 years old and had one prior conviction for cocaine possession. Defendant's youth at the time of the offense and his lack of a violent history do not support the trial court's contention that he deserves abnormal punishment or that he poses a greater danger to society than others who have been convicted of second-degree murder. Nor does the nature of defendant's crime appear sufficiently worse than other second-degree murders.[3] Thus, while a

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[2] Because the sentencing transcript is no longer available, the reasoning the trial court placed on the record during sentencing cannot be evaluated.

[3] Compare the defendant's conduct in *People v James*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 2009 (Docket No. 282280), lv den 485 Mich 927 (2009), with defendant's conduct in this case. In *James*, the defendant was sentenced to 70 to 150 years (virtually the same as what defendant received in this case) for a 1996 second-degree murder that involved killing an 11-year-old child and wounding a 15-year-old child after the defendant shot at the victim's family members multiple times (including driving past the house and shooting guns into the air, chasing the victim's uncle through a field and shooting at him, and shooting at the uncle's friends sitting on the porch) because of a

departure from the sentencing guidelines may have been warranted in this case, the departure imposed by the trial court offends the principle of proportionality.

Additionally, *Moore* held that the Legislature has prescribed two types of sentences that can be imposed on a defendant for second-degree murder: a sentence of life in prison or a sentence of a term of years less than life. *Moore*, 432 Mich at 319; see, also, MCL 750.317; MCL 769.9(2). *Moore* explained that the Legislature has established that a defendant sentenced to life for second-degree murder is eligible for parole after 10 years. *Moore*, 432 Mich at 321; MCL 791.234(7)(a). Meanwhile, a defendant sentenced to a term of years for second-degree murder is not eligible for parole until the defendant has served the minimum term of imprisonment. *Moore*, 432 Mich at 322; see, also, MCL 791.233b. As I explained in *People v Merriweather*, 447 Mich 799, 813 (1994) (CAVANAGH, J., dissenting), the problem in this case is not new: because of the discrepancy in the sentencing scheme between life sentences and indeterminate sentences, a person serving a life sentence may come under the jurisdiction of the Parole Board more quickly than one serving an indeterminate sentence. While the sentencing judge or his successor has the authority to preclude parole for a defendant who is sentenced to life in prison,

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history of family disputes. The depravity of the defendant in *James* was far worse than that of defendant in this case.

Indeed, defendants in other cases whose conduct is arguably worse than defendant's conduct in this case received much lighter sentences. See, e.g., *People v Moorer*, 246 Mich App 680, 684-686 (2001) (affirming the defendant's sentence when he was sentenced to 40 to 85 years for second-degree murder after he kidnapped and smothered his 21-month-old son because the child's mother told the defendant that she did not want to continue a relationship with him), lv den 466 Mich 853 (2002); *People v Gaines*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2013 (Docket No. 308378) (affirming the defendant's sentence when he was sentenced to 30 to 60 years for a 1993 second-degree murder after he killed an 8-year-old child while shooting into a randomly chosen house because an accomplice was mad that he had been assaulted and robbed), lv den 494 Mich 857 (2013); *People v Hall*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 2007 (Docket No. 269990) (affirming the defendant's sentence when he was sentenced to 32 to 50 years for a 1982 second-degree murder after he shot and killed the victim in order to take back money that the defendant had lost to the victim while gambling), lv den 480 Mich 1008 (2008).

Thus, while defendant may have deserved an upward departure, the extent of the upward departure is disproportionate to the crime. While the trial court may have been justified in imposing a lengthy sentence, setting the minimum of the term-of-years sentence at 75 years, effectively sentencing defendant to life in prison, is not proportionate to defendant's crime.

MCL 791.234(8)(c), the sentencing judge may not effectively sentence a defendant convicted of second-degree murder to a nonparolable life sentence by means of a lengthy term of years. *Moore*, 432 Mich at 324, 326. In my view, it is an abuse of discretion to deliberately sentence a defendant with the purpose of depriving the Parole Board of its jurisdiction. *Merriweather*, 447 Mich at 812 (CAVANAGH, J., dissenting).

In this case, I believe that the trial court abused its discretion by imposing a term-of-years sentence for the purpose of foreclosing defendant's eligibility for parole. Had defendant been given a life sentence or a term-of-years sentence in accordance with the sentencing guidelines, defendant would have been eligible for parole in 1999. Under the sentence imposed by the trial court, however, the earliest that defendant will be eligible for parole is 2064.[4] The trial judge had the option to sentence defendant to life in prison, which substantively would have had the same effect as defendant's 75- to 150-year sentence, except for defendant's eligibility for parole. Given the disproportionate upward departure that will effectively amount to a life sentence, the only purpose I can perceive for sentencing defendant to the unjustifiable lengthy term-of-years sentence was to improperly deprive the Parole Board of its legislatively prescribed jurisdiction over defendant.

I acknowledge that this Court is generally hesitant to venture beyond the confines of MCR 6.508(D). However, in rare cases such as this, I believe that it is the duty of this Court to exercise its powers under MCR 7.316(A)(7) and "grant relief as the case may require[.]" Therefore, I would vacate the defendant's sentence and remand to the trial court for resentencing.

PEOPLE v ANDREW WILLIAMS, No. 147581; Court of Appeals No. 306191.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal in this case in which defendant has questioned the effectiveness of his trial counsel in a defense to a charge of first-degree criminal sexual conduct (CSC-I). We are presented here with a situation in which (a) counsel fully reviewed the report of the prosecutor's forensic expert regarding his medical examination of the alleged victim, (b) counsel consulted with a local physician regarding the medical findings set forth in the report, (c) counsel consulted with defendant concerning whether to retain their own expert to counter the medical findings set forth in the report and defendant agreed with counsel that this was unnecessary, and (d) counsel effectively cross-examined the forensic expert to minimize any harm done to defendant by the report. What counsel did *not* do, however, was to recognize the extent to which the report may have been of considerable potential *benefit* to defendant by evidencing that he might be innocent of the crimes for which he has now been convicted and is serving a 15- to 30-year sentence.

In 2010, defendant's granddaughter alleged that between 2001 and 2005 defendant sexually abused her on 15 occasions. These allegations led the prosecutor to charge defendant with three counts of CSC-I. The

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[4] This assumes that defendant receives credit for all available disciplinary credits. See MCL 800.33.

charges were based on three separate incidents in which it was alleged that defendant engaged in sexual intercourse with his granddaughter, who was between five and nine years old. The granddaughter was examined by a forensic expert, Dr. Mischa Pollard, whose report stated, *inter alia*, that her examination revealed no visible tears or transections of the victim's hymenal ring.

In preparing for trial, defense counsel read Dr. Pollard's report and consulted a local general practitioner for the purpose of determining whether anything in the report was damaging to defendant. Learning from the practitioner that "there was nothing really damaging in [the] report by itself," defense counsel focused on other aspects of the case without further investigating or apparently recognizing that the lack of any visible tearing or transection of the hymenal ring was not simply not "really damaging" to defendant, but potentially highly exculpatory.

Defendant was eventually convicted on all three CSC-I counts. On appeal, he now argues that counsel was ineffective for failing to recognize that Dr. Pollard's report significantly supported defendant's claim of innocence, in part as a result of counsel's failure to consult with and retain his own forensic expert. To further develop this argument, a *Ginther*[1] hearing was held, and Dr. Stephen Guertin[2] testified that there is a 94% to 96% chance that a single incident of sexual intercourse with a prepubertal child would result in a tear or transection of the hymenal ring, leaving a lasting visible abnormality.[3] Given the likelihood that any *single* incident would leave such an abnormality, it follows statistically that there may have been as high as a 99.978% chance that an abnormality would result from at least one of *three* charged incidents of sexual intercourse.[4]

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[1] *People v Ginther*, 390 Mich 436 (1973).

[2] Dr. Guertin is the medical director of the Sparrow Children's Center and the director of the Pediatric Intensive Care Unit at Sparrow Hospital. He is also an associate professor of pediatrics at Michigan State University. As part of his practice, Dr. Guertin "sees between 100 and 200 children per year who have been referred . . . for suspected child abuse," which often results in Dr. Guertin assisting the police and the prosecution in cases brought against individuals who have abused children.

[3] Dr. Guertin testified that the reason sexual intercourse with a prepubertal child is so likely to leave such an abnormality is because the hymen during the prepubertal stage typically has a "maximum opening" of 10 millimeters while "[t]he average penis is 35 millimeters . . . ."

[4] This latter percentage was not set forth by Dr. Guertin, but is a statistical inference drawn from his testimony. That is, if each episode of intercourse independently of the others gave rise to a 94% to 96% chance of a tear, the 99.978% percentage would seem to be an accurate figure in identifying the likelihood of a tear from at least one of these episodes. If, however, potential anatomical factors, rather than happenstance, pre-

Following the *Ginther* hearing, the trial court denied defendant's motion for a new trial, and the Court of Appeals affirmed because it concluded that counsel's decision not to retain and call an expert witness was "sound trial strategy" on the grounds that Dr. Pollard's testimony "did not favor the prosecution."[5]

To make out a claim of ineffective assistance of counsel, a defendant must show that (1) "his attorney's representation fell below an objective standard of reasonableness" and (2) there is " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . .' " *People v Toma*, 462 Mich 281, 302-303 (2000), citing *Strickland v Washington*, 466 US 668, 687 (1984), and quoting *People v Mitchell*, 454 Mich 145, 167 (1997). To provide effective assistance of counsel, defense counsel not only must consult with experts when doing so "would have revealed [the] weaknesses of the prosecution's case," *People v Trakhtenberg*, 493 Mich 38, 53 (2012), but also must consult with experts when an expert analysis, as part of the investigatory process, is likely to develop evidence favorable to the defendant, *Strickland*, 466 US at 690-691. Sound trial strategy can only be "developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486 (2004). This, in part, requires counsel to make " 'an independent examination of the facts, circumstances, pleadings and laws involved . . . .' " *Id*. at 486-487, quoting *Von Moltke v Gillies*, 332 US 708, 721 (1948).

Under these standards, a court reviewing ineffective-assistance claims must evaluate those claims on a case-by-case basis. In so doing, an appellate court should look at the specific steps counsel took in light of the facts, evidence, and circumstances of the case. There is no particular "checklist" of actions that may be undertaken by counsel that will automatically immunize him from being found ineffective, but his actions as a whole and in context must be assessed. There is no "one-size fits all" investigation.

Defendant here was arguably prejudiced, and considerably so, by counsel's decision not to consult and retain an expert. Had counsel been apprised of the data set forth by Dr. Guertin, he likely would have developed a trial strategy that encompassed expert forensic testimony. Indeed, he admitted as much at the *Ginther* hearing, stating that he "obviously . . . would have used" the testimony offered by Dr. Guertin because "it certainly would [have] help[ed] [defendant's] case."

For these reasons, I would grant leave to appeal to assess whether counsel here employed reasonable professional judgment. In particular, I would address the following: (1) whether counsel here satisfied his professional duty when he consulted a general practitioner rather than a forensic expert, (2) whether counsel here could effectively delegate his

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dominately explain the absence of a tear, then the likelihood of a lasting visible abnormality might remain at 94% to 96%.

[5] *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2013 (Docket No. 306191), p 2.

responsibility for identifying arguments in support of his client to a general practitioner or to any other expert, (3) whether the forensic report contained findings that an ordinary attorney would reasonably recognize as helpful to his client independently of any expert analysis, (4) whether counsel here can be deemed ineffective despite having consulted with his client and secured his agreement to the trial strategy pursued, and (5) whether counsel's performance in this case was properly reviewed by the trial court and the Court of Appeals on the basis of the specific "facts, circumstances, pleadings and laws involved."[6]

PEOPLE v GUINN, No. 148155; Court of Appeals No. 313029.

In re RANDOLPH/HARTMAN, No. 148722; Court of Appeals No. 316831.

In re BROWN/MORRIS, No. 148724; Court of Appeals No. 316761.

Order Rejecting Recommendation of the Judicial Tenure Commission Entered March 7, 2014:

In re HON SHEILA ANN GIBSON, No. 147235. On order of the Court, the Judicial Tenure Commission having filed a Decision and Recommendation on the basis of an agreement between the Examiner and the respondent judge, we reject the recommendation on the ground that the proposed discipline is insufficient in light of the facts presented to the Court. See *In re Brown*, 461 Mich 1291, 1292-1293 (2000), in particular its admonitions that, "everything else being equal," misconduct constituting part of a pattern or practice is more serious than an isolated instance of misconduct; misconduct on the bench (including, in our judgment, misconduct centered on the failure to take the bench) is more serious than the same misconduct off the bench; misconduct that is deliberate is more serious than misconduct that is spontaneous; and misconduct prejudicial to the actual administration of justice is more serious than conduct that is not.

Despite the Commission's own acknowledgment that respondent's conduct was "repeated and sustained," the Commission limited its investigation to a one-week period. By so doing, the Commission may have given substantially less consideration than was warranted to the burdens and inconveniences imposed by respondent upon parties, witnesses, attorneys, employers and employees, court staff, and members of the public. As the Commission concluded, "[t]he stipulated facts demonstrate that Respondent did not confer the necessary regard for the value of time of all of the other people involved in the justice system," as she "returned to her *earlier pattern* of not coming to the courthouse in a punctual manner, leaving litigants, lawyers, and witnesses waiting for her to make her appearance." In further investigating this matter—the Commission asserts that "presumably there were other instances" of respondent's misconduct—this Court urges the Commission to examine whether the one-week period under investigation sufficiently reflects

[6] *Grant*, 470 Mich at 486-487 (quotation marks and citation omitted).

respondent's ongoing misconduct. We further urge the Commission *not* to "refrain from [deciding] whether similar examples of tardiness or absence, or repeated instances of the same behavior over a longer period or in the future, warrant a greater sanction."

We remand this matter to the Judicial Tenure Commission for further proceedings. The Commission shall present either a new decision and recommendation or a status report to this Court within 42 days of the date of this order.

We retain jurisdiction.

CAVANAGH, J. (*dissenting*). After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000), and the commission's findings and conclusions, I would accept the recommendation of the commission and order that the Honorable Sheila Ann Gibson be publicly censured.

KELLY, J., not participating.

Summary Disposition March 14, 2014:

In re MCCARTHY, No. 148793; Court of Appeals No. 318855. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 14, 2014:

HUFFAKER v HUFFAKER, No. 148638; Court of Appeals No. 313392.

Rehearing Denied March 21, 2014:

NACG LEASING v DEPARTMENT OF TREASURY, No. 146234. Reported at 495 Mich 26.

YOUNG, C.J. (*concurring*). Petitioner has filed its motion for rehearing on the ground that this Court's opinion "rests upon a palpable error regarding the existence of a critical fact by which the Court clearly was misled." Motion, p 1. "[T]he Court's erroneous assumption of a fact not in evidence is fundamental to the Court's holding . . . ." *Id*. at 4.

And what was that "critical fact" the Court got so fundamentally wrong in its decision? Petitioner claims that this Court erred by "asserting" in its opinion that the parties executed the lease in Michigan because that fact is not supported by the record. Petitioner was quite adamant in this assertion of error and restated this claim no fewer than nine times in its motion for rehearing:

(1) "[T]here is no evidence whatever in the record that the lease was executed in Michigan." *Id*. at 1.

(2) "[T]he Court's decision is based solely upon a factual assumption having no basis in the record . . . ." *Id*.

(3) "[T]he record is entirely silent in this regard." *Id*. at 2.

(4) "**Nor does the lease itself contain any evidence of where it was executed**." *Id*. (emphasis added).

(5) "**There is no reference in either the introductory material or the body of the lease to indicate where it was executed**." *Id*. (emphasis added).

(6) "[E]vidence of the place of execution of the lease is totally lacking." *Id*.

(7) "[The fact of the place of execution] has zero support in the record . . . ." *Id*.

(8) "[T]he factual record in this case will not bear the burden of [the Court's] holding." *Id*. at 3-4.

(9) "It is clear beyond any question that the Court has committed a palpable error by basing its holding entirely on a fact that does not exist in the record." *Id*. at 4.

There is just one problem with this assertion and thus the basis for the entire motion for rehearing: petitioner's assertion of error is completely belied by page 102b of *petitioner's own appendix*. There, in the "Stipulated Facts and Exhibits" is the very lease at issue in this case. On the last page of that lease, just above the signatures, is the following statement:

> **In Witness Whereof the parties hereto have executed this Lease on April 19, 2005, *at Ypsilanti, Michigan***. [Exhibit 13 to Stipulated Statement of Facts, Petitioner's Appendix, p 102b (emphasis added).]

If one needed a textbook example of what constitutes a "frivolous" appellate paper, one need look no further than petitioner's motion for rehearing. Under our court rules, this Court may award sanctions for the filing of a frivolous motion. See MCR 7.316(D). However, in as much as three of petitioner's lawyers prepared and signed this motion and presumably charged petitioner for filing it, I believe that is sanction enough.

Leave to Appeal Granted March 21, 2014:

HUNTER v SISCO, No. 147335; Court of Appeals No. 306018. On order of the Court, the motion for reconsideration of this Court's November 20, 2013 order is considered, and it is granted. We vacate that part of our November 20, 2013 order that denied the plaintiff's application for leave to appeal. On reconsideration, the application for leave to appeal the April 2, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to whether damages for pain and suffering and/or emotional distress may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008)).

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *Hannay v Dep't of Transp* (Docket No. 146763).

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Insurance Institute of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition March 26, 2014:

WOODBURY v RES-CARE PREMIER, INC, No. 144721; reported below: 295 Mich App 232. This Court granted leave to appeal on November 7, 2012, 493 Mich 881, and the case was submitted for judgment. By order of July 26, 2013, the parties were ordered to provide supplemental briefing and the Clerk was directed to schedule this case for resubmission in the October 2013 session. 494 Mich 879. Subsequently, the parties stipulated that the case had been settled and that the appeal should be dismissed. MCR 7.316(A)(7). On order of the Court, the appeal is dismissed and the January 19, 2012 judgment of the Court of Appeals, 295 Mich App 232 (2012), is vacated.

MARKMAN, J. (*concurring in part and dissenting in part*). Given that the parties have stipulated that this case has been settled and that the appeal should be dismissed, and given that this Court has accepted that stipulation, the case is now clearly moot. Because of this, I do not believe that we possess the authority to do anything other than dismiss the appeal as the parties have requested us to do. Accordingly, while I concur in the decision to dismiss this appeal, I respectfully dissent from the Court's decision to vacate the judgment of the Court of Appeals.

It is well established that "[t]he judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920) (citation and quotation marks omitted). As a result, "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before" it. *Federated Publications, Inc v Lansing*, 467 Mich 98, 112 (2002), overruled on other grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463 (2006). That is, "[m]ootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Mich Chiropractic Council v Comm'r of Fin & Ins Servs*, 475 Mich 363, 371 n 15 (2006) (citations and quotation marks omitted), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010). Accordingly, "[w]here the facts of a case make clear that a litigated issue has become moot, a court is, of course, bound to take note of such fact and dismiss the suit . . . ." *Id.* at 373 (citation and quotation marks omitted).

In the instant case, because there is no longer an actual controversy between the parties, the case is moot and we are therefore bound to dismiss the appeal. We lack the authority to take any additional actions, including vacating the Court of Appeals' judgment. Although perhaps there is some concern that while the Court of Appeals' judgment may not harm the parties in the *instant* case, it may harm parties in *future* cases,

it is important that this Court exercise traditional understandings of the "judicial power" and refrain from fixing things that are outside this Court's immediate authority to fix. As asserted by three Justices in dissent in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69, 105-106 (2010) (YOUNG, J., dissenting), vacated 489 Mich 884 (2011):

> Indeed, plaintiffs do not now contend that they have an immediate injury at stake; they nevertheless want this Court to rule on the substantive legal issues—for the benefit of *future cases*. *This is the definition of mootness.* Again, the [*Street R Co of E S v Wildman*, 58 Mich 286, 287 (1885)] decision provides guidance:
>
> > It was suggested on the hearing that we ought to settle the rights of the parties so that the principle established might be a guide in other cases likely to arise. But courts of equity will not lend their aid by injunction for the enforcement of a right or the prevention of a wrong in the abstract, not connected with any injury or damage to the person seeking relief, nor when such injury or damage can be fully and amply recovered in an action at law. Nor are courts of equity established to decide or declare abstract questions of right for the future guidance of suitors. [Emphasis altered.]

Accordingly, I believe that this Court should refrain from vacating the Court of Appeals' judgment for any perceived "benefit of future cases" because any such benefit will be considerably outweighed by the cost of this Court exercising an authority that it does not possess—the authority to do anything other than dismiss an appeal after it has been rendered moot by this Court's acceptance of the parties' stipulation to dismiss. See *US Bancorp Mtg Co v Bonner Mall Partnership*, 513 US 18, 27 (1994) ("It seems to us inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits.").

PEOPLE V TOMMY BROWN, No. 147759; Court of Appeals No. 308510. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentences imposed by the Wayne Circuit Court for the defendant's first-degree criminal sexual conduct convictions, and we remand this case to the trial court for resentencing. The trial court imposed an invalid sentence when it imposed seven consecutive sentences for the defendant's seven convictions of first-degree criminal sexual conduct. Pursuant to MCL 750.520b(3), "The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Having reviewed the record, we agree with the trial prosecutor who argued at sentencing that the trial court had discretion to impose consecutive sentences for *at most* three of the defendant's

first-degree criminal sexual conduct convictions, because the three sexual penetrations that resulted in those convictions "ar[ose] from the same transaction." That is, the three sexual penetrations "grew out of a continuous time sequence" and had "a connective relationship that was more than incidental." *People v Ryan*, 295 Mich App 388, 402-403 (2012). On remand, the trial court shall resentence the defendant in accordance with MCL 750.520b(3). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v RAINS, No. 148216; Court of Appeals No. 317723. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied March 26, 2014:

PEOPLE v BEALS, No. 147540; Court of Appeals No. 310032.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v JEFFREY MILLER, No. 147751; Court of Appeals No. 312020.

CAVANAGH, J., would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v LEE, No. 147903; Court of Appeals No. 313359.

PEOPLE v JOE GALVAN, No. 147904; Court of Appeals No. 299814.

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY, No. 147910; Court of Appeals No. 311036.

PEOPLE OF THE CITY OF WESTLAND v MARTIN, No. 147930; Court of Appeals No. 313457.

PEOPLE v RAINES, No. 147971; Court of Appeals No. 317166.

PEOPLE v BORING, No. 147974; Court of Appeals No. 314817.

PEOPLE v JENNIFER GALVAN, No. 147979; Court of Appeals No. 299822.

PEOPLE v STEWART, No. 148060; Court of Appeals No. 311270.

PEOPLE v PARSONS, No. 148065; Court of Appeals No. 316734.

Order of Public Censure Entered March 26, 2014:

In re WILEY, No. 148512. On order of the Court, the Judicial Tenure Commission has issued a Decision and Recommendation for Order of

Discipline, and the Honorable Dennis M. Wiley has consented to the Commission's findings of fact, conclusions of law, and recommendation of a public censure.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In this case those standards are being applied to the following findings of fact of the Judicial Tenure Commission, which adopted the admissions contained in the settlement agreement. We adopt them as our own.

> 1. Prior to December 4, 2012, LaRue Ford communicated with staff of the Berrien County Trial Court regarding outstanding fines that she owed which had resulted in the suspension of her Michigan driver's license.
>
> 2. Pursuant to direction by the court staff, Ms. Ford paid the balance that was found by the staff to be owed.
>
> 3. On December 4, 2012, Ms. Ford went to the Niles Division of the Berrien County Trial Court to investigate why a "hold" remained on her driver's license.
>
> 4. The staff in the clerk's office reviewed Ms. Ford's case history and discovered that a $45 reinstatement fee in Case No. 2004-403400-ST still had not been paid.
>
> 5. Ms. Ford became upset, as she believed that the court staff in St. Joseph had previously advised her that all fees had been paid and the hold on her driver's license should have been lifted. She was also upset by the possible imposition of a credit card service fee.

6. Several Niles Division court clerks, if called as witnesses, would testify that Ms. Ford used the term "fuckers" or "motherfuckers" on one or two occasions when dealing with them.

7. None of the clerks ever felt threatened, or that they were in danger, when dealing with Ms. Ford.

8. Ms. Ford never interfered with the clerks' ability to perform their duties while she was in the courthouse. However, clerks would testify that she was disruptive, and they had to pay extra attention to her to make sure she did not get out of control.

9. On December 4, 2012, Respondent [5th District Court Judge Dennis M. Wiley] was presiding in the Niles Division of the Berrien County Trial Court.

10. On that day, Respondent was in the non-public office area of the court, and overheard court clerk Katie Pugh tell court office manager Carol Brohman that Ms. Ford had called them "fuckers' or "motherfuckers." If called as a witness, Ms. Pugh would testify that Ms. Ford had said this "after all the help we gave her."

11. The conversation between Ms. Pugh and Ms. Brohman did not initially involve Respondent.

12. When Respondent overheard the discussion, Respondent approached the individuals and asked Ms. Pugh to describe the events to Respondent.

13. When Ms. Pugh recounted the events, she reported that Ms. Ford had referred to the clerk staff as "fuckers" and/or "motherfuckers."

14. Ms. Pugh also reported that Ms. Ford was expected to return to the courthouse to pay a fee to have the hold on her license removed.

15. Ms. Pugh did not tell Respondent that she or any other court staff had felt threatened by Ms. Ford during the incident, or that Ms. Ford had in any way interfered with the regular operation of the court during the incident. If called as a witness, Respondent would testify that the clerks appeared to him to be upset and distracted from their duties.

16. Respondent directed that Ms. Ford be brought before him in his courtroom when she returned to the courthouse.

17. Respondent did not discuss the preparation of a petition for order to show cause/bench warrant regarding Ms. Ford's conduct with any court employee at that time.

18. When Ms. Ford returned on December 4, 2012, and after she paid the outstanding fee, Respondent's court bailiff brought her to Respondent's courtroom, in accordance with Respondent's directive.

19. At that time, the petition had not yet been prepared.

20. Respondent arraigned Ms. Ford for contempt of court outside of his presence, based only on the unsworn conversation he had heard between Ms. Pugh and Ms. Brohman, his own observations, and his conversation with Ms. Pugh.

21. Respondent did not disclose that he had had the previously mentioned conversation with Ms. Pugh.

22. Respondent did not disqualify himself, or raise the issue of his possible disqualification, based on his receipt of the information communicated in the previously mentioned conversation with Ms. Pugh.

23. Respondent set December 18, 2012 for a hearing on the contempt charge.

24. Respondent set a bond of $5,000/10%.

25. Ms. Ford did not post bond and spent the night in jail.

26. Ms. Ford posted $500 bond on December 5, 2012 and was released from custody.

27. On December 18, 2012, Ms. Ford appeared for the contempt hearing.

28. At that proceeding, she was represented by attorney Shannon Sible, who was assigned counsel.

29. Mr. Sible requested that the contempt hearing be adjourned, as he wanted additional time to review the law applicable to the matter.

30. Respondent adjourned the matter and increased Ms. Ford's bond from $5,000/10% to $5,000/cash or surety, after her counsel requested that she be allowed to travel to Arizona and go to work as a long haul truck driver. This was the first time that Respondent heard that Ms. Ford lived in Arizona.

31. The court returned the $500.00 Ms. Ford had posted with the court. The $500.00 check was maintained with Ms. Ford's belongings in the jail until her release on December 28, 2012.

32. Ms. Ford was represented at all times and had access to a list of bondsmen.

33. John Targowski, a cooperating attorney with the American Civil Liberties Union, filed an appearance on behalf of Ms. Ford on December 28, 2012.

34. Mr. Targowski filed an emergency application for leave to appeal and a petition for review of her bond in the Berrien County Trial Court, Circuit Division that same day.

35. The appeal was assigned to Judge Charles LaSata, who was not available that day.

36. The case was referred to Chief Judge Alfred Butzbaugh, who granted leave to appeal and revised the bond to the original $5,000/10%. No transcript or video recording exists of any proceeding before Judge Butzbaugh.

37. Ms. Ford was released on December 28, 2012.

38. On December 28, 2012, Susan Akens, an Enforcement Officer in the Berrien County Trial Court collections office, sent Respondent an e-mail regarding her contact with Ms. Ford on several dates during 2012 which reflected a negative impression, and attached notes that she maintained regarding those incidents.

39. Ms. Ford, through counsel, filed a motion to disqualify Respondent and a motion to stay proceedings in the Berrien County District Court on January 2, 2013.

40. On January 3, 2013, Respondent sent a reply e-mail to Ms. Akens, instructing her to send her notes to the Berrien County Prosecuting Attorney's office, as the notes could "show a pattern of contemptuous behavior" and advising her that the prosecuting attorney might want her to testify about Ms. Ford's conduct.

41. Ms. Akens sent the notes to the prosecuting attorney via e-mail, and copied Respondent on the message.

42. The Berrien County Prosecutor declined to prosecute the contempt matter.

43. On or about January 3, 2013, Respondent instructed Ms. Brohman to prepare a sworn statement regarding her contact with Ms. Ford on December 4, 2012, which Ms. Brohman did.

44. Respondent also instructed Ms. Brohman to have all court clerks who had had any interaction with Ms. Ford on December 4, 2012 prepare sworn statements about their contact with her.

45. Court clerks Katie Pugh, Sarah Belter, Julie Lear, and Toni Hall prepared sworn statements pursuant to that directive.

46. Respondent presided over a hearing on the motion for disqualification on January 8, 2013.

47. At that hearing, Respondent did not disclose his communication with Ms. Brohman regarding his request for Ms. Brohman and the other court clerks to prepare sworn statements regarding their contact with Ms. Ford on December 4, 2012.

48. Respondent also did not disclose his communication with Ms. Akens.

49. Ms. Ford, through counsel, filed a motion to dismiss the contempt charge in the Niles Division of the Berrien County District Court on January 7, 2013.

50. Respondent denied Ms. Ford's motion for disqualification at the January 8, 2013, hearing, and referred it to the Berrien County Trial Court Chief Judge for review.

51. Respondent suspended the remaining proceedings (including consideration of the motion for stay, motion to dismiss, and the contempt hearing) to allow for the Chief Judge's review of the disqualification issue.

52. On January 11, 2013, Judge LaSata issued a decision on Ms. Ford's appeal and motion to dismiss, dismissing the contempt charge without prejudice.

The standards set forth in *Brown* are also being applied to the following Judicial Tenure Commission legal conclusions, to which respondent stipulated and which we adopt as our own:

A. Respondent violated the Michigan Code of Judicial Conduct, Canon 3A(1), in that he did not faithfully execute the law and

maintain his professional competence when he commenced indirect contempt proceedings based only on unsworn conversations with his staff; and

B. Respondent violated the Michigan Code of Judicial Conduct, Canon 3A(4), in that he received communications regarding Ms. Ford's conduct from court staff, after the commencement of proceedings, and directed staff to provide the information to the prosecuting attorney and directed staff to prepare affidavits concerning the events of December 4, 2012 and did not advise Ms. Ford's counsel of these communications.

The Commission also concludes, and we agree, that Respondent's conduct constitutes:

C. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, § 30, and MCR 9.105;

D. Conduct clearly prejudicial to the administration of justice, as defined by Const 1963, art 6, § 30, and MCR 9.105;

E. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

F. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

G. Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

H. Failure to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B; and

I. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2).

After review of the Judicial Tenure Commission's decision and recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Dennis M. Wiley be publicly censured. This order stands as our public censure.

Summary Disposition March 28, 2014:

PEOPLE v LAFOUNTAIN, No. 146496; Court of Appeals No. 306858. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we affirm the result reached in the November 20, 2012 judgment of the Court of Appeals. "[R]eview[ing] the evidence in the light most favorable to the prosecutor," as we are obligated to do, we conclude that "a rational

trier of fact could find the defendant guilty beyond a reasonable doubt," *People v Smith-Anthony*, 494 Mich 669, 676 (2013), of operating a methamphetamine laboratory involving a firearm. (Citation and quotation marks omitted.) A defendant is guilty of this offense when he or she operates a methamphetamine laboratory and this operation "involves the possession, placement, or use of a firearm or any other device designed or intended to be used to injure another person . . . ." MCL 333.7401c(2)(e). "[A]ctual possession is not required; constructive possession is sufficient." *People v Minch*, 493 Mich 87, 91 (2012). " '[A] person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . .' " *Id.* at 92 (citation omitted). In this case, defendant only disputes whether there was sufficient evidence to support the jury's finding that her operation of a methamphetamine laboratory "involve[d] the possession, placement, or use of a firearm." The term "involve" means "to include within itself or its scope." *Random House Webster's College Dictionary* (2005). See also *The Merriam-Webster Dictionary* (2005) ("[T]o have as part of itself : INCLUDE[.]"); *Oxford English Dictionary* (2d ed) ("To include; to contain; imply."). We rely on this definition of "involve" rather than the dissent's definition of "to relate closely : CONNECT" because the former seems to be more consistently cited in dictionaries than the latter and thus seems to be the most ordinary understanding of the word "involve"; however, we would reach the same result here even had we adopted the latter definition. Given that there was evidence that defendant had lived at the house at issue for five years; that the firearms were found in plain view in the bedroom of defendant's children, a room that defendant admitted she was in on a regular basis; that the firearms had been in this room for some period of time; and that this room was immediately across the hallway from defendant's own bedroom, which also served as the methamphetamine laboratory, a rational trier of fact could find beyond a reasonable doubt that defendant constructively possessed the firearms and that defendant's operation of the methamphetamine laboratory involved her constructive possession of the firearms. That is, a rational trier of fact could infer from the evidence that defendant knowingly had the power and the intention to exercise dominion or control over the firearms, thus satisfying the constructive possession element. In addition, the evidence, when viewed as a whole, including the close proximity between defendant's constructive possession of the firearms and her operation of the methamphetamine laboratory, and the well-known relationship between drugs and the use of firearms as protection, a rational trier of fact could also infer that defendant's operation of the laboratory involved defendant's constructive possession of the firearms. See *People v Rapley*, 483 Mich 1131 (2009). Contrary to the dissent's suggestion, there is absolutely nothing wrong with "conviction[s] built on inferences derived from circumstantial evidence . . . ." *People v Hardiman*, 466 Mich 417, 430 (2002). Indeed, it is important for appellate courts to remember that "[i]t 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." *Id.* at 428. For these reasons, we affirm the Court of Appeals' holding

that "there was sufficient evidence to permit a rational jury to conclude that defendant was guilty of operating or maintaining a methamphetamine laboratory involving a firearm." *People v LaFountain*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 306858), pp 2-3. However, we vacate that part of the Court of Appeals opinion holding that the trial court did not err by assessing 10 points for Prior Record Variable (PRV) 7, MCL 777.57. It was unnecessary for the Court of Appeals to address this issue because defendant waived it by requesting the trial court to assess 10 points for PRV 7. *People v Jones*, 468 Mich 345, 352 n 6 (2003) ("Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished."), citing *People v Carter*, 462 Mich 206, 214-215 (2000).

VIVIANO, J. (*dissenting*). In this case, defendant was convicted of operating a methamphetamine laboratory "involv[ing] the possession, placement, or use" of a firearm.[1] Defendant claims that there was insufficient evidence that the operation of her methamphetamine laboratory involved firearms. The majority rejects this argument and affirms defendant's conviction. Respectfully, I believe this is error.

I believe that neither the majority nor the Court of Appeals interprets the word "involves" in a way that is consistent with its ordinary meaning. Doing so, I would conclude that there was insufficient evidence that the firearms were involved in the operation of the methamphetamine laboratory.

I. THE MEANING OF "INVOLVES"

MCL 333.7401c(2)(e) applies when a drug-manufacturing violation for owning or using a laboratory also "*involves* the possession, placement, or use of a firearm or any other device designed or intended to be used to injure another person . . . ."[2] "When construing a statute, [a] court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory."[3] The Legislature did not define "involves" as it is used in this statute. Presumably, then, the Legislature intended for this Court to give

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[1] MCL 333.7401c(2)(e). This offense is punishable by a maximum prison term of 50 years for a second or subsequent offense. MCL 333.7413(2). Defendant was also convicted of operating her laboratory in the presence of a minor and operating a lab involving the generation of hazardous materials, each of which carries a maximum sentence of 40 years for second or subsequent offense. MCL 333.7401c(2)(b) and (c); MCL 333.7413(2). The trial court vacated the latter convictions pursuant to an agreement between defendant and the prosecution that only her most serious operation conviction would stand.

[2] Emphasis added.

[3] *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999).

the word its plain meaning,[4] in accord with the word's "context or setting."[5] "Involve" has many different meanings.[6] *The Merriam-Webster Dictionary* lists seven definitions,[7] and defendant, the Court of Appeals, the majority, and the prosecution all interpret this word differently.

Defendant claims that "involve" means "to require as a necessary accompaniment."[8] Under this definition, drug-manufacturing activity would involve the possession, placement, or use of a firearm if a defendant required a firearm to conduct his or her criminal activity as a necessary accompaniment. This cannot be the definition that the Legislature intended because the base offense that defendant was convicted of does not require that firearms be involved in any way.[9] Instead, firearm involvement is an aggravating factor that raises the maximum sentence upon conviction. Hence, the Legislature has determined that it is possible to violate MCL 333.7401c both with and without firearm involvement, and in this sense, firearms are not *necessary* for the illegal manufacture of controlled substances. Therefore, "involves" cannot mean "to require as a necessary accompaniment," as defendant claims.

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[4] *People v Morey*, 461 Mich 325, 330 (1999).

[5] *People v Tennyson*, 487 Mich 730, 737 (2010).

[6] *The Oxford English Dictionary* (2d ed) has almost an entire page of text devoted to this word. *The Random House Dictionary of the English Language: Second Unabridged Edition*, lists 15 different definitions:

> **1.** to include as a necessary circumstance, condition, or consequence; imply entail . . . . **2.** to engage or employ. **3.** to affect, as something within the scope of operation. **4.** to include, contain, or comprehend within itself or its scope. **5.** to bring into an intricate or complicated form or condition. **6.** to bring into difficulties (usually [followed] by *with*) . . . . **7.** to cause to be troublesomely associated or concerned, as in something embarrassing or unfavorable . . . [.] **8.** to combine inextricably (usually [followed] by *with*). **9.** to implicate, as in guilt or crime, or in any matter or affair. **10.** to engage the interests or emotions or commitment of . . . . **11.** to preoccupy or absorb fully (usually used passively or reflexively) . . . . **12.** to envelope or enfold, as if with a wrapping. **13.** to swallow up, engulf, or overwhelm. **14. a.** *Archaic.* to roll, surround, or shroud, as in a wrapping. **b.** to roll up on itself; wind spirally; coil; wreathe.

[7] *The Merriam-Webster Dictionary* (2005). Defendant's preferred definition is listed in the online version of Merriam-Webster, but not in the print edition. Merriam-Webster, <http://www.merriam-webster.com/dictionary/involve> (accessed March 11, 2014) [http://perma.cc/8JJY-CCA6]. The prosecution did not address the argument concerning the word "involves" in its brief, but did address the argument and provide its own proposed definition at oral argument.

[8] *Id.*

[9] See MCL 333.7401c(1)(a) through (c).

The Court of Appeals did not expressly state the meaning that it attributed to the word "involve." However, it appears that the Court of Appeals treated this word as if it described spatial proximity. The Court explained:

> There is no question that a methamphetamine lab was being operated inside the house, nor is there any question that firearms were inside the house. Therefore, there was sufficient evidence to permit a rational jury to conclude that defendant was guilty of operating or maintaining a methamphetamine laboratory involving a firearm.[10]

Thus, the Court of Appeals seemed to believe that this crime involved the possession, placement, or use of a firearm because a firearm was in the same building where the crime was committed. Similarly, the majority in this Court states that given

> the close proximity between defendant's constructive possession of the firearms and her operation of the methamphetamine laboratory, and the well-known relationship between drugs and the use of firearms as protection, a rational trier of fact could also infer that defendant's operation of the laboratory involved defendant's constructive possession of the firearms.

In keeping with its proximity rationale, the majority believes that a different dictionary definition is more fitting, namely, "to include within itself or its scope."

The problem with the Court of Appeals' interpretation is that the dictionary does not list "spatial proximity" or "location within the same building" as possible definitions for "involve." Hence, the plain meaning of the word cannot be the meaning that the Court of Appeals ascribed to it. To the extent that the majority's preferred definition suggests that "involves" could describe a spatial relationship, the Legislature clearly knew how to use simpler terms to describe mere presence or proximity: the very same statute prohibits using an area to manufacture controlled substances "*in the presence* of a minor"[11] and doing so "*within 500 feet* of a residence, business establishment, school property, or church or other house of worship."[12] In the light of this textual evidence, I do not believe the Legislature intended for the word "involves" to refer to spatial proximity or to mean "include within itself or its scope." Therefore, I am convinced that the interpretation of the Court of Appeals and the majority does not give effect to the intent of the Legislature.

At oral argument, the assistant attorney general representing the prosecution proposed a third definition of "involves," stating that "fire-

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[10] *People v LaFountain*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 306858), pp 2-3.

[11] MCL 333.7401c(2)(b) (emphasis added).

[12] MCL 333.7401c(2)(d) (emphasis added).

arms are involved with a lab if they're part of the lab—if they have a connection—a minimal connection." I cannot find a dictionary that defines "involve" as "having a minimal connection," but *The Merriam-Webster Dictionary* does say that "involve" can mean "to relate closely : connect[.]"[13] Under this definition, a drug-manufacturing offense would involve firearms if there was a close connection or relationship between firearms and the drug manufacturing activity.

Unlike the alternatives previously discussed, this latter definition gives effect to every word in the applicable statutory provision, accords with the ordinary meaning of "involves," and is consistent with the language in the rest of the statute. The word "involves" describes a relationship that must exist *between firearms and drug activity*—a close relationship or connection. The words "possession, placement, or use" then describe the prohibited relationship *between the defendant and the firearms*. Because this definition gives all the words in the statute an independent meaning, it should govern this Court's analysis in this case.[14]

II. SUFFICIENCY-OF-THE-EVIDENCE ANALYSIS

For evidence to be sufficient to sustain a conviction, it must not merely provide some basis for a jury to conclude that a defendant is guilty; the evidence must provide a basis on which a rational jury could conclude that a defendant is guilty *beyond a reasonable doubt*.[15] As this Court has explained before, "the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable

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[13] *The Merriam-Webster Dictionary* (2005).

[14] It is also worth noting that the Legislature knows how to penalize simple possession of a firearm during the commission of an offense without requiring a connection between the firearm and the criminal activity: Michigan's felony-firearm statute states that a person commits a felony if he or she "carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . ." MCL 750.227b(1); see also *People v Elowe*, 85 Mich App 744, 747 (1978) (holding that the felony-firearm statute does not require a nexus between the firearm and the criminal activity). In contrast, the statute at issue here only applies when the underlying violation "involves" the possession, placement, or use of a firearm.

[15] *Jackson v Virginia*, 443 US 307, 316 (1979) (stating that an "essential" component "of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense"). Thus, a sufficiency-of-the-evidence challenge is a constitutional claim grounded in the Due Process Clause of the Fourteenth Amendment.

juror in reasonably concluding the existence of that fact beyond a reasonable doubt."[16] Thus, even though we must view the evidence in the light most favorable to the prosecution when reviewing a sufficiency-of-the-evidence challenge,[17] we must still hold the prosecution accountable to the standard of proof that applied at trial.

The prosecutor did not introduce any evidence that defendant had actually possessed the firearms or discussed them with her accomplice. Instead, the prosecutor asked the jury to believe that defendant possessed the guns in the office while she was manufacturing methamphetamine in her bedroom because she had been in the office before. The theory was that because defendant had come so near to the weapons, she must have known about them; and because she knew about them, she must have realized that they could be useful to her; and because she realized that they could be useful to her, she must have intended to control them; and because she intended to control them, she constructively possessed them; and because she constructively possessed them, they were involved in her drug activity. While as the majority notes, there is nothing wrong with convictions built on inferences derived from circumstantial evidence, the string of inferences required to sustain the verdict in this case is too attenuated to merit confidence. On the evidence presented, any rational jury would have had at least "a fair, honest doubt growing out of the evidence or lack of evidence," that is, "a doubt based on reason and common sense,"[18] regarding whether the firearms were involved in the drug activity. This is especially true in view of the countervailing evidence that defendant did not own the weapons, that she did not exclusively control access to the room where they were kept, that someone else put the weapons there, that the weapons were put there some time before defendant began her criminal activity, and that the weapons were not loaded. Far from showing a close relationship, the evidence actually suggested that the location of the firearms was *incidental* to the drug-manufacturing activity, not closely connected to it.

As the majority notes, defendant might have been able to use the firearms in the event that someone tried to steal her drugs. But demonstrating *potential utility*, without more, is not enough to prove that there was an *actual, close relationship*. "Closely related" cannot mean "potentially useful." There were many other items in the house that could have been potentially useful to defendant's criminal activity, but we would not say that these items were involved in the crime. Would we say, for example, that knives in the kitchen were involved in the offense because they too could have been used to ward off intruders? Without evidence that defendant ever armed herself with a dangerous weapon, or that she arranged for one to be close at hand, or that she chose the location of her crime in part because of its proximity to weapons, the relationship between the firearms and the drug activity was so attenuated that it could not provide a basis for a rational jury to conclude *beyond a reasonable doubt* that there was a close relationship between the weapons and the drug manufacturing. Consequently, if

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[16] *People v Hampton*, 407 Mich 354, 368 (1979).

[17] *People v Nowack*, 462 Mich 392, 399 (2000).

[18] CJI2d 3.2(3).

"involves" means "closely related or connected to," there was not sufficient evidence that firearms were involved here.

The majority's preferred definition places emphasis on the scope or boundaries of defendant's methamphetamine operation, but even under this definition, there was scant evidence of involvement of a firearm. There was no evidence at trial that the methamphetamine production took place in the same room as the firearms. In fact, defendant's son called the authorities only after his mother called him into her own bedroom and he witnessed the drug activity occurring inside that room, not the room across the hall. The firearms were not included in the scope of the laboratory and, therefore, were not involved in the laboratory even under this definition.

The majority still believes that the weapons were involved in defendant's crime on the theory that defendant constructively possessed the firearms that were outside her lab while she herself was inside the lab. In doing so, "[t]he Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used."[19] If someone were to ask me, Was a computer *involved* in the writing of your dissenting statement? that person would not be asking if there was a computer in a room across the hall while I wrote out my statement with a pen in another room. Similarly, when the Legislature increased the maximum punishment for a violation that *involves* a firearm, I highly doubt that it had in mind a case in which a drug user produced methamphetamine in her bedroom while there were unloaded rifles behind the door in someone else's room across the hall. If it did, it certainly chose a strange word to communicate its intent.

III. CONCLUSION

I believe the jury's conclusion that the firearms were involved in the drug activity simply because they were nearby and could have been useful was, at best, *speculation*. Speculation, even based on the reasonable observation that defendant could have used the firearms for defense, is not sufficient to sustain a criminal conviction. For the due process right described in *Jackson v Virginia*[20] to be meaningful, there must be some point above which the evidence presented at a trial must rise in order to justify rational inferences of guilt beyond a reasonable doubt.[21] I believe the evidence failed to reach that constitutional threshold in this case.

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[19] *Smith v United States*, 508 US 223, 242 (1993) (Scalia, J. dissenting).

[20] *Jackson*, 443 US at 316.

[21] To be clear, I do not believe that this Court should resurrect the "no inferences upon inferences" rule that it wisely rejected in *People v Hardiman*, 466 Mich 417 (2002). In that case, we relied heavily on the analysis provided by Professor John Henry Wigmore, and as noted in Wigmore's treatise, the proper question concerning the sufficiency of evidence "is always whether, in view of all patterns of corroborating and contradicting evidence at all levels of all inferential chains, the final [fact to be proved] has been shown to the degree of likelihood required by the

Because I believe that in view of the ordinary meaning of the word "involve," there was insufficient evidence that defendant's drug operation involved the possession, placement, or use of a firearm, I would reverse the judgment of the Court of Appeals and vacate defendant's conviction for violating MCL 333.7401c(2)(e).[22] Pursuant to defendant's agreement with the prosecution, I would remand this case to the trial court for reinstatement of one of defendant's previously vacated convictions.

CAVANAGH and MCCORMACK, JJ., join the statement of VIVIANO, J.

PEOPLE v HAZELY, No. 147294; Court of Appeals No. 311454. By order of October 28, 2013, the defendant's former appellate counsel was directed to file a supplemental brief. On order of the Court, it appearing that the defendant's former appellate counsel will not file the brief, the application for leave to appeal the April 25, 2013 order of the Court of Appeals is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration under the standard for direct appeals.

PEOPLE v BEATY, No. 148203; Court of Appeals No. 314935. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 28, 2014:

HUDDLESTON v TRINITY HEALTH MICHIGAN, No. 146041; Court of Appeals No. 303401.

PEOPLE v PARKS, No. 146746; Court of Appeals No. 311435.

PEOPLE v MELESSA CURTIS, No. 147043; Court of Appeals No. 312606.

PEOPLE v SHEPARD, No. 147418; Court of Appeals No. 308867.

PEOPLE v ROLARK, No. 147434; Court of Appeals No. 313207.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal to consider (a) whether the trial court clearly erred by determining that a document discovered in defendant's prison cell, appearing to police to contain a detailed and first-hand confession by defendant of his involvement in a homicide for which he was then under

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applicable standard of persuasion, whatever that may be." 1A Wigmore, Evidence (Tillers rev), § 41, p 1138. In a criminal trial, in which the standard of persuasion is proof beyond a reasonable doubt and an individual's liberty is usually at stake, it is of the utmost importance that reviewing courts enforce the rule that "[j]uries are not permitted to convict a defendant based on speculation or mere suspicion." *United States v Michel*, 446 F3d 1122, 1127 (CA 10, 2006).

[22] Defendant's alternative claims of error would be moot under my disposition.

investigation, was "intended for counsel" and therefore properly suppressed and (b) whether the Court of Appeals in its characterization of the scope of the attorney-client privilege in Michigan erroneously or inadvertently expanded the traditional understanding of the privilege to encompass communications intended for yet-unidentified attorneys. See *Watson v Detroit Free Press*, 248 Mich 237, 240 (1929) (stating that for the privilege to apply, "the relation of attorney and client must exist"); *Devich v Dick*, 177 Mich 173, 178 (1913) (stating that the defendant need not have formally retained an attorney for this privilege to exist, but he must have " 'consult[ed] with an attorney in his professional capacity, with the view to obtaining professional advice or assistance, and [if] the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established' ") (citation omitted).

PEOPLE v HOPSON, No. 147480; Court of Appeals No. 301054.

PEOPLE v TRACY RUSSELL, No. 147587; Court of Appeals No. 310278.

PEOPLE v RITCHIE, Nos. 147590 and 147591; Court of Appeals Nos. 308307 and 313216.

PEOPLE v DAVID SMITH, No. 147651; Court of Appeals No. 316028.

PEOPLE v CHRISTOPHER JOHNSON, No. 147765; Court of Appeals No. 314899.

PEOPLE v NYILAS, No. 147819; Court of Appeals No. 311721.

PEOPLE v RICKY SCOTT, No. 147837; Court of Appeals No. 305972.

RAINMAKER RECOVERY, INC v LOSSIA, No. 147876; Court of Appeals No. 313292.

LEGEL v WEST SHORE MEDICAL CENTER, No. 147893; Court of Appeals No. 311588.

PEOPLE v MATELIC, No. 147907; Court of Appeals No. 317176.

INDEPENDENT BANK v HAMMEL ASSOCIATES, LLC, No. 147911; reported below: 301 Mich App 502.

PEOPLE v DOW, No. 147931; Court of Appeals No. 317238.

PORTIS v CITY OF TAYLOR, No. 147953.

BERKSHIRE v DEPARTMENT OF CORRECTIONS, No. 147955; Court of Appeals No. 314467.

PEOPLE v ABRAMS, No. 147960; Court of Appeals No. 317335.

PEOPLE v MERIWEATHER, No. 147986; Court of Appeals No. 315042.

PEOPLE v JOSEPH GIBBS, No. 147992; Court of Appeals No. 316226.

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY ROAD COMMISSION, No. 147999; reported below: 302 Mich App 574.

PEOPLE v MEECHEE MORRIS, No. 148025; Court of Appeals No. 316268.

PEOPLE v FRANK LITTLE, No. 148034; Court of Appeals No. 317795.

PEOPLE v SPAGNOLA, No. 148046; Court of Appeals No. 314053.

PEOPLE v PERRY WILSON, No. 148047; Court of Appeals No. 314545.

PEOPLE v DERRIUS LAMBERT, No. 148057; Court of Appeals No. 311054.

SILVA v CH2M HILL INC, No. 148064; Court of Appeals No. 307699.

PEOPLE v SENARCHI BUFORD, No. 148067; Court of Appeals No. 314109.

PEOPLE v COLES, No. 148089; Court of Appeals No. 314983.

PEOPLE v LAMKIN, No. 148096; Court of Appeals No. 308695.

PEOPLE v RUNNER, No. 148102; Court of Appeals No. 316526.

PEOPLE v SPENCER WILLIAMS, No. 148104; Court of Appeals No. 314833.

PEOPLE v CONNER, No. 148107; Court of Appeals No. 315662.

PEOPLE v MARK DALTON, No. 148109; Court of Appeals No. 317815.

PEOPLE v ERIC MILLER, No. 148110; Court of Appeals No. 317613.

PEOPLE v NICHOLAS ANTHONY, No. 148119; Court of Appeals No. 316138.

PEOPLE v DARNELL DUNLAP, No. 148121; Court of Appeals No. 317357.

PEOPLE v WILLIE ROSE, No. 148122; Court of Appeals No. 314483.

PEOPLE v DENG, No. 148123; Court of Appeals No. 317630.

HUGHES v DETROIT BOARD OF EDUCATION, No. 148125; Court of Appeals No. 314886.

J & N KOETS, INC v REDMOND, No. 148126; Court of Appeals No. 311909.

PEOPLE v CHRISTOPHER LANE, No. 148133; Court of Appeals No. 309972.

PEOPLE v CURRY, No. 148135; Court of Appeals No. 308027.

PEOPLE v JOSHUA GOMEZ, No. 148136; Court of Appeals No. 316755.

VEGA v GILLETTE, No. 148145; Court of Appeals No. 313124.

HARRISON v ATTORNEY GENERAL, No. 148147; Court of Appeals No. 314463.

PEOPLE v HURICK, No. 148150; Court of Appeals No. 316328.

PEOPLE v LINGEMAN, No. 148152; Court of Appeals No. 315986.

NOWAK v MACIEJEWSKI, No. 148159; Court of Appeals No. 313713.

PEOPLE v JAMES JOHNSTON, No. 148168; Court of Appeals No. 318295.

PEOPLE v VANLIEW, No. 148173; Court of Appeals No. 311745.

PEOPLE v CORREA, No. 148174; Court of Appeals No. 315391.

PEOPLE v DENT, No. 148180; Court of Appeals No. 313647.

PEOPLE v TREVINO, No. 148183; Court of Appeals No. 315434.

PEOPLE v MILJOUR, No. 148187; Court of Appeals No. 310433.

PEOPLE v MCGOWAN, No. 148188; Court of Appeals No. 314283.

PEOPLE v HINOJOSA, No. 148192; Court of Appeals No. 308327.

WELLS FARGO BANK, NA v COLSTON, No. 148193; Court of Appeals No. 316626.

PEOPLE v TREY LAWRENCE, No. 148194; Court of Appeals No. 315303.

PEOPLE v NOWAK, No. 148195; Court of Appeals No. 316197.

PEOPLE v VASQUEZ, No. 148197; Court of Appeals No. 311759.

PEOPLE v BUCK, No. 148201; Court of Appeals No. 316703.

PEOPLE v DREMEL LANDERS, No. 148206; Court of Appeals No. 314977.

PEOPLE v BILL LITTLE, No. 148207; Court of Appeals No. 315831.

PEOPLE v DOBINE, No. 148208; Court of Appeals No. 318196.

PEOPLE v SHELTON, No. 148209; Court of Appeals No. 313609.

BEST v PARK WEST GALLERIES, INC, No. 148214; Court of Appeals No. 305317.

PEOPLE v PERVELL JONES, No. 148217; Court of Appeals No. 310310.

PEOPLE v DEREK FRANKLIN, No. 148218; Court of Appeals No. 316415.

PEOPLE v RICHARD HILL, No. 148219; Court of Appeals No. 311756. CAVANAGH, J., would grant leave to appeal.

PEOPLE v LAKEITH HOPKINS, No. 148221; Court of Appeals No. 316372.

PEOPLE v ARNTZ, No. 148222; Court of Appeals No. 316378.

PEOPLE v DUNCAN ALEXANDER, Nos. 148227, 148228, and 148229; Court of Appeals Nos. 302026, 302038, and 302045.

PEOPLE v JONATHON SMITH, No. 148237; Court of Appeals No. 300581.

PEOPLE v ROLAND, No. 148238; Court of Appeals No. 313071. CAVANAGH, J., would grant leave to appeal.

PEOPLE v CHATMAN, No. 148242; Court of Appeals No. 311033.

PEOPLE v WALLINE, No. 148243; Court of Appeals No. 311772.

PEOPLE v BARNES, No. 148247; Court of Appeals No. 316573.

PEOPLE v LEMKE, No. 148249; Court of Appeals No. 316039.

PEOPLE v ABSOLEM THOMAS, No. 148252; Court of Appeals No. 317313.

PEOPLE v KEVIN CARTER, No. 148255; Court of Appeals No. 315549.

PEOPLE v REGINALD NELSON, No. 148257; Court of Appeals No. 306339.

PEOPLE v MULL, No. 148259; Court of Appeals No. 315235.

PEOPLE v BOONE-BEY, No. 148261; Court of Appeals No. 316260.

PEOPLE v LAQWAN SCOTT, No. 148276; Court of Appeals No. 317472.

PEOPLE v MILTON LEWIS, No. 148289; Court of Appeals No. 310295.

PEOPLE v LEON BRIDINGER, No. 148293; Court of Appeals No. 303248.

PEOPLE v COLEMAN, No. 148294; Court of Appeals No. 314287.

PEOPLE v GIVHAN, No. 148295; Court of Appeals No. 317570.

PEOPLE v POLICE, No. 148300; Court of Appeals No. 316810.

PEOPLE v CHRISTOPHER TAYLOR, No. 148302; Court of Appeals No. 316082.

PEOPLE v CRISTOVAL HERNANDEZ, No. 148304; Court of Appeals No. 309710.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v DEAN, No. 148307; Court of Appeals No. 308500.

PEOPLE v BENTLEY, No. 148310; Court of Appeals No. 310779.

TRAKHTENBERG v MCKELVY, No. 148314; Court of Appeals No. 285247.

WOHLSCHEID v BRIDGEWATER INTERIORS, LLC, No. 148315; Court of Appeals No. 316818.

PEOPLE v TIWARI, No. 148327; Court of Appeals No. 311863.

PEOPLE v ROBERT JACKSON, No. 148337; Court of Appeals No. 315566.

PEOPLE v MARC MORRIS, No. 148339; Court of Appeals No. 316899.

TITAN INSURANCE COMPANY v THOMAS, No. 148340; Court of Appeals No. 312747.

MICHIGAN PRODUCTION MACHINING, INC v DEPARTMENT OF TREASURY, No. 148369; Court of Appeals No. 312224.

OLDHAM v AJ STEEL ERECTORS, LLC, No. 148370; Court of Appeals No. 314937.

PEOPLE v ROMASHKO, No. 148372; Court of Appeals No. 311414.

PEOPLE v AL-BADRI, No. 148375; Court of Appeals No. 318048.

PEOPLE v REBECCA HERNANDEZ, No. 148382; Court of Appeals No. 309431.

MCLAUGHLIN v SKANEE BOUND, No. 148386; Court of Appeals No. 312876.

PEOPLE v EVANS, No. 148388; Court of Appeals No. 310076.

PEOPLE v SHADE, No. 148421; Court of Appeals No. 318474.

PEOPLE v MARTINNEZE MOORE, No. 148423; Court of Appeals No. 315580.

HATCHEW v MILLER APPLE, LP, No. 148433; Court of Appeals No. 316018.

TATAR v RYDER INTEGRATED LOGISTICS, INC, No. 148439; Court of Appeals No. 310833.

PEOPLE v SINER, No. 148450; Court of Appeals No. 318243.

PEOPLE v NENROD, No. 148452; Court of Appeals No. 308340.

PEOPLE v ORTEGA, No. 148454; Court of Appeals No. 315328.

PEOPLE v KEYE, No. 148456; Court of Appeals No. 317873.

PEOPLE v BROOKS, No. 148458; Court of Appeals No. 317647.

PEOPLE v MUEX, No. 148467; Court of Appeals No. 317582.

PEOPLE v COX, No. 148469; Court of Appeals No. 318393.

PEOPLE v MICHAEL LANDERS, No. 148476; Court of Appeals No. 314997.

PEOPLE v CLETE ROBINSON, No. 148498; Court of Appeals No. 308341.

CONRAD v CERTAINTEED CORPORATION, No. 148547; Court of Appeals No. 308705.

MCDONALD v MCDONALD, Nos. 148548 and 148549; Court of Appeals Nos. 313253 and 314925.

PEOPLE v COKLOW-EL, No. 148586; Court of Appeals No. 311598.

KINNE v HB EMPLOYMENT SERVICES/OUTDOOR ADVENTURES, No. 148618; Court of Appeals No. 316424.

Superintending Control Denied March 28, 2014:

LYTTLE v ATTORNEY GRIEVANCE COMMISSION, No. 148211.

Reconsideration Denied March 28, 2014:

CENTURY PARKHOMES CONDOMINIUM ASSOCIATION v FEDERAL NATIONAL MORTGAGE ASSOCIATION, No. 146600; reported below: 298 Mich App 304188. Leave to appeal denied at 495 Mich 864.

GREENBROOKE PARKHOMES CONDOMINIUM ASSOCIATION v THOMAS, No. 146832; Court of Appeals No. 305985. Leave to appeal denied at 495 Mich 864.

PEOPLE v STANLEY WHITE, No. 147731; Court of Appeals No. 310918. Leave to appeal denied at 495 Mich 916.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147792. Superintending control denied at 495 Mich 919.

Summary Disposition April 1, 2014:

HOWARD v KOWALSKI, No. 145773; reported below: 296 Mich App 664. On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we reverse in part the judgment of the Court of Appeals and reinstate the March 2, 2010 judgment of the Wexford Circuit Court. The Court of Appeals erred in holding that the trial court abused its discretion in excluding from evidence correspondence between counsel for the plaintiff and the claims representative for Dr. Urse's liability insurer. The trial court reasonably found that there was no evidence that Dr. Urse was aware of the correspondence, or that by executing the affidavit he was intending to confirm, or respond to, the facts of the case as understood by the plaintiff's counsel. The correspondence at issue was not admissible under MRE 104(b) because the plaintiff failed to offer evidence of a condition of fact that would permit the introduction of the conditional evidence. Specifically, the correspondence was properly excluded under MRE 104(b) based on the plaintiff's failure to establish, as a factual condition precedent to admissibility, that Dr. Urse was aware of the correspondence. As such, the trial court did not abuse its discretion in failing to admit the correspondence into evidence.

In light of our holding, we also vacate that portion of the Court of Appeals judgment holding that the trial court abused its discretion in not admitting Dr. Urse's affidavit. Given that the trial court did not abuse its discretion in refusing to admit the correspondence, the Court of Appeals correctly concluded that any error in not admitting the affidavit was harmless because the trial court allowed the contents of the affidavit into evidence, allowed the plaintiff's counsel to discuss its contents during closing argument, and instructed the jury to consider whether the affidavit contradicted Dr. Urse's testimony.

YONO v DEPARTMENT OF TRANSPORTATION, No. 146603; reported below: 299 Mich App 102. On January 16, 2014, the Court heard oral argument on the application for leave to appeal the December 20, 2012 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we remand this case to the Court of Appeals for further proceedings not inconsistent with this order. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Wade v Dep't of*

Corrections, 439 Mich 158, 163 (1992). In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Sewell v Southfield Pub Schs*, 456 Mich 670, 674 (1998); MCR 2.116(G)(5). On remand, the Court of Appeals shall consider: (1) what standard a court should apply in determining as a matter of law whether a portion of highway was "designed for vehicular travel," as used in MCL 691.1402(1); and (2) whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under this standard. We do not retain jurisdiction.

CAVANAGH, J., would deny leave to appeal.

POSEN CONSTRUCTION, INC v CITY OF DEARBORN, No. 147130; Court of Appeals No. 311214. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MELVIN MARSHALL, No. 147415; Court of Appeals No. 308654. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Hardy*, 494 Mich 430, 438 (2013), and *People v Osantowski*, 481 Mich 103, 111 (2008). Determining whether a trial court properly scored sentencing variables is a two-step process. First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made. See *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257 (2012). Second, the appellate court considers de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

BAGBY v DETROIT EDISON COMPANY, No. 147898; Court of Appeals No. 311597. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

TAYLOR v MICHIGAN PETROLEUM TECHNOLOGIES, INC, No. 147991; Court of Appeals No. 314534. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted April 1, 2014:

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM v CHARTER COUNTY OF WAYNE, No. 147296; reported below: 301 Mich App 1. On March 5, 2014, the Court heard oral argument on the application for leave to appeal the May 9, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is granted. The parties shall include

among the issues to be briefed: (1) an identification of the source and nature of the County's power to move funds from the Inflation Equity Fund (IEF); (2) whether the movement of IEF assets to the defined benefit plan without the corresponding offset to the County's Annual Required Contribution violates the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*.; and (3) whether the movement of $32 million in IEF assets to the defined benefit plan constitutes a "transaction" within the meaning of MCL 38.1133(8). The parties should not submit mere restatements of their previous briefs.

Leave to Appeal Denied April 1, 2014:

PEOPLE v GLOVER, No. 147412; Court of Appeals No. 310193.

OVERWEG v THOMAS, No. 147618; Court of Appeals No. 308785.

PEOPLE v BRAZZELL, No. 148031; Court of Appeals No. 315263.

PEOPLE v BROCKITT, No. 148062; Court of Appeals No. 311042.

TILLMAN v THE PERFECT PITCHER SPORTS PUB, INC, No. 148063; Court of Appeals No. 309121.

MARKMAN, J., would reverse the judgment of the Court of Appeals in part, for the reasons stated in the Court of Appeals dissenting opinion.

PEOPLE v DENNIS MILLER, No. 148081; Court of Appeals No. 311267.

KARWACKI v DEPARTMENT OF TRANSPORTATION, No. 148127; Court of Appeals No. 308772.

CAVANAGH, J., would grant leave to appeal.

In re FORFEITURE OF A QUANTITY OF MARIJUANA, No. 148130; Court of Appeals No. 310106.

PEOPLE v CYNTHIA FLEMING, No. 148576; Court of Appeals No. 318777.

In re SANDERS/LAIRD, No. 148779; Court of Appeals No. 320142.

Leave to Appeal Denied April 4, 2014:

PEOPLE v STONE, No. 147544; Court of Appeals No. 308503.

MARKMAN, J. (*dissenting*). Defendant pleaded guilty to single counts of carjacking, unarmed robbery, and resisting and obstructing and the trial court calculated defendant's recommended minimum sentence range under the sentencing guidelines for only the felony with the highest offense class, the carjacking. I write to restate the concerns I raised in *People v Getscher*, 478 Mich 887, 888 (2007) (MARKMAN, J., dissenting), and *People v Warren*, 485 Mich 970, 970-971 (2009) (MARKMAN, J., dissenting), regarding this practice of courts calculating the guidelines only for the highest class felony when imposing concurrent sentences for multiple felonies of differing classes.

MCL 771.14(2)(e)(*iii*) has served as the basis for this practice, permitting the probation officer, when preparing the presentence report, to only include a "computation that determines the recommended minimum sentence range for the crime having the highest crime class." However, MCL 777.21(2) places a different responsibility on courts themselves in this process, stating:

> If the defendant was convicted of multiple offenses, subject to [MCL 771.14], *score each offense* as provided in this part. [Emphasis added.]

This obligation to "score each offense" is underscored when one looks at other provisions of Michigan's sentencing guidelines. For instance, MCL 769.34(2) states that "the minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the appropriate sentence range," and MCL 769.34(3) states, "A court may depart from the appropriate sentence range . . . [only] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Obviously, a court can only know whether a sentence is "within the appropriate sentence range" of the guidelines if it first calculates the guidelines for an offense. The fact that the probation officer is not required to perform a calculation for each offense in no way relieves the court of its statutory responsibility to perform such a calculation.

As a result of courts scoring only the highest class felony and imposing sentences for lower class felonies on the basis of the guidelines range for the highest class felony, courts in an unknown number of cases are sentencing defendants to terms in excess of the guidelines recommendation without being required to set forth "substantial and compelling reasons" for the departure. In the instant case, the current practice resulted in defendant's being sentenced to 20 to 50 years for an unarmed robbery although the highest guidelines range for a minimum sentence for a person sentenced as a fourth-offense habitual offender for this offense is 5 1/6 to 19 years.

I would grant leave to appeal with respect to whether a court is or is not obligated to score *all* felonies and sentence a defendant accordingly.

TELLURIDE ASSOCIATION, INC v CITY OF ANN ARBOR, No. 147867; Court of Appeals No. 304735.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal to consider (a) whether petitioner was rightfully disqualified by respondent as an "educational institution," and therefore disentitled to certain tax exemptions, on the grounds that it does not make a "substantial contribution to the relief of the burden of government," *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 755-756 (1980), despite the fact that nothing in the language of MCL 211.7n seems to require an entity to carry out what is effectively a "quasi-governmental" role by relieving the government of some public responsibility in order to qualify as an educational institution, and (b) whether petitioner was rightfully disqualified by respondent as a "charitable institution," and therefore disentitled to certain tax exemptions, on the grounds that it allocates its limited scholarship resources

through an application and essay process that is alleged to be "discriminatory" because it seeks to identify those students most committed to community service activities, *Wexford Med Group v City of Cadillac*, 474 Mich 192, 215 (2006). The application of legal standards by which the public sector defines which educational and charitable institutions qualify as "educational" and "charitable" institutions is a matter of considerable importance for Michigan's nonprofit sector, and for the overall social environment of this state, and merits further judicial review.

YOUNG, C.J., joins the statement of MARKMAN, J.

BOLZ V BOLZ, No. 148754; Court of Appeals No. 319535.

In re LDH, No. 148926; Court of Appeals No. 316670.

In re LDH, No. 148953; Court of Appeals No. 316669.

Leave to Appeal Denied April 9, 2014:

PEOPLE V AMBROSE, Nos. 148995 and 148996; Court of Appeals Nos. 315881 and 318798.

Summary Disposition April 11, 2014:

In re MCCARRICK/LAMOREAUX, No. 148966; Court of Appeals No. 315510. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the February 18, 2014 judgment of the Court of Appeals, and we remand this case to the Court of Appeals for its reconsideration of the respondent's jurisdictional issue, in light of *In re White*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 313770); *In re McClain/Waters/Skinner*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 302460); and *In re Klemkow*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 295488). The motion to consolidate is denied as moot, but without prejudice to the filing of a similar motion in the Court of Appeals on remand. We direct the Court of Appeals' attention to the fact that we have also remanded *In re McCarrick* (Docket No. 148749) to the Court of Appeals for plenary consideration of the same issue. We do not retain jurisdiction.

In re MCCARRICK, No. 148749; Court of Appeals No. 317403. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the September 16, 2013 and January 10, 2014 orders of the Court of Appeals, and we remand this case to the Court of Appeals for its plenary consideration of the respondent's jurisdictional issue, especially in light of *In re White*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 313770); *In re McClain/Waters/Skinner*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 302460); and *In re Klemkow*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 295488). We direct the Court of Appeals' attention to the fact that we have also remanded *In re McCarrick/Lamoreaux* (Docket No. 148966) to the Court of Appeals for reconsideration of the same issue. We do not retain jurisdiction.

Leave to Appeal Denied April 11, 2014:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, INC, No. 147752; Court of Appeals No. 306844.

MARKMAN, J. (*dissenting*). I would grant leave to appeal. This case, remarkable in its outcome in my judgment, features a speeding and uninsured motorcyclist who was injured when he crashed his motorcycle while fleeing from the police, and who thereafter collected a double no-fault insurance recovery. In particular, I would grant leave to decide two questions. First, whether a pursuing police vehicle was "involved in the accident" for the purposes of MCL 500.3114(5)(a) of the no-fault insurance act when that police vehicle, after slowing down out of concern for the motorcyclist's safety and for its own ability to navigate a curved dirt road, followed a half-mile and a sharp curve behind the fleeing motorcyclist such that the police vehicle could not even see the motorcycle at the time of the crash. Cf. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 38-40 (1995) (indicating that a police vehicle is "involved in the accident" of a vehicle it is pursuing when the police vehicle "actively, as opposed to passively, contribute[s] to the accident" and that there must be more than a mere " 'but for' connection between" the police vehicle and the accident, "even where a 'but for' standard is narrowed by interposing a requirement of physical proximity" between the police vehicle and the accident). Second, whether, if the police vehicle was "involved in the accident," defendant has a coverage responsibility for medical expenses in the amount of $218,000, an amount already paid by the motorcyclist's health insurance, an issue involving an analysis of the interaction between MCL 500.3114(5)(a) and MCL 500.3109a, in circumstances in which a motorcyclist involved in an accident lacks vehicular insurance but has health insurance.

ZAHRA, J., joins the statement of MARKMAN, J.

Summary Disposition April 23, 2014:

PORTER v HILL, No. 147333; reported below: 301 Mich App 295. On January 15, 2014, the Court heard oral argument on the application for leave to appeal the June 11, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals erred in holding that the parents of a man whose parental rights to his minor children were involuntarily terminated before his death did not have standing to seek grandparenting time with the children under the Child Custody Act, MCL 722.21 *et seq*., when, under the circumstances of this case, a biological parent is encompassed by the term "natural parent" in MCL 722.22(e) and (h), regardless of whether the biological parent's parental rights have been terminated. We remand this case to the Saginaw Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

NICHOLS v HOWMET CORPORATION, No. 148118; reported below: 302 Mich App 652. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate Part III, Section D of the Court of Appeals opinion and we remand this case to the Court of Appeals. On remand, the Court of Appeals shall address the issue of whether there should be an allocation of liability for worker's compensation wage loss benefits, such that defendant Pacific Employers Insurance Company, as the insurer at the time of the plaintiff's cervical injuries, is only obligated to pay differential wage loss benefits beyond those defendant American Manufacturers Mutual Insurance (now substituted by the Michigan Property & Casualty Association), as the insurer at the time of the plaintiff's low back injury, must pay for the plaintiff's wage loss due to that later injury. MCL 418.301(5)(e), as constituted at the time applicable to this case, did not allocate liability between insurance carriers for the payment of wage loss benefits. And, contrary to the determination of the Court of Appeals, defendant Pacific Employers did raise this issue in response to the appeals of the plaintiff and American Manufacturers at the Workers' Compensation Appellate Commission (WCAC). The WCAC implicitly rejected Pacific Employers' argument by assigning full wage loss liability to that insurer. As the appellee at the WCAC, Pacific Employers adequately raised the issue for the purpose of subsequent Court of Appeals review. Consideration of this issue is necessary for a proper determination of the case, the issue presenting a question of law where all facts necessary for its resolution have been presented. In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted April 23, 2014:

SAL-MAR ROYAL VILLAGE, LLC v MACOMB COUNTY TREASURER, No. 147384; reported below: 304 Mich App 405. The parties shall include among the issues to be briefed: (1) whether interest and administrative fees for delinquent taxes assessed pursuant to MCL 211.78a(3) can be waived in a Michigan Tax Tribunal proceeding in which the Macomb County Treasurer was not a party; (2) whether the Macomb County Treasurer was in privity with Macomb Township for purposes of waiving interest and fees under § 78a(3); and (3) whether the plaintiff's complaint for relief falls under the exclusive jurisdiction of the Tax Tribunal pursuant to MCL 205.731.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

Leave to Appeal Denied April 23, 2014:

PEOPLE v GOJCAJ, No. 147474; Court of Appeals No. 300728.

PEOPLE v RODNEY WILSON, No. 147797; Court of Appeals No. 300274.

NULL v AUTO-OWNERS INSURANCE COMPANY, No. 148165; Court of Appeals No. 308473.

PEOPLE v KEITH ROBINSON, No. 148288; Court of Appeals No. 298929.

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

PEOPLE v HOOD, Nos. 148392 and 148393; Court of Appeals Nos. 307575 and 315294.

PEOPLE v CHRISTOPHER TAYLOR, No. 148451; Court of Appeals No. 315603.

BANK OF NEW YORK MELLON TRUST COMPANY v JONES, No. 149126; Court of Appeals No. 321236.

Summary Disposition April 25, 2014:

PEOPLE v KRANZ, No. 148038; Court of Appeals No. 304853. pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion addressing ineffective assistance of counsel as it relates to the presentation of a defense, and we remand this case to the Court of Appeals. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Allegan Circuit Court for further findings. The trial court failed to complete its duties under the April 12, 2012 order of the Court of Appeals, which remanded for a hearing under *People v Ginther*, 390 Mich 436 (1973), because it did not determine whether the evidence that it considered in finding ineffective assistance by trial counsel was admissible. Where a claim of ineffective assistance of counsel is based on the failure of counsel to produce evidence at trial, there is no reasonable likelihood of a different outcome unless the evidence is admissible. Independent of any question regarding the documents' admissibility, the trial court may also consider whether it would have permitted further cross-examination of witnesses if counsel had provided the documents produced at the hearing as a foundation for his questions, and, if so, whether that line of questioning would have created a reasonable probability of a different outcome under *People v Armstrong*, 490 Mich 281 (2011). The trial court shall make findings of fact and legal determinations on the record, but shall not grant or deny a motion for a new trial. After the circuit court has made its findings, it shall forward the record to the Court of Appeals, which may permit supplemental briefing by the parties. Thereafter, the Court of Appeals shall review the trial court's findings and determinations under the standards set forth in *Armstrong* and reconsider whether the defendant is entitled to a new trial. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v DAVONTAE SANFORD, No. 148215; Court of Appeals No. 291293. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and reinstate the February 28, 2012 order of the Wayne Circuit Court denying the defendant's motion to withdraw his plea. Defendant filed a motion to withdraw his guilty plea after he was sentenced. MCR 6.310(C) permits a defendant to withdraw a guilty plea after sentencing only 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. "A defendant

seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown*, 492 Mich 684, 693 (2012). Because the defendant did not base his motion on an error in the plea proceeding, the Court of Appeals erred by adjudicating the defendant's appeal under MCR 6.310(C). The application for leave to appeal as cross-appellant is therefore denied.

This order is without prejudice to the defendant's ability to file a motion for relief from judgment pursuant to MCR 6.500 *et seq*. raising the issues addressed in his motion to withdraw plea.

MCCORMACK, J., did not participate because of her prior involvement in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 25, 2014:

PEOPLE V BOROM, No. 148674; Court of Appeals No. 313750. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 25, 2014:

CLOHSET V NO NAME CORPORATION, No. 148434; reported below: 302 Mich App 550.

PEOPLE V WATSON, No. 148575; Court of Appeals No. 307741.

MARKMAN, J. I would reverse the Court of Appeals' reversal of defendant's jury-trial convictions for first-degree arson of a dwelling, MCL 750.72, and fourth-degree arson of insured property, MCL 750.75, for the reasons set forth by the dissenting judge in the Court of Appeals. See *People v Watson*, unpublished opinion per curiam of the Court of Appeals, issued December 12, 2013 (Docket No. 307741) (O'CONNELL, J., dissenting).

Summary Disposition April 28, 2014:

PEOPLE V ANTHONY PORTER, No. 147678; Court of Appeals No. 310293. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to amend the judgment of sentence to reflect that the sentences imposed in this case are to run concurrently. *People v Sawyer*, 410 Mich 351 (1981). In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

THE BANK OF NEW YORK MELLON v JAAFAR, No. 148416; Court of Appeals No. 316521. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CLIFFORD JOHNSON, No. 148535; Court of Appeals No. 318443. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to correct the Presentence Investigation Report by replacing the words "crack cocaine" with "marijuana" in the Evaluation and Plan. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied April 28, 2014:

MUSASHI AUTO PARTS OF MICHIGAN INC v DEPARTMENT OF TREASURY, No. 146573; Court of Appeals No. 305268.

MOVSISYAN v IPAX CLEANOGEL, INC, No. 147754; Court of Appeals No. 299235.

PEOPLE v MICHAEL BAILEY WILLIAMS, No. 147934; Court of Appeals No. 317528.

MOTT v KINDROSS CORRECTIONAL FACILITY WARDEN, No. 147956; Court of Appeals No. 316716.

PEOPLE v JEROME MILLER, No. 147993; Court of Appeals No. 309417.

PEOPLE v LOROASO TRAVIS, No. 148004; Court of Appeals No. 314214.

PEOPLE v COLBERT, No. 148008; Court of Appeals No. 310813.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

CITIBANK, NA v SMALLWOOD, No. 148009; Court of Appeals No. 309238.

CITIBANK (SOUTH DAKOTA), NA v SMALLWOOD, No. 148011; Court of Appeals No. 310894.

CITIBANK (SOUTH DAKOTA), NA v SMALLWOOD, No. 148013; Court of Appeals No. 312328.

SEWARD v PASANT, No. 148021; Court of Appeals No. 315282.

PEOPLE v DINO FLEMING, No. 148045; Court of Appeals No. 317585.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, No. 148061; Court of Appeals No. 306048.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, Nos. 148077 and 148078; Court of Appeals Nos. 300643 and 306048.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, No. 148550; Court of Appeals No. 304756.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, No. 148552; Court of Appeals No. 305741.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, No. 148554; Court of Appeals No. 306790.

ZIGMOND CHIROPRACTIC, PC v AAA MICHIGAN, Nos. 148683 and 148684; Court of Appeals Nos. 305741 and 306790.

PEOPLE v REAM, No. 148071; Court of Appeals No. 315752.

ATTORNEY GRIEVANCE COMMISSION v CHAMBERS, No. 148076.

PEOPLE v LARRY ADAMS, No. 148083; Court of Appeals No. 315444.

SEARCY v PAROLE BOARD, No. 148093; Court of Appeals No. 315174.

PEOPLE v ANDREW LAMBERT, No. 148095; Court of Appeals No. 317366.

PEOPLE v JOSEPH HENDRIX, No. 148101; Court of Appeals No. 314334.

PEOPLE v ANTWAN HALL, No. 148103; Court of Appeals No. 317143.

PEOPLE v JEFFREY TRAVIS, No. 148105; Court of Appeals No. 316735.

DEN UYL v PARK TOWNSHIP, No. 148116; Court of Appeals No. 312172.

PEOPLE v COLEMAN-YOUNG, No. 148134; Court of Appeals No. 309455.

COX v SUNTRUST MORTGAGE, INC, No. 148143; Court of Appeals No. 314649.

PEOPLE v DAVID WILLIAMS, No. 148153; Court of Appeals No. 314642.

PEOPLE v CHEVIS, No. 148158; Court of Appeals No. 304358.

PEOPLE v THOMPKINS, No. 148161; Court of Appeals No. 315432.

PEOPLE v WEI, No. 148169; Court of Appeals No. 308353.

PEOPLE v REICH, No. 148170; Court of Appeals No. 315623.

PEOPLE v JAMES STEVENS, No. 148171; Court of Appeals No. 313654.

PEOPLE v RHINES, No. 148177; Court of Appeals No. 316739.

PEOPLE v DWIGHT ROBERSON, No. 148179; Court of Appeals No. 315525.

PEOPLE v DERRICK DAVIS, No. 148181; Court of Appeals No. 316043.

PEOPLE v BARRON, No. 148189; Court of Appeals No. 317445.

PEOPLE v STERLING HARRIS, No. 148190; Court of Appeals No. 316076.

PEOPLE v CHARLES JONES, No. 148196; Court of Appeals No. 308293.

PEOPLE v FAVORS, No. 148198; Court of Appeals No. 316883.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v NIEMIEC, No. 148199; Court of Appeals No. 317386.

PEOPLE v MCINTYRE, No. 148210; Court of Appeals No. 310849.

PEOPLE v JOSEPH THOMPSON, No. 148213; Court of Appeals No. 314828.

PEOPLE v DEJESUS, No. 148220; Court of Appeals No. 317746.

PEOPLE v GREGORY RIVERS, No. 148224; Court of Appeals No. 316637.

PEOPLE v LERMA, No. 148226; Court of Appeals No. 314800.

PEOPLE v CROWDER, No. 148232; Court of Appeals No. 318691.

PEOPLE v RAMON JONES, No. 148234; Court of Appeals No. 316524.

PEOPLE v DULAK, No. 148235; Court of Appeals No. 315164.

PEOPLE v DEWAYNE SMITH, No. 148246; Court of Appeals No. 316292.

PEOPLE v PAUL DAVIS, No. 148248; Court of Appeals No. 310706.

PEOPLE v ASBURY, No. 148250; Court of Appeals No. 314668.

PEOPLE v PAUL FLORES, No. 148254; Court of Appeals No. 312613.

PEOPLE v MATHEWS, No. 148256; Court of Appeals No. 316094.

PEOPLE v MCGHEE, No. 148270; Court of Appeals No. 316330.

PEOPLE v CRUMMIE, No. 148272; Court of Appeals No. 311047. CAVANAGH, J., would grant leave to appeal.

PEOPLE v VICTOR WILSON, No. 148273; Court of Appeals No. 317678.

2010-3 SFR VENTURE REO, LLC v DUEWEKE, No. 148275; Court of Appeals No. 315745.

PEOPLE v CARR, No. 148278; Court of Appeals No. 310645.

PEOPLE v HAVENAAR, No. 148280; Court of Appeals No. 318242.

PEOPLE v WARNER, No. 148281; Court of Appeals No. 318541.

PEOPLE v ANTONIO CLARK, No. 148282; Court of Appeals No. 316607.

PEOPLE v JOSEPH GREEN, No. 148285; Court of Appeals No. 316280.

PEOPLE v RAYNARD WILLIAMS, No. 148290; Court of Appeals No. 315833.

PEOPLE v MICHAEL BRIDINGER, No. 148299; Court of Appeals No. 310403.

PEOPLE v GENTRY, No. 148306; Court of Appeals No. 311741.

PEOPLE v ANTHONY GATES, No. 148309; Court of Appeals No. 316976.

PEOPLE v SIMPSON, No. 148312; Court of Appeals No. 317542.

PEOPLE v PERREAULT, No. 148316; Court of Appeals No. 316188.

PEOPLE v WILLIS, No. 148326; Court of Appeals No. 315156.

GILES v MARABLE, No. 148333; Court of Appeals No. 315152.

PEOPLE v ERICKSON, No. 148359; Court of Appeals No. 317711.

STAMPS v R A HANDLON CORRECTIONAL FACILITY WARDEN, No. 148363; Court of Appeals No. 317001.

BUREAU OF HEALTH PROFESSIONS v RODGERS, No. 148379; Court of Appeals No. 304710.

PEOPLE v SPANGLER, No. 148380; Court of Appeals No. 318457.

PEOPLE v ROBERT WHITE, No. 148383; Court of Appeals No. 317530.

SMITH v WASHTENAW COUNTY BOARD OF COMMISSIONERS, No. 148384; Court of Appeals No. 317886.

PEOPLE v VIRGEL GIBBS, No. 148389; Court of Appeals No. 317486.

PEOPLE v MORRISSETTE, No. 148391; Court of Appeals No. 317920.

PEOPLE v LAVELY, No. 148394; Court of Appeals No. 312389.

PEOPLE v TERRANCE JOHNSON, No. 148397; Court of Appeals No. 315577.

PEOPLE v DEFOUW, No. 148398; Court of Appeals No. 317409.

PEOPLE v CORWIN ROBERSON, No. 148399; Court of Appeals No. 314819.

PEOPLE v JOSEPH SMITH, No. 148401; Court of Appeals No. 317140.

PEOPLE v GERARD, No. 148402; Court of Appeals No. 317396.

PEOPLE v GIAMPORCARO, No. 148403; Court of Appeals No. 312556.

PEOPLE v COLE, No. 148405; Court of Appeals No. 317762.

GE MONEY BANK v HADDAD, No. 148406; Court of Appeals No. 316223.

PEOPLE v EDISON, No. 148414; Court of Appeals No. 314449.

LEE v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 148415; Court of Appeals No. 318489.

PEOPLE v BYAS, No. 148418; Court of Appeals No. 315095.

In re HARDY ESTATE, No. 148424; Court of Appeals No. 315608.

PEOPLE v THOMAS JOHNSON, No. 148426; Court of Appeals No. 310799.

PEOPLE v GOODMAN, No. 148429; Court of Appeals No. 311131.

HARTFORD EQUITIES, INC v CLINTON COUNTY, No. 148430; Court of Appeals No. 313443.

TOMKIEWICZ v HALBOTH, No. 148438; Court of Appeals No. 316603.

PEOPLE v KEIPER, No. 148441; Court of Appeals No. 310472.

PEOPLE v CHRISTOPHER HERNANDEZ, No. 148455; Court of Appeals No. 314945.

WALTHALL v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 148459; Court of Appeals No. 317546.

PEOPLE v WELL, No. 148462; Court of Appeals No. 317471.

PEOPLE v TILL, No. 148463; Court of Appeals No. 317610.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v RACHEL MOORE, No. 148465; Court of Appeals No. 311870.

PEOPLE v ANTHONY GATES, No. 148471; Court of Appeals No. 316975.

PEOPLE v ESCOBAR, No. 148474; Court of Appeals No. 312382.

PEOPLE v BURNS, No. 148477; Court of Appeals No. 317255.

PEOPLE v ROSCOE, No. 148479; Court of Appeals No. 317398.

PEOPLE v LISA SMITH, No. 148481; Court of Appeals No. 313543.

PEOPLE v GENTZ, No. 148484; Court of Appeals No. 318279.

PEOPLE v NATALIE FOSTER, No. 148487; Court of Appeals No. 309365.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v GURBACHAN SINGH, No. 148490; Court of Appeals No. 312175.

PEOPLE v DUBY, No. 148491; Court of Appeals No. 315386.

PEOPLE v SHARON SMITH, No. 148492; Court of Appeals No. 315186.

PEOPLE v BOTHEL, No. 148496; Court of Appeals No. 310900.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v WILSON-STRAT, Nos. 148501 and 148502; Court of Appeals Nos. 310877 and 310879.

PEOPLE v DEESE, No. 148505; Court of Appeals No. 317705.

HAMMER v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 148507; Court of Appeals No. 305568.
MCCORMACK, J., not participating.

CMS ENERGY CORPORATION v DEPARTMENT OF TREASURY, No. 148514; Court of Appeals No. 309172.

PEOPLE v HUBBERT, No. 148516; Court of Appeals No. 316085.

PEOPLE v MARRERO, No. 148519; Court of Appeals No. 315448.

PEOPLE v BUCHANAN, No. 148534; Court of Appeals No. 318448.

IDA TOWNSHIP v SOUTHEAST MICHIGAN MOTORSPORTS, No. 148540; Court of Appeals No. 303595.

PEOPLE v DEANGELO BAKER, No. 148542; Court of Appeals No. 312075.

PEOPLE v WINSTANLEY, No. 148543; Court of Appeals No. 315260.

GEORVASSILIS v CHRYSLER GROUP, LLC, No. 148555; Court of Appeals No. 316174.

PEOPLE v BRAY, No. 148556; Court of Appeals No. 318206.

PEOPLE v JUTILA, No. 148557; Court of Appeals No. 315694.

LANTON v DEPARTMENT OF CORRECTIONS, No. 148559; Court of Appeals No. 316817.

PEOPLE v TOWNS, No. 148562; Court of Appeals No. 318244.

PEOPLE v BARBER, No. 148564; Court of Appeals No. 311238.

PEOPLE v FRANK SCHALK, No. 148583; Court of Appeals No. 318256.

LAWSON v FERGUSON, No. 148584; Court of Appeals No. 316677.

PEOPLE v DICKERSON, No. 148596; Court of Appeals No. 315473.

PEOPLE v WILBON, No. 148597; Court of Appeals No. 318125.

PEOPLE v WHITTY, No. 148598; Court of Appeals No. 315097.

PEOPLE v STITT, No. 148602; Court of Appeals No. 318435.

RICHARDSON v SCHOONOVER, No. 148603; Court of Appeals No. 311240.

DEMING v CH NOVI, LLC, No. 148604; Court of Appeals No. 309989.

CITIBANK, NA v MOSHE, No. 148605; Court of Appeals No. 315788.

PEOPLE v SWITEK, No. 148616; Court of Appeals No. 318187.

PEOPLE v BOBBY ROOKS, No. 148626; Court of Appeals No. 318611.

PEOPLE v WEATHERSPOON, No. 148634; Court of Appeals No. 313165.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v SANTONI, No. 148637; Court of Appeals No. 315455.

PEOPLE v JOYCE PHILLIPS, No. 148651; Court of Appeals No. 318283.

PEOPLE v ARTHUR ALLEN, No. 148662; Court of Appeals No. 318373.

PEOPLE v BERNARD SMITH, No. 148669; Court of Appeals No. 311548.

PEOPLE v MUKHTIAR SINGH, No. 148723; Court of Appeals No. 312421.

GUSMANO v GUSMANO, No. 148798; Court of Appeals No. 315908.

Reconsideration Denied April 28, 2014:

PEOPLE v DABNEY, No. 147297; Court of Appeals No. 312489. Leave to appeal denied at 495 Mich 912.

PEOPLE v HESS, No. 147487; Court of Appeals No. 312244. Summary disposition at 495 Mich 921.

PEOPLE v ARMOUR, No. 147542; Court of Appeals No. 311341. Leave to appeal denied at 495 Mich 946.

MCFADDEN v TITAN INSURANCE COMPANY, No. 147554; Court of Appeals No. 316012. Leave to appeal denied at 495 Mich 934.

CINTAS CORPORATION v STATE TAX COMMISSION, No. 147571; Court of Appeals No. 312004. Leave to appeal denied at 495 Mich 922.

CUMMINS BRIDGEWAY, LLC v STATE TAX COMMISSION, No. 147573; Court of Appeals No. 312005. Leave to appeal denied at 495 Mich 922.

TARGET CORPORATION v STATE TAX COMMISSION, No. 147575; Court of Appeals No. 312045. Leave to appeal denied at 495 Mich 922.

STATE PACKARD, LLC v ARTISAN BISTRO, LLC, No. 147597; Court of Appeals No. 308546. Leave to appeal denied at 495 Mich 902.

PEOPLE v HUGHES, No. 147616; Court of Appeals No. 304182. Leave to appeal denied at 495 Mich 939.

PEOPLE v AUGUSTUS ROBINSON, No. 147693; Court of Appeals No. 304878. Leave to appeal denied at 495 Mich 915.

PEOPLE v THREAT, No. 147699; Court of Appeals No. 310331. Leave to appeal denied at 495 Mich 915.

PEOPLE v TIGGART, No. 147737; Court of Appeals No. 314815. Leave to appeal denied at 495 Mich 916.

WARD v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 147785; Court of Appeals No. 313557. Leave to appeal denied at 495 Mich 934.

PEOPLE v JAMARIO MITCHELL, No. 147805; Court of Appeals No. 314357. Leave to appeal denied at 495 Mich 917.

Superintending Control Denied April 28, 2014:

PARTRICH v ATTORNEY GRIEVANCE COMMISSION, No. 147657.

BODNER-MYERS v ATTORNEY GRIEVANCE COMMISSION, No. 147949.

Leave to Appeal Before Decision by the Court of Appeals Denied April 30, 2014:

In re RAYOLA A BANFIELD TRUSTS, Nos. 149141 and 149142; Court of Appeals Nos. 321204 and 321206.

Leave to Appeal Denied May 1, 2014:

PILARSKI v VHS HURON VALLEY-SINAI HOSPITAL, INC, No. 149063; Court of Appeals No. 320149.

Summary Disposition May 2, 2014:

In re RYAN, No. 149033; Court of Appeals No. 318571. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the February 21, 2014 order of the Court of Appeals and we remand this case to the Court of Appeals for consideration as on reconsideration granted. On remand, the Court of Appeals shall either reinstate the children's claim of appeal or explain why the children do not have an appeal of right, pursuant to MCR 3.993(A)(1), from the trial court's September 27, 2013 order of disposition.

Leave to Appeal Denied May 2, 2014:

MOUNT PLEASANT PUBLIC SCHOOLS v MICHIGAN AFSCME COUNCIL 25, No. 148080; reported below: 302 Mich App 600.

CAVANAGH and MCCORMACK, JJ., would grant leave to appeal.

LAKEVIEW COMMUNITY SCHOOLS v LAKEVIEW EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, No. 148117; reported below: 302 Mich App 600.

CAVANAGH and MCCORMACK, JJ., would grant leave to appeal.

PEOPLE v MAXEY, No. 148233; Court of Appeals No. 316917.

In re ZANONI, No. 149124; Court of Appeals No. 317937.

Leave to Appeal Denied May 9, 2014:

In re COOMBES, No. 149003; Court of Appeals No. 316989.

Rehearing Denied May 9, 2014:

PEOPLE v CHENAULT, Nos. 146523 and 146524; reported at 495 Mich 142.

Leave to Appeal Denied May 14, 2014:

CLINTON TOWNSHIP v UNI-DIG, INC, No. 149217; Court of Appeals No. 321296.

Rehearing Denied May 14, 2014:

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC, No. 145052; reported at 495 Mich 161.

Leave to Appeal Denied May 16, 2014:

TIENDA v INTEGON NATIONAL INSURANCE COMPANY, No. 147483; reported below: 300 Mich App 605. On April 30, 2014, the Court heard oral argument on the application for leave to appeal the April 23, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, J. (*concurring*). I concur in the order denying leave to appeal. I agree with the Court of Appeals' analysis in this case and write only to highlight the difference between domicile and residence clarified in *Grange Ins Co v Lawrence*, 494 Mich 475 (2013), which was released after the published Court of Appeals opinion in this case. *Grange* involved the meaning of the word "domicile" in the context of the no-fault act, MCL 500.3101 *et seq*. This Court stated that

> the common law has necessarily distinguished between the concepts of "domicile" and "residence:"
>
> > The former, in its ordinary acceptation, was defined to be, 'A place where a person lives or has his home,' while '[a]ny-place of abode or dwelling place,' however temporary it might have been, was said to constitute a residence. A person's domicile was his legal residence or home in contemplation of law.
>
> Stated more succinctly, a person may have only one domicile, but more than one residence. For purposes of distinguishing "domicile" from "residence," this Court has explained that "domicile is acquired by the combination of residence and the intention to reside in a given place . . . . If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile." [*Id*. at 494-495 (citations omitted) (alteration in original).]

It is in determining domicile, and not residence, that an individual's intent to reside is relevant. Furthermore, because a person can have more than one residence, it is possible for an individual to be a resident of more than one state. In such a case, how the term "out-of-state resident" in MCL 500.3163 would apply to an individual who is a resident of both Michigan and another state is not one we need decide today, as this case presents no such question. The insured maintained no other living space in any other state at the time of the accident. He carried all his worldly possessions with him as he followed agricultural seasonal work from state to state. The insured had only one residence at the time of the accident, and that residence was in Michigan.[1]

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[1] Although I agree with the Court of Appeals that the insured was not an out-of-state resident at the time of the accident, I believe that the

MENARD, INC v DEPARTMENT OF TREASURY, Nos. 147883, 147884, 147885, 147886, and 147887; reported below: 302 Mich App 467.

ZAHRA, J. (*dissenting*). I respectfully dissent and would grant leave to appeal to consider whether plaintiffs are entitled to bad-debt deductions under MCL 205.54i from their sales tax remittances to the state based on credit sales to customers who defaulted on their credit card payments. MCL 205.54i provides that a "taxpayer" may deduct from its monthly sales tax remittance "the amount of bad debts." In *DaimlerChrysler Servs North America LLC v Dep't of Treasury*, 271 Mich App 625 (2006), the Court of Appeals held that DaimlerChrysler Services North America LLC, which had overpaid tax revenue to the Department of Treasury for motor vehicles sold to consumers by its affiliated dealers, was entitled to relief under MCL 205.54i in part because a nexus existed between the bad debt, DaimlerChrysler, and the retail sales. Specifically, the Court of Appeals reasoned that DaimlerChrysler was a "taxpayer" as defined under MCL 205.51(1)(m) as " 'a person subject to a tax under this act.' " *Id*. at 635, quoting MCL 205.51(1)(m). In turn, "person" was defined as " 'an individual, firm, partnership, joint venture . . . *or any other group or combination acting as a unit* . . . .' " *DaimlerChrysler*, 271 Mich App at 635, quoting MCL 205.51(1)(a) as amended by 2000 PA 390 (emphasis added). Having concluded that the plain language of the statute contemplated a broad array of taxpayers—including DaimlerChrysler and its affiliated dealers acting as a single, taxable entity for the purpose of the retail sale of automobiles—the Court of Appeals held that Chrysler was entitled under MCL 205.54i to recover overpayment. *DaimlerChrysler*, 271 Mich App at 635-636.

The Legislature enacted 2007 PA 105 shortly after the *DaimlerChrysler* decision, adding to MCL 205.54i a definition of "taxpayer" as

> a person that has remitted sales tax directly to the department on the specific sales at retail transaction for which the bad debt is recognized for federal income tax purposes or, after September 30, 2009, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes. [MCL 205.54i(1)(e).]

The enacting language of 2007 PA 105 provides that the amendatory act is, in part, meant to "correct[] any misinterpretation of the meaning of the term 'taxpayer' that may have been caused by the Michigan Court of Appeals decision in Daimler Chrysler . . . ." MCL 205.54i, enacting § 1. Significantly, the amendatory act did not change the definition of "person" on which the *DaimlerChrysler* Court relied.

In the instant case, the retailer-plaintiffs sold goods that consumers purchased by using private label credit cards bearing the retailers' names but issued by independent financial institutions. The plaintiffs contend that their actions, in conjunction with the actions of the respective financial institutions, qualified for the bad-debt deduction under MCL

Legislature might wish to review the language of MCL 500.3163 because the statute would seem to place liability on Michigan's Assigned Claims Facility even when an out-of-state insurance company has collected monthly premiums for an out-of-state insurance policy.

205.54i. Relying on 2007 PA 105 and the new definition of "taxpayer" in MCL 205.54i(1)(e), the Court of Appeals disagreed. But again, the new definition of "taxpayer" added by 2007 PA 105 relies on the definition of "person" provided in MCL 205.51(1)(a), which remains unchanged from when the Court of Appeals decided *DaimlerChrysler*. Thus, plaintiffs' contention that they are taxpayers under MCL 205.54(1)(e) is at least plausible given that their actions, in conjunction with those of the respective lenders, presumably constitute those of "any other group or combination acting as a unit," thereby making each plaintiff a "person" under MCL 205.54(1)(a). The Court of Appeals in this case failed to address the relevant definition of "person" when it omitted the phrase "any other group or combination acting as a unit" from its analysis of MCL 205.54(1)(a). *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 481-482 (2013). Rather, the Court of Appeals stated that "MCL 205.51(1)(a) defines 'person' to include '[a] municipal or private corporation[,] whether organized for profit or not, [and a] company,' " and stated that "[t]herefore, the payment of the bad debt by a third party lender, an organized corporation, does not entitle retailers to a bad debt refund." *Id*.

PEOPLE v FRY, No. 147994; Court of Appeals No. 315651.

Summary Disposition May 21, 2014:

In re PETITION OF INGHAM COUNTY TREASURER FOR FORECLOSURE OF CERTAIN PARCELS OF PROPERTY, No. 147661; Court of Appeals No. 312547. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Ingham Circuit Court for consideration of whether the petitioners were given adequate notice prior to the foreclosure of the property. See *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 8, 10 (2007) (holding that MCL 211.78k(6) deprives the circuit court of jurisdiction to alter a judgment of foreclosure, but that such a rule could, in some cases, violate a person's constitutional right to due process). We do not retain jurisdiction.

PEOPLE v BRANDON MITCHELL, No. 148111; Court of Appeals No. 311147. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the Livingston Circuit Court erred in concluding that the district court's exclusion of the defense expert testimony was not harmless beyond a reasonable doubt with respect to the defendant's conviction for operating a motor vehicle while visibly impaired, MCL 257.625(3). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v SCHOMAKER, No. 148263; Court of Appeals No. 316095. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of sentence, and we remand this case to the Saginaw Circuit Court. The sentencing guidelines apply to probation violation sentences. *People v Hendrick*, 472 Mich 555 (2005). The upper limit of the

defendant's sentencing guidelines range was less than 18 months, and the court was required to impose an intermediate sanction under MCL 769.34(4)(a) unless it provided a substantial and compelling reason to depart from the guidelines range in accordance with MCL 769.34(3). The court erred by departing from the sentencing guidelines range without providing a substantial and compelling reason, contrary to *People v Babcock*, 469 Mich 247 (2003). On remand, the trial court shall sentence the defendant to an intermediate sanction, or state on the record a substantial and compelling reason for departing from the sentencing guidelines range. We note that the acts giving rise to the probation violation may provide a substantial and compelling reason to depart. *Hendrick*, *supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v TIMOTHY THOMAS, No. 148522; Court of Appeals No. 312483. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals to the extent that it affirmed the lower court's order for the payment of a specific amount of restitution, we vacate the sentence of the Wayne Circuit Court insofar as it ordered the defendant to pay restitution in the amount of $35,000, and we remand this case to the circuit court to conduct an evidentiary hearing to determine the appropriate amount of restitution to be paid by the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

LEGACY FIVE, LLC v CITY OF JACKSON, No. 148765; Court of Appeals No. 318137. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, for the reasons stated by the Court of Appeals dissenting judge, and we remand this case to the Court of Appeals for further proceedings.

Leave to Appeal Granted May 21, 2014:

AFT MICHIGAN v STATE OF MICHIGAN, No. 148748; reported below: 303 Mich App 651.

Leave to Appeal Denied May 21, 2014:

MICHIGAN ASSOCIATION OF CHIROPRACTORS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 147176; reported below: 300 Mich App 551.

MICHIGAN ASSOCIATION OF CHIROPRACTORS v BLUE CARE NETWORK OF MICHIGAN, INC, No. 147178; reported below: 300 Mich App 577.

PEOPLE v CRUMP, No. 147950; Court of Appeals No. 298206.

MAY v MERCY MEMORIAL NURSING CENTER, No. 148001; Court of Appeals No. 303999.

MAY v MERCY MEMORIAL NURSING CENTER, Nos. 148019 and 148020; Court of Appeals Nos. 303999 and 304832.

PEOPLE v CARROLL, No. 148132; Court of Appeals No. 314415.

PEOPLE v TULLOS, No. 148186; Court of Appeals No. 315748.

BROWN v BROWN, No. 148553; Court of Appeals No. 315911.

Superintending Control Denied May 21, 2014:

In re STRYKER HIP IMPLANT LITIGATION, No. 148698.

Leave to Appeal Granted May 23, 2014:

SERVICE SOURCE, INC, LLC v DHL EXPRESS (USA), INC, No. 147860; Court of Appeals No. 301013. The parties shall include among the issues to be briefed: (1) whether the two agreements at issue are requirements contracts, and if so, whether that affects the issue of the defendant's alleged breach of contract; (2) whether summary disposition was appropriately granted to the plaintiffs on the issue of liability; and (3) assuming that the defendant is liable for breach of contract, the period for which the defendant is responsible for plaintiff's lost profits.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 23, 2014:

PEOPLE v HERSHEY, No. 148627; reported below: 303 Mich App 330. At oral argument, the parties shall address whether the defendant waived his challenges to scoring of Offense Variable (OV) 16, MCL 777.46, and OV 19, MCL 777.49, when the defendant and his counsel informed the trial court they reviewed and discussed the Presentence Investigation Report and had no additions, deletions or corrections to offer. The parties shall files supplemental briefs within 42 days following the appointment of counsel, but they should not submit mere restatements of their applications papers.

Leave to Appeal Denied May 23, 2014:

In re HARDIMAN, No. 149026; Court of Appeals No. 317996.

Reconsideration Denied May 23, 2014:

In re RAYOLA A BANFIELD TRUSTS, Nos. 149141 and 149142; Court of Appeals Nos. 321204 and 321206. Summary disposition at 495 Mich 997.

Application for Leave to Appeal Dismissed on Stipulation May 23, 2014:

In re TALH, No. 148066; reported below: 302 Mich App 594.

Summary Disposition May 27, 2014:

PEOPLE v SHAMAZZ FOSTER, No. 148139; Court of Appeals No. 316745. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate only the defendant's two sentences for second-degree criminal sexual conduct, and we remand this case to the Wayne Circuit Court for resentencing on those two convictions. The trial court was without authority to impose a maximum sentence other than that provided by law. MCL 769.8(1); MCL 750.520c(2).

Leave to Appeal Denied May 27, 2014:

PEOPLE v PINK, No. 145650; Court of Appeals No. 310287.

PEOPLE v OLIVERO, No. 145935; Court of Appeals No. 305506.

PEOPLE v JAMES KELLEY, No. 145939; Court of Appeals No. 311303.

PEOPLE v VICTOR SCHALK, No. 145986; Court of Appeals No. 311409.

PEOPLE v PINK, No. 146032; Court of Appeals No. 304909.

PEOPLE v MCNAMARA, No. 146073; Court of Appeals No. 305690.

PEOPLE v ROBIN YOUNG, No. 146090 and 146091; Court of Appeals No. 311521 and 311522.

PEOPLE v SCOTT STEVENS, No. 146213; Court of Appeals No. 311489.

PEOPLE v WOOD, No. 146221; Court of Appeals No. 312039.

PEOPLE v DUNN, No. 146329; Court of Appeals No. 305671.

PEOPLE v HOOVER, No. 146774; Court of Appeals No. 308115.

PEOPLE v LEGAULT, No. 146835; Court of Appeals No. 310501.

PEOPLE v WORDEN, No. 146903; Court of Appeals No. 304509.

PEOPLE v GUNN, No. 146913; Court of Appeals No. 308145.

PEOPLE v FOMBY, No. 147124; Court of Appeals No. 305602.

PEOPLE v STACEY ANDERSON, No. 147238; reported below: 300 Mich App 652.

PEOPLE v MICAI HILL, No. 147338; Court of Appeals No. 304972.

PEOPLE v GLEN ANTHONY, No. 147523, 147524, 147525, 147526, and 147527; Court of Appeals Nos. 300212, 300264, 308204, 308205, and 308212.

PEOPLE v BOWER, No. 147560; Court of Appeals No. 308825.

PEOPLE v WHYTE, No. 147698; Court of Appeals No. 312679.

PEOPLE v ECKERT, No. 147712; Court of Appeals No. 317026.

PEOPLE v JUSTIN STEPHENS, No. 147869; Court of Appeals No. 306032.

PEOPLE v THREET, No. 147982; Court of Appeals No. 315661.

PEOPLE v MOORER, No. 147985; Court of Appeals No. 317670.

SCOTTI v OAKLAND COUNTY SHERIFF, No. 148027; Court of Appeals No. 316700.

PEOPLE v HYROSHA WILSON, No. 148037; Court of Appeals No. 305063.

STATE TREASURER v HUTCHESON, No. 148059; Court of Appeals No. 318131.

PEOPLE v BRADSHAW-LOVE, No. 148074; Court of Appeals No. 312315.

PEOPLE v WILLIAM BROWN, No. 148082; Court of Appeals No. 316760.

ADKINS v ADKINS, No. 148086; Court of Appeals No. 314556.

PEOPLE v HITSMAN, No. 148098; Court of Appeals No. 314542.

PEOPLE v MENDOZA, No. 148120; Court of Appeals No. 317767.

PEOPLE v RIDEAUX, No. 148137; Court of Appeals No. 314384.

PEOPLE v TIMOTHY DAWSON, No. 148141; Court of Appeals No. 314882.

PEOPLE v MARK PORTER, No. 148144; Court of Appeals No. 298474.

PEOPLE v HAIRSTON, No. 148148; Court of Appeals No. 313909.

PEOPLE v CURTIS JONES, No. 148176; Court of Appeals No. 313463.

ROGERS EXCAVATING, INC v MANA PROPERTIES, LLC, No. 148185; Court of Appeals No. 308514.

MEDILODGE OF OXFORD v DEPARTMENT OF COMMUNITY HEALTH, No. 148212; Court of Appeals No. 315526.

PEOPLE v JARRHOD WILLIAMS, No. 148225; Court of Appeals No. 317374.

PEOPLE v CARLTON, No. 148230; Court of Appeals No. 318240.

PEOPLE v GIERZAK, No. 148251; Court of Appeals No. 311443.

PEOPLE v GOBER, No. 148260; Court of Appeals No. 309323.

PEOPLE v CORDER, No. 148264; Court of Appeals No. 307027.

PEOPLE v REYNALDO GONZALEZ, No. 148266; Court of Appeals No. 316775.

PEOPLE v KENNETH JOHNSON, No. 148267; Court of Appeals No. 316798.

PEOPLE v NOONAN, No. 148268; Court of Appeals No. 316103.

PEOPLE v KIKUCHI, No. 148269; Court of Appeals No. 313979.

PEOPLE v KENNETH SIMS, No. 148279; Court of Appeals No. 316482.

PEOPLE v POPE, No. 148286; Court of Appeals No. 306372.

PEOPLE v GARY WATKINS, No. 148287; Court of Appeals No. 318199.

PEOPLE v ROBERT HOWARD, No. 148291; Court of Appeals No. 314298.

PEOPLE v ASHMAN, No. 148292; Court of Appeals No. 313510.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD v KOSTERS & DEVRIES, INC, No. 148296; Court of Appeals No. 311103.

PEOPLE v ALANA, No. 148325; Court of Appeals No. 316954.

PEOPLE v BELTON, No. 148329; Court of Appeals No. 302107.

KIRSCH v SUPERINTENDENT OF PUBLIC INSTRUCTION, No. 148331; Court of Appeals No. 311121.

PEOPLE v VICKERS, No. 148355; Court of Appeals No. 314915.

PEOPLE v DANIELS, No. 148356; Court of Appeals No. 316725.

PEOPLE v DIXISON, No. 148365; Court of Appeals No. 318458.

COLEMAN v UNDERWOOD, No. 148368; Court of Appeals No. 315036.

COLEMAN v UNDERWOOD, No. 148567; Court of Appeals No. 315036.

CAUDILL v SHELDON MILLER LAW FIRM, No. 148385; Court of Appeals No. 310714.

In re FORFEITURE OF APPROXIMATELY 530 POUNDS OF MARIJUANA, No. 148407; Court of Appeals No. 314533.

BROWN v WACHOVIA MORTGAGE, No. 148408; Court of Appeals No. 307344.

PEOPLE v MARCUS MANNING, No. 148466; Court of Appeals No. 309876.

PEOPLE v JOSEPH WILLIAMS, No. 148473; Court of Appeals No. 307183.

PEOPLE v EIROSIUS, No. 148494; Court of Appeals No. 318208.

PEOPLE v FRAME, No. 148495; Court of Appeals No. 310591.

PEOPLE v MARC BENNETT, No. 148504; Court of Appeals No. 311234.

PEOPLE v HARTUNG, No. 148508; Court of Appeals No. 311239.

PEOPLE v ROBERT MARTINEZ, No. 148509; Court of Appeals No. 318414.

PEOPLE v SPANN, No. 148510; Court of Appeals No. 317736.

CITY OF EAST LANSING v RAPP, No. 148520; Court of Appeals No. 315433.

PEOPLE v IRVIN, No. 148523; Court of Appeals No. 306188.

PEOPLE v SHANNON ANDERSON, No. 148527; Court of Appeals No. 302023.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v DARYL FOSTER, No. 148536; Court of Appeals No. 313757.

ISAAC v STANDARD PARKING CORPORATION, No. 148546; Court of Appeals 303642.

PEOPLE v KULLMAN, No. 148563; Court of Appeals No. 315639.

PEOPLE v KARES, No. 148566; Court of Appeals No. 312680.

PEOPLE v PATZKOWSKY, No. 148572; Court of Appeals No. 313232.

PEOPLE v LEONARD COLLINS, No. 148573; Court of Appeals No. 315496.

PEOPLE v JULIAN, No. 148574; Court of Appeals No. 312316.

SOKOLOWSKI v MACOMB COUNTY, No. 148580; Court of Appeals No. 311611.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v DEANGELO WILLIAMS, No. 148581; Court of Appeals No. 312212.

PEOPLE v GANT, No. 148582; Court of Appeals No. 316738.

PEOPLE v MICHAEL MORRIS, No. 148587; Court of Appeals No. 303102.

PEOPLE v DAVENPORT, No. 148599; Court of Appeals No. 315175.

BAY COUNTY v BLUE CROSS BLUE SHIELD, No. 148606; Court of Appeals No. 307447.

PEOPLE v BROADWAY, No. 148608; Court of Appeals No. 318095.

PEOPLE v TYRONZA MILLER, No. 148610; Court of Appeals No. 312773.

PRYOR v HARPER HOSPITAL-DMC, No. 148613 and 148614; Court of Appeals Nos. 301942 and 307944.

PITTS v GENERAL MOTORS CORPORATION, No. 148615; Court of Appeals No. 315736.

PEOPLE v CAMPBELL, No. 148623; Court of Appeals No. 318301.

REID v CITY OF FLINT, No. 148630; Court of Appeals No. 315345.

PEOPLE v JEDD, No. 148641; Court of Appeals No. 311867.

PEOPLE v PIERSON, No. 148642; Court of Appeals No. 309315.

PEOPLE v PRUETT, No. 148649; Court of Appeals No. 318220.

PEOPLE v KARL COTTON, No. 148650; Court of Appeals No. 311956.

PEOPLE v BENDER, No. 148657; Court of Appeals No. 318517.

PEOPLE v WOODSON, No. 148658; Court of Appeals No. 318480.

PEOPLE v KENNETH WRIGHT, No. 148659; Court of Appeals No. 308765.

BOLISH v MILLER PARK TOWNHOMES, LLC, No. 148661; Court of Appeals No. 310100.

PEOPLE v MARGOSIAN, Nos. 148663, 148664, and 148665; Court of Appeals Nos. 306847, 306850, and 306851.

PEOPLE v LEONARD MULLINS, No. 148673; Court of Appeals No. 312179.

PEOPLE v NICKERSON, No. 148675; Court of Appeals No. 308060.

PEOPLE v NAZARKO, No. 148676; Court of Appeals No. 309276.

PEOPLE v SNEED, No. 148679; Court of Appeals No. 318718.

PEOPLE v REGINALD TAYLOR, No. 148700; Court of Appeals No. 312355.

PEOPLE v STEWARD, No. 148701; Court of Appeals No. 318704.

PEOPLE v MAURICE BANKS, No. 148702; Court of Appeals No. 312482.

PEOPLE v FORDHAM, No. 148703; Court of Appeals No. 318365.

MAULDIN v TRANSPORTATION SECURITY ADMINISTRATION, No. 148707; Court of Appeals No. 316221.

PEOPLE v CARLETUS WILLIAMS, No. 148711; Court of Appeals No. 319887.

PEOPLE v HALLER, No. 148715; Court of Appeals No. 318490.

PEOPLE v JEANNETTE DAVIS, No. 148738; Court of Appeals No. 312533.

PEOPLE v LIONEL BENNETT, No. 148745; Court of Appeals No. 312592.

PEOPLE v CLEMONS, No. 148746; Court of Appeals No. 319179.

STRUDGEON v BURT WATSON CHEVROLET-PONTIAC, LLC, No. 148750; Court of Appeals No. 316965.

PEOPLE v DERRICK ELLIS MYERS, No. 148751; Court of Appeals No. 305352.

PEOPLE v JEREMY ALLEN, No. 148759; Court of Appeals No. 318476.

PEOPLE v BESON, No. 148763; Court of Appeals No. 318878.

PEOPLE v QUINN, No. 148771; Court of Appeals No. 318759.

PEOPLE v EPPERSON, No. 148772; Court of Appeals No. 311933.

PEOPLE v MCCALLUM, No. 148773; Court of Appeals No. 318499.

PEOPLE v CAYLOR, No. 148778; Court of Appeals No. 312239.

BOWMAN v MICHIGAN HIGHER EDUCATION ASSISTANCE AUTHORITY, No. 148780; Court of Appeals No. 313444.

BURNS v FOREST RIVER, INC, No. 148781; Court of Appeals No. 316591.

PEOPLE v RICE, No. 148787; Court of Appeals No. 319003.

DIRETTE v DAIRY QUEEN OF PRUDENVILLE, No. 148796; Court of Appeals No. 309604.

BEAR CREEK VILLAGE ASSOCIATION v BAJOR, No. 148808; Court of Appeals No. 312346.

MCINTIRE v MICHIGAN INSTITUTE OF UROLOGY, No. 148812; Court of Appeals No. 311599.

PEOPLE v DUNCAN WILLIAMS, No. 148823; Court of Appeals No. 319261.

PEOPLE v SPECKIN, No. 148825; Court of Appeals No. 319193.

PEOPLE v TIMOTHY WILLIAMS, No. 148832; Court of Appeals No. 318540.

PEOPLE v MITCHELL HALL, No. 148850; Court of Appeals No. 319241.

PEOPLE v LAUNDRY, No. 148853; Court of Appeals No. 319014.

PEOPLE v WYNN, No. 148859; Court of Appeals No. 319426.

LANDERS v GRAND BLANC REHABILITATION AND NURSING CENTER, No. 149054; Court of Appeals No. 318367.

In re FORFEITURE OF $59,760, No. 149160; Court of Appeals No. 320261.

Superintending Control Denied May 27, 2014:

REEVES v ATTORNEY GRIEVANCE COMMISSION, No. 147997.

Reconsideration Denied May 27, 2014:

OGILVIE v OGILVIE, No. 147510; Court of Appeals No. 310935. Leave to appeal denied at 495 Mich 934.

PEOPLE v ECHOLS, No. 147533; Court of Appeals No. 312933. Leave to appeal denied at 495 Mich 952.

PEOPLE v MORAN, No. 147760; Court of Appeals No. 316723. Leave to appeal denied at 495 Mich 919.

PEOPLE v ROSE, No. 147803; Court of Appeals No. 297769. Leave to appeal denied at 495 Mich 934.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 147874. Superintending control denied at 495 Mich 918.

PEOPLE v STATON, No. 147918; Court of Appeals No. 314265. Leave to appeal denied at 495 Mich 947.

PEOPLE v THURMOND, No. 147938; Court of Appeals No. 314946. Leave to appeal denied at 495 Mich 947.

PEOPLE v MARK ANDERSON, No. 147943; Court of Appeals No. 314358. Leave to appeal denied at 495 Mich 936.

PEOPLE v MARSHALL, No. 148091; Court of Appeals No. 315805. Leave to appeal denied at 495 Mich 949.

ZIEGLER v DEPARTMENT OF COMMUNITY HEALTH, No. 148166; Court of Appeals No. 314686. Leave to appeal denied at 495 Mich 950.

Leave to Appeal Denied May 28, 2014: :

ESTATE OF TURNER v HOLLOWAY, No. 149333; Court of Appeals No. 319305.

Rehearing Denied May 28, 2014:

WURTZ v BEECHER METROPOLITAN DISTRICT, No. 146157; reported at 495 Mich 242.

Reconsideration Denied May 30, 2014:

PEOPLE v ROSS, No. 147945; Court of Appeals No. 315858. Leave to appeal denied at 495 Mich 918.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered September 18, 2013:

PROPOSED AMENDMENTS OF MCR 2.510.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.510 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.510. JUROR PERSONAL HISTORY QUESTIONNAIRE.

(A) [Unchanged.]

(B) Completion of Questionnaire.

(1) The court clerk or the jury board, as directed by the chief judge, shall supply each juror drawn for jury service with a questionnaire in the form adopted pursuant to subrule (A). The court clerk or the jury board shall direct the juror to complete the questionnaire ~~in the juror's own handwriting~~ before the juror is called for service.

(2) [Unchanged.]

(C) Return of ~~Filing~~ the Questionnaire.

(1)On completion, the questionnaire shall be ~~filed with~~ returned to the court clerk or the jury board, as designated under subrule (B)(1). The only persons allowed to examine the questionnaire are:

(a)-(d) [Unchanged.]

(2) [Unchanged.]

(3) The questionnaires must be maintained ~~kept on file~~ for 3 years from the time they are completed ~~filled out~~. They may be created and maintained in any medium authorized by court rules pursuant to MCR 1.109.

(D) Summoning Jurors for Court Attendance. The court clerk, the court administrator, the sheriff, or the jury board, as designated by the chief judge, shall summon jurors for court attendance at the time and in the manner directed by the chief judge ~~or the judge to whom the action~~

~~in which jurors are being called for service is assigned~~. For a juror's first required court appearance, service must be by written notice addressed to the juror at the juror's residence as shown by the records of the clerk or jury board. The notice may be by ordinary mail or by personal service. For later service, notice may be in the manner directed by the court. The person giving notice to jurors shall keep a record of the notice and make a return if directed by the court. The return is presumptive evidence of the fact of service.

(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.510 would allow courts to authorize prospective jurors to complete and return questionnaires electronically, and would allow courts to create and maintain them electronically (i.e., in any medium authorized by court rules pursuant to MCR 1.109). The proposed change also would delete language in MCR 2.501(D) to clarify that the chief judge is responsible for initiation of the court's policies for summoning prospective jurors.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 6, 2013:

PROPOSED AMENDMENTS OF MCR 2.302.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(B)-(H) [Unchanged.]

Staff Comment: The proposed amendment would clarify that discovery is available in postjudgment proceedings in domestic relations matters.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 6, 2013:

PROPOSED AMENDMENTS OF MCR 3.602.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.602 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.602. ARBITRATION.

(A) Applicability of Rule. Courts shall have all powers described in MCL 691.1681 *et seq*., or reasonably related thereto, for arbitrations

governed by that statute. The remainder of this rule applies to all other forms of arbitration, in the absence of contradictory provisions in the arbitration agreement or limitations imposed by statute, including MCL 691.1683(2). ~~This rule governs statutory arbitration under MCL 600,5001-600.5035.~~

(B) Proceedings ~~to Compel or to Stay~~Regarding Arbitration~~:~~

(1) A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions.

(2) On motion of a party showing an agreement to arbitrate ~~that conforms to the arbitration statute~~, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement ~~and the arbitration statute~~. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the motion.

(3) On motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) A motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C)-(E) [Unchanged.]

(F) Discovery and Subpoenas~~; Depositions~~.

(1) The court may enforce a subpoena or discovery-related order for the attendance of a witness in this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state on conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. ~~MCR 2.506 applies to arbitration hearings.~~

(2) A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this state and, on motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

(3) ~~(2)~~On a party's request, the arbitrator may permit the taking of a deposition, for use as evidence, of a witness who cannot be subpoenaed or is unable to attend the hearing. The arbitrator may designate the manner of and the terms for taking the deposition.

(G)-(H) [Unchanged.]

(I) Award; Confirmation by Court. A party may move for confirmation of an arbitration award~~An arbitration award filed with the clerk of the court designated in the agreement or statute~~ within one year after the

award was rendered. The court may ~~be~~ confirm~~ed by~~ the ~~court~~ award, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint or motion to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2)-(5) [Unchanged.]

(K)-(N) [Unchanged.]

Staff Comment: The proposed changes of MCR 3.602 would apply to all other forms of arbitration that are not described in the newly adopted Revised Uniform Arbitration Act, MCL 691.1681 *et seq*.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 6, 2013:

PROPOSED AMENDMENTS OF MCR 6.302.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(F) [Unchanged.]

(G) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Staff Comment: This proposed amendment would add a harmless-error provision identical to that in FR Crim P 11(h).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-11. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 27, 2013:

PROPOSED AMENDMENTS OF MCR 3.705.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.705 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A)-(B) [Unchanged.]

(C) Pursuant to 18 USC 2265(d)(3), a court is prohibited from making available to the public on the Internet any information regarding the registration of, filing of a petition for, or issuance of an order under this rule if such publication would be likely to publicly reveal the identity or location of the party protected under the order.

Staff Comment: The proposed amendment of MCR 3.705(C) would prohibit publication of information on the Internet that could reveal the identity or location of the protected party.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov.

When filing a comment, please refer to ADM File No. 2013-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered January 29, 2014:

PROPOSED AMENDMENTS OF MCR 3.210.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.210 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1) ~~Default cases are governed by MCR 2.603.~~This subrule applies to the entry of a default and a default judgment in all cases governed by this subchapter.

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.~~Entry of Default.

(a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth proof of service and failure to plead or otherwise defend, the clerk must enter a default of the party.

(b) The party who requested entry of the default must provide prompt notice, as provided by MCR 3.203, to the defaulted party and all other parties and persons entitled to notice that the default has been entered, and file a proof of service.

(c) Except as provided under subrule (B)(2)(d), after the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court under subrule (B)(3).

(d) The court may permit a party in default to participate in discovery as provided in Subchapter 2.300, file motions, and participate in court proceedings, referee hearings, mediations, arbitrations, and other alternative dispute resolution proceedings. The court may impose conditions or limitations on the defaulted party's participation.

(e) A party in default must be served with the notice of default and a copy of every paper later filed in the case as provided by MCR 3.203, and the person serving the notice or other paper must file a proof of service with the court.

(3) ~~If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court.~~Setting Aside Default. Except when grounded on lack of jurisdiction over the defendant or subject matter, a default may be set aside, before entry of the default judgment, upon verified motion of the defaulted party showing good cause.

(4) ~~If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion.~~Notice of Hearing and Motion for Entry of Default Judgment.

(a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service.

(b) Service under subrule (B)(4)(a) shall be made in the manner provided by MCR 3.203 or, as permitted by the court, in any manner reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.

(c) If the default is entered for failure to appear for a scheduled trial or hearing, notice under this subrule is not required.

(5) ~~If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it.~~Entry of Default Judgment.

(a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. Nonmilitary affidavits required by law must be filed before a default judgment is entered in cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

(c) The moving party may be required to present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence.

(d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.

(e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment under MCR 2.602(B)(3), in conformity with the court's ruling, or as otherwise directed by the court.

(f) Upon entry of a default judgment and as provided by MCR 3.203, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, and promptly file a proof of service.

(6) Setting Aside Default Judgment.

(a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by subrule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for the entry of the judgment under subrule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.

(b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.

(7) Costs. An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions, including imposition of a reasonable attorney fee.

(C)-(D) [Unchanged.]

(E) Consent Judgment.

(1) At a hearing, any party may present to the court for entry a judgment approved as to form and content and signed by all parties and their attorneys of record.

(2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.

(3) Upon entry of a consent judgment and as provided by MCR 3.203, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered and promptly file a proof of service.

Staff Comment: The proposed amendments of MCR 3.210 would clarify default and default judgment procedures to be used in domestic relations cases. The proposed amendments also would allow parties to reach agreement on issues related to property division, custody, parent-

ing time, and support, and enter a consent judgment on those issues if the court approves. These proposed amendments were developed by a workgroup of family law practioners and judges (assisted by SCAO staff) who were instrumental in creation of an earlier version of this proposal that had been published for comment. Following reconsideration of some provisions of the earlier version, members of the group reconvened and formulated a revised proposal, which is the subject of this publication order.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-32. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered January 29, 2014:

Proposed Amendments of Rules 3.800, 3.801, 3.802, 3.804, 3.807, 5.109, 5.401, 5.402, and 5.404 of the Michigan Court Rules.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.800, 3.801, 3.802, 3.804, 3.807, 5.109, 5.401, 5.402, and 5.404 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) Generally. Except as modified by MCR 3.801-3.807, adoption proceedings~~,~~ are governed by Michigan Court Rules, the Adoption Code, MCL 710.21 *et seq.*, and, as applicable, the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, and the Indian Child Welfare Act, 25 USC 1901 *et seq*.

(B) Interested Parties.

(1) [Unchanged.]

(2)If the court knows or has reason to know the adoptee is an Indian child, in addition to subrule (B)(1)~~the above~~, the persons interested are the Indian child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:

(a)-(c) [Unchanged.]

(d) if the court knows or has reason to know the adoptee is an Indian child, the Indian child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

RULE 3.801. PAPERS, EXECUTION.

(A)A waiver, affirmation, or disclaimer to be executed by the father of a child born out of wedlock may be executed any time after the conception of the child. If a putative father acknowledges paternity, he cannot waive notice of hearing if the child is an Indian child.

(B) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Papers.

(1)-(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child. If the court knows or has reason to know an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6),

(a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested and delivery restricted to the addressee, of the pending proceedings on a petition for adoption of the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

(4) [Unchanged.]

(B) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to

locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

RULE 3.804. CONSENT AND RELEASE ~~HEARING~~.

(A) Contents and Execution of Consent or Release.

In addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

(1) except in stepparent adoptions under MCL 710.23a(4), both parents must consent.

(2) to be valid, consent must be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. The court shall also certify that either the parent fully understood the explanation in English or that it was interpreted into a language that the parent understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.

(3) the consent must contain the information prescribed by MCL 712B.13(2).

(4) in a direct placement, as defined in MCL 710.22(o), a consent by a parent shall be accompanied by a verified statement that complies with MCL 712B.13(6).

(B) Hearing.

(1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.

(2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29. Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).

(C) Withdrawal of Consent to Adopt Indian Child.

A parent who executes a consent under MCL 712B.13 may withdraw that consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the child. Once a demand is filed with the court, the court shall order the return of the child. Withdrawal of consent under MCL 712B.13 constitutes a withdrawal of a release executed under MCL 710.29 or a consent to adopt executed under MCL 710.44.

RULE 3.807. INDIAN CHILD.

(A) [Unchanged.]

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) [Unchanged.]

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d) [Unchanged.]

(3) [Unchanged.]

(C) [Unchanged.]

RULE 5.109. NOTICE OF GUARDIANSHIP PROCEEDINGS CONCERNING INDIAN CHILD.

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested and delivery restricted to the addressee, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. If a petition is filed with the court that subsequently identifies the minor as an Indian child after a guardianship has been established, notice of that petition must be served in accordance with this subrule.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

RULE 5.401. GENERAL PROVISIONS.

This subchapter governs guardianships, conservatorships, and protective order proceedings. The other rules in chapter 5 also apply to these proceedings unless they conflict with rules in this subchapter. Except as modified in this subchapter, proceedings for guardianships of adults and minors, conservatorships, and protective orders shall be in accordance with the Estates and Protected Individuals Code, 1998 PA 386 and, where applicable, the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, the Indian Child Welfare Act, 25 USC 1901 *et seq.*, or the Mental Health Code, 1974 PA 258, as amended.

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(2) [Unchanged.]

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in accordance with MCR 5.109(1).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d) [Unchanged.]

(4) The Indian custodian of the child~~, and~~ the Indian child's tribe, and the Indian child have a right to intervene at any point in the proceeding pursuant to MCL 712B.7(6).

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall provide notice of the guardianship and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be mailed to the guardian by first-class mail.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor.

(1) Petition. A petition for guardianship of a minor shall be filed on a form approved by the State Court Administrative Office. The petitioner shall state in the petition whether or not the minor is an Indian child or whether that fact is unknown. The petitioner shall document all efforts

made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian.

(2) Investigation. Upon the filing of a petition, the court may appoint a guardian ad litem to represent the interests of a minor and may order the Department of Human Services or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1). If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1). The report shall be filed with the court and served no later than 7 days before the hearing on the petition. If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership.

(3) Guardianship of an Indian Child. If the petition involves an Indian child and both parents intend to execute a consent pursuant to MCL 712B.13 and these rules, the court shall proceed under subrule (B). If the petition involves an Indian child and a consent will not be executed pursuant to MCL 712B.13 and these rules, the petitioner shall state in the petition what active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as defined in MCR 3.002(1). The court shall proceed under subrule (C).

(4) Social History. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the ~~s~~State ~~c~~Court ~~a~~Administrative ~~o~~Office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

[Please note that proposed subrule (5) below is language that has been moved from current MCR 5.404(B)(2).]

(5) Limited Guardianship of the Child of a Minor. On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.

~~(B) Limited Guardianship.~~

~~(1) Modification of Placement Plan.~~

~~(a)The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.~~

~~(b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days of the filing of the proposed modified plan.~~

~~(c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.~~

~~(d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.~~

~~(2) Limited Guardianship of the Child of a Minor. On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.~~

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian. \und

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.

(2) Hearing. The court must conduct a hearing on a petition for voluntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing on the petition must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).

(b) that a valid consent has been executed by both parents or the Indian custodian as required by MCL 712B.13 and this subrule.

(c) if it is in the Indian child's best interest to appoint a guardian.

(d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.

(3) Withdrawal of Consent. A consent may be withdrawn at any time by sending written notice to the court substantially in compliance with a form approved by the State Court Administrative Office. Upon receipt of the notice, the court shall immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian except, if both parents executed a consent, both parents must withdraw their consent or the court must conduct a hearing within 21 days to determine whether to terminate the guardianship.

(C) Involuntary Guardianship of an Indian Child.

(1) Hearing. The court must conduct a hearing on a petition for involuntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).

(b) if the placement with the guardian meets the placement requirements in subrule (C)(2) and (3).

(c) if it is in the Indian child's best interest to appoint a guardian.

(d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.

(e) whether or not each parent wants to consent to the guardianship if consents were not filed with the petition. If each parent wants to consent to the guardianship, the court shall proceed in accordance with subrule (B).

(2) Placement. An Indian child shall be placed in the least restrictive setting that most approximates a family and in which his or her special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child. Absent good cause to the contrary, the placement of an Indian child must be in descending order of preference with:

(a) a member of the child's extended family,

(b) a foster home licensed, approved, or specified by the child's tribe,

(c) an Indian foster family licensed or approved by the Department of Human Services,

(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(3) Deviating from Placement. The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c). If the Indian child's tribe has established a different order of preference than the order prescribed in subrule (C)(2), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). Where appropriate, the preference of the Indian child or parent shall be considered.

(D) Hearing. If the petition for guardianship of a minor does not indicate that the minor is an Indian child as defined in MCR 3.002(12), the court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petitioner to comply with MCR 5.404(A)(1).

(~~C~~E) Limited Guardianship Placement Plans and Court-Structured Plans.

(1) All limited guardianship placement plans and court-structured plans shall at least include provisions concerning all of the following:

(a) visitation and contact with the minor by the parent or parents sufficient to maintain a parent and child relationship;

(b) the duration of the guardianship;

(c) financial support for the minor; and

(d) in a limited guardianship, the reason why the parent or parents are requesting the court to appoint a limited guardian for the minor.

(2) All limited guardianship placement plans and court-structured plans may include the following:

(a) a schedule of services to be followed by the parent or parents, child, and guardian and

(b) any other provisions that the court deems necessary for the welfare of the child.

[Please note that proposed subrule (3) below is language that has been moved from current MCR 5.404(B)(1).]

(3) Modification of Placement Plan.

(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.

(b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days of the filing of the proposed modified plan.

(c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.

(d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.

(~~D~~F) Evidence.

(1) Involuntary Guardianship of an Indian Child. If a petition for guardianship involves an Indian child and the petition was not accompanied by a consent executed pursuant to MCL 712B.13 and these rules, the court may remove the Indian child from a parent or Indian custodian and place that child with a guardian only upon clear and convincing evidence that:

(a) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,

(b) these efforts have proved unsuccessful, and

(c) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The evidence shall include the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. If the petitioner cannot show active efforts have been made, the court shall dismiss the petition and may refer the petitioner to the Department of Human Services for child protective services or to the tribe for services.

(~~1-3~~) [Renumbered (2)-(4), but otherwise unchanged.]

(~~E~~G) Review of Guardianship for Minor.

(1) [Unchanged.]

(2) Investigation. The court shall appoint the ~~Family Independence Agency~~Department of Human Services or any other person to conduct an investigation of the guardianship of a minor. The investigator shall file a written report with the court within 28 days of such appointment. The report shall include a recommendation regarding whether the guardianship should be continued or modified and whether a hearing should be scheduled. If the report recommends modification, the report shall state the nature of the modification.

(3) [Unchanged.]

(~~F~~ H)Termination of Guardianship.

(1) Necessity of Order. A guardianship may terminate without order of the court on the minor's death, adoption, marriage, or attainment of majority or in accordance with subrule (H)(6). No full, testamentary, or limited guardianship shall otherwise terminate without an order of the court.

(2) [Unchanged.]

(3) Petition for Family Division of Circuit Court to Take Jurisdiction. If the court appoints an attorney or the ~~Family Independence Agency~~Department of Human Services to investigate whether to file a petition with the family division of circuit court to take jurisdiction of the minor, the attorney or ~~Family Independence Agency~~Department of Human Services shall, within 21 days, report to the court that a petition has been filed or why a petition has not been filed.

(a)-(b) [Unchanged.]

(4) [Unchanged.]

(5) Petition for Termination by a Party Other Than a Parent. If a petition for termination is filed by other than a parent or Indian custodian, the court may proceed in the manner for termination of a guardianship under section 5209 of the Estates and Protected Individuals Code, MCL 700.5209.

(6) Voluntary Consent Guardianship. The guardianship of an Indian child established pursuant to subrule (C) shall be terminated in accordance with subrule (B)(3).

Staff Comment: The proposal would incorporate provisions of the Michigan Indian Family Preservation Act and the Indian Child Welfare Act. The proposal is designed to make the rules reflect a more integrated approach to addressing issues specific to Indian children.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered March 26, 2014:

PROPOSED AMENDMENTS OF MCR 2.302.

On order of the Court, this is to advise that the court is considering two alternative amendments of Rule 2.302 of the Michigan Court Rules. Before determining whether either of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas of public hearings are posted at <http//:courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

This publication order contains two alternative proposals. The first alternative, shown below as Alternative A, is the original proposal submitted by the State Bar of Michigan and published for comment in this administrative file. Alternative A, in summary, would clarify that discovery-only depositions are allowed only if stipulated to by the parties or upon order of the court. Alternative B is a proposal submitted at the invitation of the Supreme Court by opponents of the bar proposal. Alternative B would allow any party to schedule (without stipulation or court order) a discovery-only deposition. The two proposals are published together to enable commenters to understand the difference between the proposals, and to generate broad comment on the implications that may relate to adoption of either proposal.

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

Alternative A

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3)[Unchanged.]

(4) Trial Preparation; Experts; Fees and Expenses. Discovery of facts known and opinions held by experts, otherwise discoverable under the

provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) Expert Expected to Testify.

~~(a)~~(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and ~~a summary of~~ the grounds for each opinion.

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. In the absence of a stipulation or an order under this subrule (B)(4)(a)(ii), the deposition may be used for any purpose permitted under the Michigan Rules of Evidence. On written stipulation or on order, the deposition of an expert may be available for limited purposes, including that the deposition is for discovery only and may be used only for impeachment. The stipulation or order must specify the purposes for which the deposition may be used and provide for the allocation of the fees and expenses attributable to the deposition.

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (~~pursuant to~~ under subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

(b) Expert Not Expected to Testify. A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

(i) as provided in MCR 2.311, or

(ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Fees and Expenses.~~Unless manifest injustice would result~~

(i) If a deposition is taken under a stipulation or order under subrule (B)(4)(a)(ii), the stipulation or order controls payment of expenses and expert fees.~~the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and~~

(ii) In order cases, with respect to discovery obtained under subrule (B)(4)(a)~~(ii) or (iii)~~, the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the ~~fees and~~ expenses and expert fees reasonably incurred by the latter party in obtaining facts and opinions from the expert. Otherwise, the assessment or allocation of fees and expenses shall be reserved for determination after entry of judgment

(d) Deposition for Use at Trial. A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and

may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.

(5)-(7) [Unchanged.]

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1)-(6) [Unchanged.]

(7) that, consistent with subrule (B)(4)(a)(ii), a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8)-(9) [Unchanged.]

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D)-(E) [Unchanged.]

(F) Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may by written stipulation~~:~~

~~(1) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions; and~~

~~(2)~~ modify the procedures of these rules for ~~other methods of~~ discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.

(G)-(H) [Unchanged.]

Alternative B

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3) [Unchanged.]

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

(b)-(d) [Unchanged.]

(5)-(7) [Unchanged.]

(C)-(H) [Unchanged.]

Staff Comment: These two proposals offer proposed amendments of MCR 2.302 regarding discovery-only depositions. The proposed amendments in Alternative A would clarify that discovery-only depositions may be taken only by stipulation or court order. The amendment would also require that the stipulation or order explain how the costs of this type of deposition are to be allocated. These proposed amendments were submitted by the State Bar of Michigan Representative Assembly. The proposed amendments in Alternative B would allow any party to schedule a discovery-only deposition without the need to obtain stipulation of the other party or parties or approval of the court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-02. Your comments and the comments of others will be posted at .

Order Entered April 2, 2014:

PROPOSED AMENDMENTS OF MCR 3.216.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.216 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A) Scope and Applicability of Rule, Definitions.

(1) All domestic relations cases, as defined in MCL 552.502(m), and actions for divorce that involve the distribution of property are subject to mediation under this rule, unless otherwise provided by statute or court rule.

(2)-(4) [Unchanged.]

(B)-(K) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.216 would clarify that distribution of property is subject to domestic relations mediation. The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered April 2, 2014:

PROPOSED AMENDMENTS OF MCR 9.106 AND 9.128.

On order of the Court, this is to advise that the Court is considering amendments of Rule 9.106 and Rule 9.128 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 9.106. TYPES OF DISCIPLINE; MINIMUM DISCIPLINE.

Misconduct is grounds for:

(1) disbarment of an attorney from the practice of law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a fine, penalty, or forfeiture payable to and for the benefit of the Supreme Court to promote rehabilitation and to protect the public irrespective of whether the restitution calculation is based on actual pecuniary loss which shall be a condition of an order of discipline. Restitution payable to the Supreme Court may be paid directly to a person or entity as directed in the order of discipline. An order under this subrule is enforceable both as a condition for reinstatement and as a money judgment for the person or entity to be paid the restitution.

RULE 9.128. COSTS

(A) Generally. The hearing panel and the board, in an order of discipline, a finding of misconduct but no discipline, or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order. An order pursuant to this subdivision is enforceable both as a condition for reinstatement and as a money judgment.

(B) Amount and Nature of Costs Assessed. The costs assessed under these rules are penalties payable to and for the benefit of the Supreme Court to promote rehabilitation and to protect the public, and the calculation of such costs based on actual expenses does not affect their penal nature. Calculation of costs shall include both basic administrative costs and disciplinary expenses actually incurred by the board, the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.

(1)-(2) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 9.106 and MCR 9.128, requested by the Attorney Grievance Commission, would identify costs and restitution imposed on an attorney ina disciplinary proceeding as a fine, penalty, or forfeiture.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the

Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-11. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Orders Entered April 23, 2014:

PROPOSED AMENDMENTS OF MCR 2.004.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.004 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.004. INCARCERATED PARTIES.

(A) [Unchanged.]

(B) The party seeking an order regarding a minor child shall

(1)-(2) [Unchanged.]

(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic or video hearing is required by this rule.

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call or by video conference in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the Michigan Department of Corrections Central Records Section or its designee, which shall notify the warden or supervisor of the facility where the incarcerated party resides.

(D) [Unchanged.]

(E) The purpose of the telephone call or video conference described in this subrule is to determine

(1)-(3) [Unchanged.]

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls or video conferences, and

(5) [Unchanged.]

(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call or video conference, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child.

(G) [Unchanged.]

Staff Comment: The proposed revisions of MCR 2.004 would change the service provisions with regard to an inmate's participation in a hearing or conference so that service would be required on MDOC's Central Records Section, instead of service on individual wardens or supervisors at the MDOC facilities; the proposed changes also would allow an inmate's participation by video or videoconferencing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENTS OF MCR 3.206.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.206 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.206. PLEADING.

(A)-(B) [Unchanged.]

(C) Attorney Fees and Expenses.

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding. A party who requests attorney fees and expenses must allege facts sufficient to show that:

~~(2) A party who requests attorney fees and expenses must allege facts sufficient to show that:~~

(a) the party in a divorce, separate maintenance, or annulment action is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Staff Comment: The proposed amendments of MCR 3.206 would limit the ability of a court to require one party to pay another party's attorney fees during the proceeding to those cases that involve divorce or separation of married persons.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-17. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENTS OF MCR 4.201.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(L) [Unchanged.]

(M) Postjudgment Motions.

(1) Except as provided in MCR 2.612, or for a motion to set aside a default money judgment, any postjudgment motion must be filed no later than 10 days after judgment enters.

(~~1~~2)[Former paragraph (1) renumbered as "(2)," but otherwise unchanged.]

(3) A motion to set aside a default money judgment shall comply with MCR 2.603(D).

(~~2~~4) [Former paragraph (2) renumbered as "(4)," but otherwise unchanged.]

(N)-(O) [Unchanged.]

Staff Comment: This proposed amendment would clarify that the typical procedure for setting aside a default judgment in MCR 2.603 applies in landlord/tenant cases that result only in a default money judgment.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-22. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENTS OF MCR 5.108, 5.125, 5.208, and 5.403.

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.108, 5.125, 5.208, and 5.403 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 5.108. TIME OF SERVICE.

(A) [Unchanged.]

(B) Mail.

(1) Petition or Motion. Service by mail of a petition or motion must be made at least 14 days before the date set for hearing, or an adjourned date.

(2) Application by a Guardian or Conservator Appointed in Another State.

(a) A court may appoint a temporary guardian or conservator without a hearing pursuant to MCL 700.5202a, MCL 700.5301a, or MCL 700.5433.

(b) If a court appoints a temporary guardian or conservator pursuant to MCL 700.5202a, MCL 700.5301a or MCL 700.5433, the temporary guardian or conservator must, not later than 14 days after the appointment, serve notice of the appointment by mail to all interested persons.

(C)-(E) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1) [Unchanged.]

(2) Devisee. Only a devisee whose devise remains unsatisfied, or a trust beneficiary whose beneficial interest remains unsatisfied, need be notified of specific proceedings under subrule (C).

(3)-(5) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(5) [Unchanged.]

(6) The persons interested in a proceeding for examination or approval of an account of a fiduciary are ~~the~~:

(a) for a testate estate, the devisees under the will (and if one of the devisees is a trustee or a trust, and the persons referred to in MCR 5.125[B][3]),

(b) for an intestate estate, the heirs,

(c) for a conservatorship, the protected individual (if he or she is 14 years of age or older and can be located), the presumptive heirs of the protected individual, and the guardian ad litem, if any,

(d) for a final conservatorship or guardianship account following the death of the protected person, the personal representative, if one has been appointed,

(e) for a guardianship, the ward (if he or she is 14 years of age or older and can be located), the presumptive heirs of the ward, and the guardian ad litem, if any,

(f) for a revocable trust, the settlor (and if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to

in MCL 700.7603[2]), the current trustee, and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(g) for an irrevocable trust, the current trustee, the qualified trust beneficiaries, as defined in MCL 700.7103(g), and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(h) in all matters described in this subsection (6), claimants, and

(i) in all matters described in this subsection (6), any person whose interests would be adversely affected by the relief requested, including an insurer or surety who might be subject to financial obligations as the result of the approval of the account, and claimants.

~~(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),~~

~~(b) heirs of an intestate estate,~~

~~(c) protected person and presumptive heirs of the protected person in a conservatorship,~~

~~(d) ward and presumptive heirs of the ward in a guardianship,~~

~~(e) claimants,~~

~~(f) settler of a revocable trust,~~

~~(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),~~

~~(h) current trustee,~~

~~(i) qualified trust beneficiaries described in MCL 700.7103(g)(i), for a trust accounting, and~~

~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.~~

(7)-(18) [Unchanged.]

(19) The persons interested in an application for appointment of a guardian of a minor by a guardian appointed in another state and in a petition for appointment of a guardian ~~for~~of a minor are

(a) the minor, if 14 years of age or older;

(b) if known by the petitioner or applicant, each person who had the principal care and custody of the minor during the 63 days preceding the filing of the petition or application;

(c) the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor~~, and~~;

(d) the nominated guardian~~.~~, and

(e) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of a minor.

(20)-(21) [Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are

(a) the alleged incapacitated individual or the incapacitated individual,

(b) if known, a person named as attorney in fact under a durable power of attorney,

(c) the alleged incapacitated individual's spouse or the incapacitated individual's spouse,

(d) the alleged incapacitated individual's adult children and the individual's parents or the incapacitated individual's adult children and parents,

(e) if no spouse, child, or parent is living, the presumptive heirs of the individual,

(f) the person who has the care and custody of the alleged incapacitated individual or of the incapacitated individual, ~~and~~

(g) the nominated guardian~~.~~, and

(h) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual.

(23) [Unchanged.]

(24) The persons interested in an application for appointment of a conservator for a protected individual by a conservator appointed in another state or for the ~~a~~ petition for the appointment of a conservator or for a protective order are:

(a) the individual to be protected if 14 years of age or older,

(b) the presumptive heirs of the individual to be protected,

(c) if known, a person named as attorney in fact under a durable power of attorney,

(d) the nominated conservator, ~~and~~

(e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending~~.~~, and

(f) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to manage the protected individual's finances.

(25)-(26) [Unchanged.]

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

(a) the protected individual or ward, if he or she is 14 years of age or older and can be located,

(b) the presumptive heirs of the protected individual or ward,

(c) the claimants, ~~and~~

(d) the guardian ad litem~~.~~, and

(e) the personal representative, if any.

(28)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A)-(B) [Unchanged.]

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

(1) The name, and, if known, ~~last known address,~~ date of death, and date of birth of the trust's deceased settlor;

(2)-(5) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP

(A) Limitation. The court may appoint a temporary guardian ~~only~~ in the course of a proceeding for permanent guardianship or pursuant to an application to appoint a guardian serving in another state to serve as guardian in this state.

(B)-(D) [Unchanged.]

Staff Comment: These proposed Chapter 5 rule amendments were submitted to the Court by the Probate and Estate Planning Section of the State Bar of Michigan so that the rules would comport to recent legislation regarding guardianships and conservatorships.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Orders Entered May 21, 2014:

PROPOSED AMENDMENTS OF MCR 2.203.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.004 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

RULE 2.203. JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS.

(A)-(F) [Unchanged.]

(G) Joining Additional Parties

(1) Persons Who May be Joined. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim, subject to MCR 2.205 and 2.206.

(2) Summons. On the filing of a counterclaim or cross-claim adding new parties, the court clerk shall issue a summons for each new party in the same manner as on the filing of a complaint, as provided in MCR 2.102(A)-(C). Unless the court orders otherwise, the summons is valid for 21 days after the court issues it.

Staff Comment: This proposal, submitted by the State Bar of Michigan Representative Assembly, would add explicit language allowing parties to be added to a counterclaim or cross-claim, and would require that a court clerk issue a summons for those added parties.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENTS OF MCR 6.001.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.001 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A) and (D), 6.106, 6.125, 6.202, 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapters 6.600-~~6.800~~ govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.001(B) includes additional rules and subrules that are found in Chapter 6 that govern procedural issues relevant to criminal cases falling under the jurisdiction of district courts.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2014, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.